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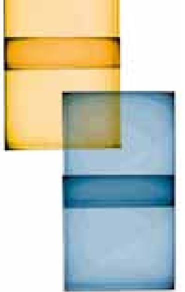
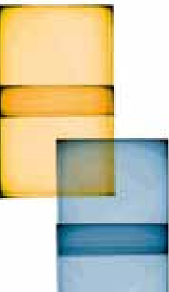
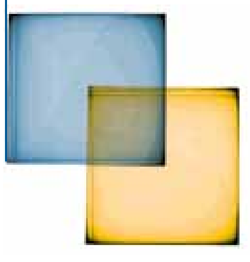
Internal Market and Services DG
Final Report
Transparency Directive Assessment Report
MAZARS



Transparency Directive Assessment Report





Acknowledgement

This study, undertaken by Mazars in collaboration with Marccus Partners, the law firm for the Mazars Group, is the result of a team effort which includes all the offices across 15 EU Member States and 6 major third countries. The project coordinators would like to express their deepest gratitude to all contributors.

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Finally, we would like to thank each Mazars Managing Partner in the 21 countries and their teams for their time, diligence and expertise.

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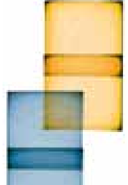

Executive summary and analytical conclusion

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Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (the "Directive", the "Transparency Directive" or "TD") requires issuers of securities admitted to trading on regulated markets within the EU to ensure appropriate transparency for investors through a regular flow of information by disclosing periodic and on-going regulated information and by disseminating such information to the public throughout the Community. Regulated information consists of financial reports, information on major holdings of voting rights and information disclosed pursuant to the Market Abuse Directive (2003/6/EC). The Transparency Directive has been in operation for over two years in the EU. It is one of the key FSAP directives for the transparent functioning, and therefore, attractiveness, for the Single Market.

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

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

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

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

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

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

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

1. Clarity and suitability of the Directive

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

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

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

62% of stakeholders consider the Directive to be sufficiently detailed except for: (i) some provisions (i.e.

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

content of the Quarterly Interim Management Statement), (ii) where it allows for excessive divergence in national implementation (i.e. notification of thresholds), and (iii) some definitions triggering obligations (i.e. “acting in concert”).

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

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

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

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

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

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

** Initial Public Offering*

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

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

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

2. The disclosure of periodic information

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

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

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

Seen from the issuers' point of view, 70% do not experience any difficulty with the publication deadlines; however, 26% of issuers of shares or debt securities confess to having problems in meeting the publication deadlines. In most cases (87%), the difficulty comes from the two month deadline for the publication of half-yearly reports. SMEs have been very vocal in expressing their dissatisfaction about this deadline. Users of financial information, and in particular financial analysts, also feel that this bottleneck of disclosure of information at the end of the second month disrupts the market, deviating the analysts' and financial press' attention from SMEs as they focus more on the Blue chips. In addition, be it by obligation or on a voluntary basis, 80% of issuers have their half-yearly

reports audited or reviewed by an external auditor (in 5 Member States this is mandatory) and this contributes to the difficulty in meeting the deadline. Spreading the publications over an extended period of time would therefore both alleviate SMEs and contribute to a more fluid functioning of the market. The idea of having different deadlines for SMEs is supported by 26% of stakeholders. It has recently been recommended by the International Organisation of Securities Commissions (IOSCO) and is currently practised in the U.S.

The balance achieved by the Directive to avoid the "short-termist" effect of the publication of full quarterly reports is supported by stakeholders. 69% of the latter judge quarterly information to be useful for the transparency and the functioning of the market. The information published in the Interim Management Statements (IMS) is deemed valuable by 62% of users of financial information and more valuable than quarterly financial reports. Having said that, a number of stakeholders complained about the lack of clarity and detail of the content of the IMS (Article 6.1 of the Directive). Some predictability and comparability has been provided by CESR in October 2009 (see FAQ Regarding the Transparency Directive – Ref 09-965).

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

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

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

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

* *eXtensible Business Reporting Language*

3. Information and notification of major holdings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In all EU jurisdictions under review, typical **stock-lending** agreements result in a transfer of ownership of the lent shares. Under article 9 of the Directive, the transaction should thus be notified both by the lender and the borrower. Some countries, such as the United Kingdom, consider that the lender does not need to be notified.

The logic is that, under a standard stock lending arrangement, whereby the lender maintains a right to call for redelivery of the shares, there is a simultaneous disposal of rights in the shares and the acquisition of a corresponding right to reacquire them. The lender under such an arrangement is permitted to "net off" the disposal and acquisition and, therefore, not count the transaction under its disclosure obligations. There is a concern that disclosure on both sides of the transaction would lead to confusing and conflicting disclosures which may harm the market information available to third parties.

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

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

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

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

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

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

4. The dissemination and storage of Regulated Information

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

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

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

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

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

85% of stakeholders consider the storing of historical information to be useful. 50% are of the opinion

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

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

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

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

- To rely exclusively on the issuers' website. In order for this to function, the way in which information is stored in a specific section of the issuers' website would have to be harmonised and made compulsory at EU level.

- To improve the functioning and visibility of national storage mechanisms. This would mean more streamlined and harmonised technical requirements to allow for an efficient interconnection at a regional or pan European level, and more flexibility in the way in which such systems are run to improve their business case.

- To create an EU single entry point. One possibility is to give this role to the Committee of European Securities Regulators (CESR), where a list of EU listed companies would be accessible with a direct link to the specific section of the company's website where regulated information would be stored.

5. Use of language for the disclosure of Regulated Information

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

6. Supervision

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

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

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

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

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

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

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

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

Positive points are expressed mainly by institutional investors: 66% of non-EU institutional investors consider that the level of transparency of the ownership of EU listed companies is sufficient and that they have satisfactory access to the financial information stored by EU listed companies. 55% are of the opinion that the compliance with the Directive has not resulted in an increase of burden. Finally, non-EU stakeholders do not consider language to be an obstacle in accessing the EU markets.

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

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

Possible improvements

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

General clarity and suitability of the Directive

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

Periodic information

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

Major holdings

7. ***Maximum harmonisation for the notification of thresholds:*** *to simplify cross-border compliance with notification requirements, a number of major holding provisions of the Directive could be made of maximum harmonisation. This could include: the definition of the category of financial instruments or products to be included in the calculation of the threshold, the exemptions, the timelines for notification and disclosure as well as the threshold levels (initial and subsequent) and the content of the notification. For the latter two, specific options could be explicitly introduced as long as they add value to the functioning of the Single Market. In order to ensure validity of the legislation over time, more market-resistant principles of transparency of ownership should be included in the Level 1 Directive and the harmonised figures and practical details specified in a Level 2 implementing measure under the Lamfalussy approach. In short, a better combination of Principle and Rule based approaches.*

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

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

10. ***Limiting "empty voting" practices:*** *more transparency on empty voting could be contemplated (with a reservation on this option, as the creation of a disclosure regime would provide a legal framework comforting empty voting). The notification proposal would require the economic exposure of all shareholders (above a certain threshold) be notified on the day of the record date of each general meeting, to the extent such net economic exposure was not disclosed pursuant to a previous notification (no double notification would be required if it does not provide any new information). Any change in the net economic exposure between the record date and the date of the general meeting should be immediately notified. This system would be comprehensive and would not be very burdensome as only one extra notification would be required (subject to updates, which should be limited). This mechanism would also prevent hidden record date captures. However, a more straight-forward and radical response to "empty voting" practices would be to ban them entirely.*

To this effect, the appropriate legislative instruments could consider suspending voting rights for investors holding their shares, either directly or indirectly, on the basis of a stock loan or a similar temporary transfer.

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

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

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

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

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

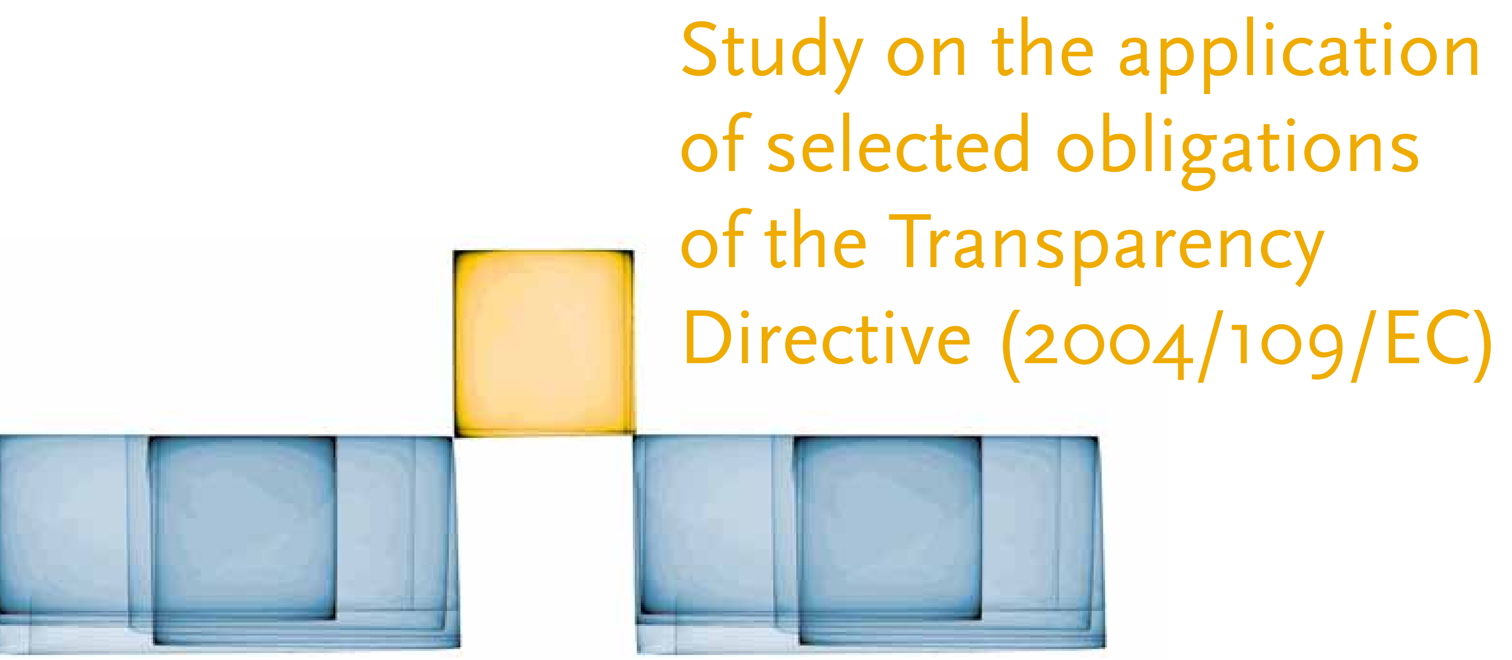
Dissemination and storage of financial information

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

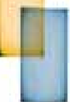
Supervision

15. ***Equivalence of third countries Transparency regimes:*** *the market would benefit from a increased transparency by supervisors regarding: (i) their decision-making processes when assessing equivalence and (ii) the result of their decision by publishing a consolidated list of thirds countries transparency regimes considered equivalent.*
16. ***Section 30.4 exemption for bond issuers:*** *based on a more precise identification of debt issuers likely to be affected (and in particular those with outstanding Eurobonds after January 1st, 2015) and the assessment of the impact of such a decision on those issuers, the Commission could consider leaving the ten year exemption to publish half-yearly financial reports (section 30.4) to expire in 2015.*

Study on the application of selected obligations of the Transparency Directive (2004/109/EC)



Core report



Introduction

Overall Study Context

Efficient, transparent and integrated security markets contribute to a genuine Single Market in the Community and foster growth and job creation by a better allocation of capital and a reduction in costs. The disclosure of accurate, comprehensive and timely information on security issuers would build sustained investor confidence and allow an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency. Greater harmonisation of provisions of national law on periodic and on-going information requirements for security issuers should also lead to a higher level of investor protection throughout the Community.

The Directive 2004/109/EC on the harmonisation of the transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market (hereafter "the Directive" or "the Transparency Directive") requires issuers of securities admitted to trading on regulated markets within the EU to ensure appropriate transparency for investors through a regular flow of information by disclosing periodic and on-going regulated information and by disseminating such information to the public throughout the Community. Regulated information consists of financial reports, information on major holdings of voting rights and information disclosed pursuant to the Market Abuse Directive.

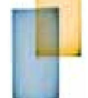
The Directive has been in operation for over two years in the EU. It is one of the key Financial Services Action Plan (FSAP) directives for the transparent functioning, and therefore, attractiveness, of the Single Market. The Directive has attempted to strike a balance between investors' needs (including accessible and comparable financial information) and issuers (cost efficient rules and attraction of third country issuers into EU regulated markets).

Study objectives

One of the primary objectives of the study is to provide quantitative and qualitative evidence to assist the Commission in fulfilling its obligation under Article 33 of the Directive and report on the operation of the Directive to the European Parliament and to the Council. The report by the Commission is to be made in 2010 and will examine whether the application and obligations of the Directive fully meets the objectives in allowing investors to make an informed assessment of the financial position of an issuer. The obligation to evaluate the functioning of an EU directive is also driven by the "*Better Regulation*" agenda of the Commission.

In assisting the Commission in fulfilling its obligations, this study evaluates the current functioning of the Directive and, in particular: (i) evaluates the perception of stakeholders of the Directive legal framework; (ii) examines the operation of the Directive legal framework regarding selective issues; (iii) compares the Directive framework with other similar obligations regarding disclosure, dissemination and storage of regulated information in major third countries; and (iv) provides analytical conclusions and practical recommendations for improvement.

It should be noted that this study has been intended to act as a complement to exhaustive reports on the functioning of the Directive published in particular by the European Commission and the Committee of European Securities Regulators (CESR) (see "How to know more about the Transparency Directive", section 5 of the Methodology Annex). It is therefore not the study's intention to repeat the findings and conclusions of these studies.



An external study

In order to meet this objective, the Commission issued an invitation to tender (no. MARKT/2008/07/F) for a study of the application of selected obligations of the Directive on 13 June 2008.

The Commission chose Mazars to undertake this study based on the following criteria: quality of the proposed work programme, relevance, completeness and viability of the proposed methodology for undertaking the tasks of the study, depth (in terms of quality and detail), completeness (in terms of breadth) and reliability of the information; geographical distribution of individual stakeholders covered in the survey, EU Member States covered in the detailed description of the operation of the Directive with regard to selected issues, Third countries covered in the comparison with the regime in third countries (4 countries and the US should be covered), and price. Following a competitive tender process, the contract was awarded on 29 December 2008.

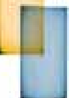
Key outcomes of the study

In accordance with the expectations of the Commission, the study includes the following elements:

- Detailed information on the perception by various stakeholders of the Directive legal framework. The study draws on the perceptions of ten separate stakeholder groups across the 15 EU Member States and 6 other jurisdictions[1] and makes an assessment of the level of clarity and the suitability of the legislation on the obligations imposed by the legislation; periodic information disclosed by issuers, on-going obligations of regulated information, use of language for the disclosure of regulated information, dissemination of regulated information, storage of regulated information, and supervision;
- Detailed description of the operation of the Directive including the following key issues:
  - A brief examination of the national legal framework transposing the Directive legal framework in 15 EU Member States, representing over 80% of market capitalisation in EU stock exchanges and including Member States who joined the EU in or after 2004;
  - An examination of the practical implementation by issuers and investors of the Directive legal framework obligations covering the introduction of the home Member State rule and supervisory implications; periodic reporting; the notification of major holdings in relation to voting rights detached from shares and financial instruments; the dissemination of information to the public; and an assessment of the suitability of ending the exemption for existing debt securities after the 10 year period (as provided in Article 30(4) of the Directive).
- A comparison of the Directive legal framework obligation with similar obligations in major third countries covering the disclosure, dissemination and storage of financial information;
- An analytical conclusion on the effectiveness of the Directive based on the issues highlighted above.

1 The Methodology Annex provides a detailed explanation of the geographical coverage. The 15 Member States chosen represent more than 80% of market capitalisation of EU regulated markets and include Member States who joined the EU in or after 2004. Other jurisdictions studied include countries with a significant international financial market, a European non-EU country and fast growing emerging markets (China, Hong Kong, India, Japan, Switzerland and the United States of America).

The annexes of the Transparency Report are available on the European Commission Internal Market and Services DG website and on www.mazars.com.



Study methodology

In order to meet the objectives of the study as set out above, our approach for collating evidence on stakeholder's perceptions, operation of the Directive and third country comparison, has included a number of methodologies including an on-line stakeholder questionnaire; stakeholder interviews; financial reporting compliance reviews; and legal implementation reviews.

Full details of the various methodologies adopted in conducting this study are set out within the Methodology Annex in this report.

On-line stakeholder questionnaires

The underlying concept underpinning our selection of stakeholders was to capture the extensive views of all stakeholders across all selected jurisdictions. This has ensured that the opinions expressed in each territory are meaningful and are a fair reflection of the perceptions at stakeholder and country level.

Stakeholder perceptions have been requested and collated for the following categories of stakeholders across all territories: Issuers of shares, Issuers of debt securities and other securities, Institutional investors, Retail investors, Media (including data vendors & financial newspapers), Supervisors, Regulated markets, other stakeholder associations, Financial analysts and Sovereign funds. Financial intermediaries responded to the questionnaire as listed issuers and/or institutional investor.

At the Commission's request, we were engaged to collate and analyse the perceptions of a minimum of 930 stakeholders in the main and other EU Member States and 115 stakeholders in non-EU jurisdictions (a total of 1,045 stakeholders). We have exceeded these minimum requirements by targeting a total of 3,887 stakeholders (Main EU and Other EU Member States: 2,005 and non-EU jurisdictions: 1,882).

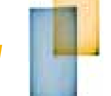
The perceptions of the above stakeholders were collected via the use of specific stakeholder questionnaires, designed in consultation with the Commission and using a dedicated web-based system, to record, collate and analyse the responses to our questionnaires.

385 on-line questionnaires were fully completed by stakeholders between May and July 2009, comprising 334 from the EU Member States and 51 from non-EU Jurisdictions. Response rates were encouraging with a 12.5% global response rate spread as follows: 18% for the Main EU Jurisdictions, 20% for Other EU Jurisdictions, and 4% for Other Jurisdictions.

A full analysis of the response rates by country and stakeholder category is set out within the Methodology Annex.

Stakeholder interviews

To complement the on-line questionnaires, in particular when the response rate was unsatisfactory in a country and/or for a category of stakeholders, Mazars conducted a series of one-to-one interviews with selected stakeholders in each EU Member States and with industry associations. Interviews with stakeholders in non-EU jurisdictions focused only on Issuers of shares, Institutional Investors and Supervisors.



These interviews, conducted by the Mazars offices[2] in the 21 jurisdictions, allowed for the receipt of more concrete and a "real life" understanding of stakeholders and the issues they face in the practical application of the obligations of the Directive. The majority of the interviews were conducted with senior management of stakeholder organisations using a series of stakeholder specific interview questions designed in consultation with the Commission.

No quantitative targets were set by the Commission as to the minimum number of interviews to be conducted, however local Mazars offices have targeted a broad range of stakeholders based on their importance, in terms of size or influence of opinion in the local market or on the particular interest of the responses given to the on-line questionnaire.

Financial reporting compliance review

The timely disclosure of periodic financial information (annual, half-yearly and quarterly reports) is a key obligation of the Directive. In order to assess the degree to which issuers of shares have met the requirements of the Directive in this area, Mazars conducted research on 303 Main EU Member State companies and 190 Other EU Member State companies to determine the extent to which these entities met the disclosure deadlines for their last financial year end (prior to or on 31 December 2008). A full summary of the compliance rates and timing constraints, by jurisdiction is set out in section 2.3 of this report.

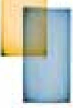
Legal implementation reviews

To assess and evaluate the legal framework and the operation of the Directive, Marccus Partners, Mazars' Group law firm, together with its network of best friends throughout Europe has reviewed and presented the laws and regulations relevant for the review of the Directive in each of the 15 selected EU Member States.

In parallel with the on-line stakeholder questionnaires and interviews which include legal elements, additional legal questionnaires were designed in consultation with the EU Commission and completed by the selected law firms in the 15 Member States. We would like to thank the following law firms for their joint efforts in contributing to this study:

- CHSH, Cerha Hempel Spiegelfeld Hlawati (Austria)
- PRK Partners (Czech Republic)
- Marccus Partners (France)
- Marccus Partners (Germany)
- DLA Piper (Hungary)
- Eugene F. Collins Solicitors (Ireland)
- Marccus Partners (Italy)
- Elvinger, Hoss & Prussen (Luxembourg)
- Pellicaan Advocaten (Marccus Partners Alliance) (The Netherlands)
- Siemiatkowski I Davies (Poland)
- Marccus Partners (Romania)
- PKR Partners (Slovakia)
- Marccus Partners (Spain)
- Mannheimer Swartling (Sweden)
- Olswang (United Kingdom)

2 In Sweden Mazars operates through a joint venture with SET-revision: Mazars Sweden AB



The comparison with the legal requirements imposed in selected non-EU jurisdictions is critical to evaluate alternative options and solutions to those already existing at EU level. The results of this legal review have identified potential improvements to the Directive to further improve its objectives.

A standardised questionnaire, developed in conjunction with the EU Commission and completed by six law firms in the selected Other Jurisdictions has been used to provide an overview of the comparative description of the legal framework regarding transparency in relation to issuers having securities admitted to trading on a regulated market.

The results included in this study have been achieved largely due to the collaboration with six law firms, each established in one of the relevant countries included in the study. We would like to thank the following firms for their joint efforts in contributing to this study:

- HHP Attorneys-At-Law, Shanghai (China);
- Duane Morris LLP, New York (US);
- Gallant Y.T. Ho & Co (Hong Kong);
- Nagashima Ohno & Tsunematsu, Tokyo, (Japan);
- Altenburger & Partner Rechtsanwälte, Zürich, (Switzerland);
- DUA Associates (India).

Report structure

The structure of the report collates all the key expected outcomes of the study.

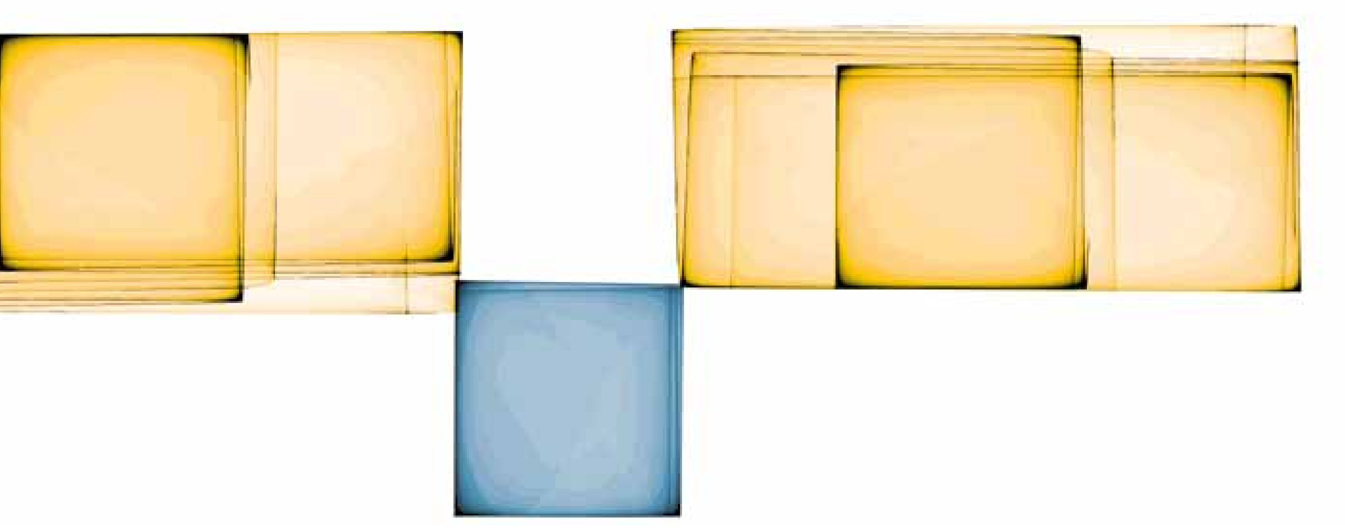
The Executive Summary composes our analytical conclusion based on the results of the stakeholder and legal questionnaires, interviews, direct research and our assessment of the key benefits of the current Directive. This conclusion also sets out our views as to whether the Directive currently fulfils its objectives in enhancing investor confidence and market transparency.

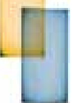
Sections 1 to 5 set out the detailed presentation of the results of the responses by stakeholders to the on-line questionnaires and the key points made during interviews. It also summarizes selected legal implementation issues identified during the legal assessment of the operation of the Directive. For each set of the Directive's provisions, a summary of the key findings and the suggested possible improvements to the functioning of the Directive has been made.

Section 6 outlines the selected stakeholders' perceptions and comparison of the Directive legal framework obligations with similar obligations in non-EU countries.

This report should be read in conjunction with the Methodology Annex and the Statistical Annex, which present the full results of the online investigation. The Methodology Annex also provides indicative information on how to learn more on the Transparency Directive.

1. Clarity and suitability of the obligations imposed by the Directive





1.1 Key perceptions and implemention issues

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

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

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

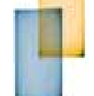
62% of stakeholders consider the Directive to be sufficiently detailed except for: (i) some provisions (i.e. content of the Quarterly Interim Management Statement), (ii) where it allows for excessive divergence in national implementation (i.e. notification of thresholds), and (iii) some definitions triggering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

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

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

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

- 50% of stakeholders expressed no opinion on this matter or believe that the Directive has no effect on primary market issuances. More regular issuers of debt or other securities are inclined to believe that the Directive has favoured issuances.



- 50% of stakeholders consider that the Directive has no effect on the IPO market. The current dry IPO market is more readily explained by the financial crisis and the economic cycle.
- Companies not listed in their Member State of incorporation have expressed frustration as the Home Member State principle of the Directive was to simplify matters, whereas in reality they do not feel that this is the case - dual reporting and compliance with two different sets of rules continue to exist due to supervisors' practices going beyond what is required by the Directive.
- Finally, 60% of stakeholders support lighter transparency rules for exchange-regulated or alternative markets and therefore oppose extending the requirements of the Directive to those markets.

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

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

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

However, in consideration of the overreaching transparency objective of the Directive, a high level question may be asked: to what extent should transparency be extended to non-financial issues? The increase of SRI investment leads to the inclusion of non-directly financial issues within the scope of those relevant to the decision of whether to invest in, keep or dispose of, the investor's interest in the issuer. This concern does not only relate to the Transparency Directive and should thus be addressed separately.

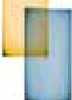
Possible improvements

As a result, the following improvements could be recommended:

*1. Should the **Directive (or selected provisions of the Directive)** become of **maximum harmonisation,** a number of practical cross-border implementation issues would be solved, notably those connected with the notification of the crossing of thresholds.*

*2. **A specific regime for SMEs,** limited to well-identified measures, would create a more favourable environment for listing and, if in relation to the timing of the publication of periodic information, it would contribute to the efficiency of the market. Without undermining investor protection, well identified measures could include more flexible deadlines and an exemption from certain disclosure obligations during an initial period of time.*

*3. For the benefit of the daily application of a number of practical issues that are described in the report and in the recommendations, **additional harmonised guidance by CESR** (or biding standards by its successor), would facilitate market participants daily compliance with the requirements of the Directive. The additional guidance should be rigorously implemented and in a uniform manner by the relevant authorities.*



1.2 Key provisions of the Directive

The EU legal framework regarding transparency in relation to issuers having securities admitted to trading on a Regulated Market is outlined in the following two pieces of legislation:

- Directive 2004/109/EC of the European Parliament and of the Council dated 15 December 2004 and amending Directive 2001/34/EC (hereafter "The Directive");
- Commission Directive 2007/14/EC dated 8 March 2007 setting out the detailed rules for the implementation of certain provisions of Directive 2004/109/EC.

The objective of the Directive is to improve investor protection and market efficiency. To that end, the Directive aims to promote transparency in EU capital markets by prescribing rules for securities traded on EU Regulated Markets and the issuers of such securities. The Directive imposes obligations for issuers to publish periodic and on-going financial information as well as specifying the manner in which such information should be disclosed to the market and stored. It also requires investors to declare major holdings when they invest in shares of EU issuers.

The Directive has been transposed in each EU Member State through its national laws and/or rules. Generally speaking, the provision of the Directive covers key principles and does not include all the details and guidance for technical implementation. The EU Member States must implement as a minimum the provision of the Directive but they can adopt more stringent requirements. This flexibility at national level may result in different transparency regimes in Europe.

The Directive covers the on-going disclosure obligations of listed companies and is often read in conjunction with the Prospectus Directive which defines the information disclosed by issuers at the time of a listing or a public offering. Taken together, these two directives form the full set of EU requirements that a company must respect for being listed.

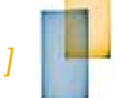
For issuers, the key matters covered by the Directive are: publication by listed companies (issuing shares and / or bonds and / or other forms of securities) of periodic financial information (annual / half-yearly / quarterly) and on-going information (price sensitive press releases, changes in the ownership structures, etc.). Under the Directive small and medium size listed companies (SMEs) then have the same obligations as a larger company.

1.3 Examination of the national legal framework transposing the Directive

According to Article 31.1 of the Directive, Member States were due to adopt the national measures necessary to comply with the Directive by 20th January 2007 at the very latest.

With some exceptions, the transposition has been reported as being full to date. A number of detailed studies on how the Directive has been implemented in Member States have been published in particular by the European Commission and the Committee of European Securities Regulators (CESR) (See Section 5 of the Methodology Annex: "How to learn more on the Transparency Directive"). It is not the purpose of this report to repeat the analysis and conclusions of these exhaustive studies. Therefore only short additional information will be added.

The exceptions are, for instance, Italy, where a legislative decree has provided for a framework regulation giving the Italian regulator the power to further regulate in detail. As such authority usually initiates long consulting procedures before adopting regulation; the transposition of the Directive is still in underway in Italy.



At present, timeliness in the full transposition of the Directive was observed only in few countries, France, Germany and United Kingdom. In some other Member States, like Romania, Slovakia and Spain, the transposition process began before the deadline set by the Directive through partial legislation or regulation, and continued after 20th January 2007 until completion.

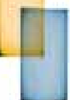
The subject matter of the Directive seems to fuel a constant debate in the Member States. The transposition results in continuous amendments to legislation and regulation. Pursuant to an ordinance dated 30th January 2009, the French regulator amended its "Règlement Général" lastly on 31st July 2009. In the Netherlands, amendments were made to the Civil Code with effect on 1st January 2009. In Poland, some provisions of the Act regarding public offers and the conditions of introducing financial instruments to an organised system of trading were amended by another Act dated 18th June 2009 that came into force on 5th August 2009. In the Czech Republic, the Directive was implemented in the national legal system on 1st August 2009.

It should be noted that in many Member States, significant "gold plating" has occurred (see the complete report on this matter in the **Commission Staff Working Document** - *Report on more stringent national measures concerning Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading, SEC (2008) 3033 final, 10th December 2008). This raises the question as to whether a minimum harmonisation Directive is the appropriate tool to achieve high level harmonisation of transparency requirements in the EU.*

In view of potential changes in the Directive, it is worth noting that laws had to be adopted in connection with the transposition in all the 15 selected EU Member States. The reason for this is that the Directive led to the amendment of existing acts pertaining to company law, security market law or financial supervision law. As a result, transposing amendments to the Directive is likely to require further amendments to national laws of Member States. This may not always be the case, however, depending on the scope and nature of the amendments and the content of the various national laws.

It should also be noted that late transposition by some Member States, such as the Netherlands, has led to awkward transitional situations where some companies listed in a Member State but incorporated in another one were not regulated by either of them. To the extent it is not envisaged to amend the Home Member State principle, this type of situation should not take place again as a result of an amended version of the Directive (if any). In any event, it should be noted that such issues are difficult to avoid when there is a reshuffling of national competences applicable to cross-border situations.

Finally, regarding the detailed content of national rules, the reader is referred to the detailed studies made, inter alia, by the European Commission and by the Committee of European Securities Regulators, which are listed in Section 5 of the Methodology Annex: "How to learn more about the Transparency Directive".

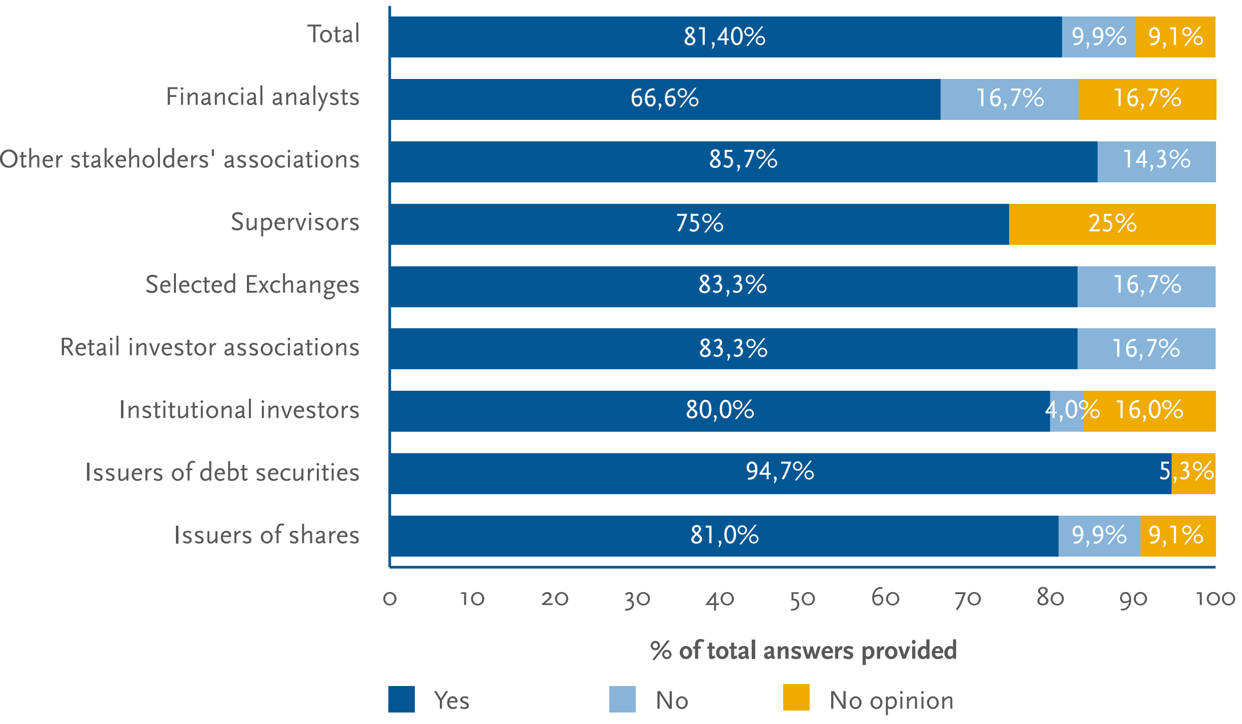


1.4 Clarity of the Directive

Overall, the obligations of the Directive are considered clear by stakeholders. The view is that the lack of clarity lies more in the national transpositions or in the lack of clarity of certain definitions.

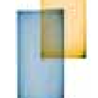
1.4.1 Overall clarity of the obligations of the Directive

In general terms, 81.4% of the stakeholders consider that they are clear with the obligations imposed by the Directive:



This positive perception is shared by all categories of stakeholders. The lowest level of clarity is expressed by Financial Analysts; the highest is expressed by Issuers of debt securities. A specific focus on Issuers of shares shows that the smaller the company is, the less clear the obligations of the Directive are (91% for the top companies and 71.4% for small companies).

Compared to other Member States, Sweden and the most recent Member States such as Poland and Slovakia are the jurisdictions where the level of clarity is considered relatively low but always with a degree of clarity superior to 50%. In



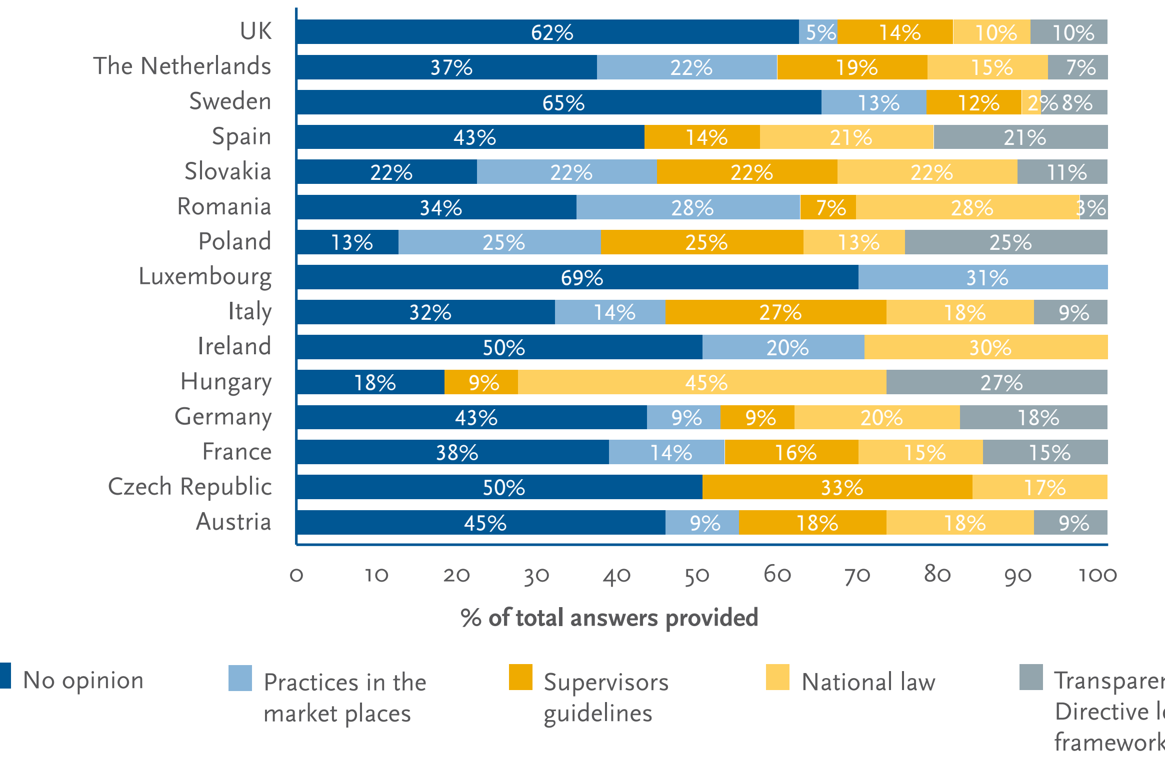
the Netherlands, Luxembourg, Italy and Ireland, all stakeholders consider the obligations of the Directive as perfectly clear (100%).

During interviews, stakeholders broadly confirmed that the obligations imposed by the Directive itself are sufficiently clear. They generally confessed that it was difficult to know what these obligations are as they have been very often spread out in numerous transposition laws or rules on a national level. In fact, in many jurisdictions with an active market, the Directive has not introduced fundamental changes compared with the previous situation.

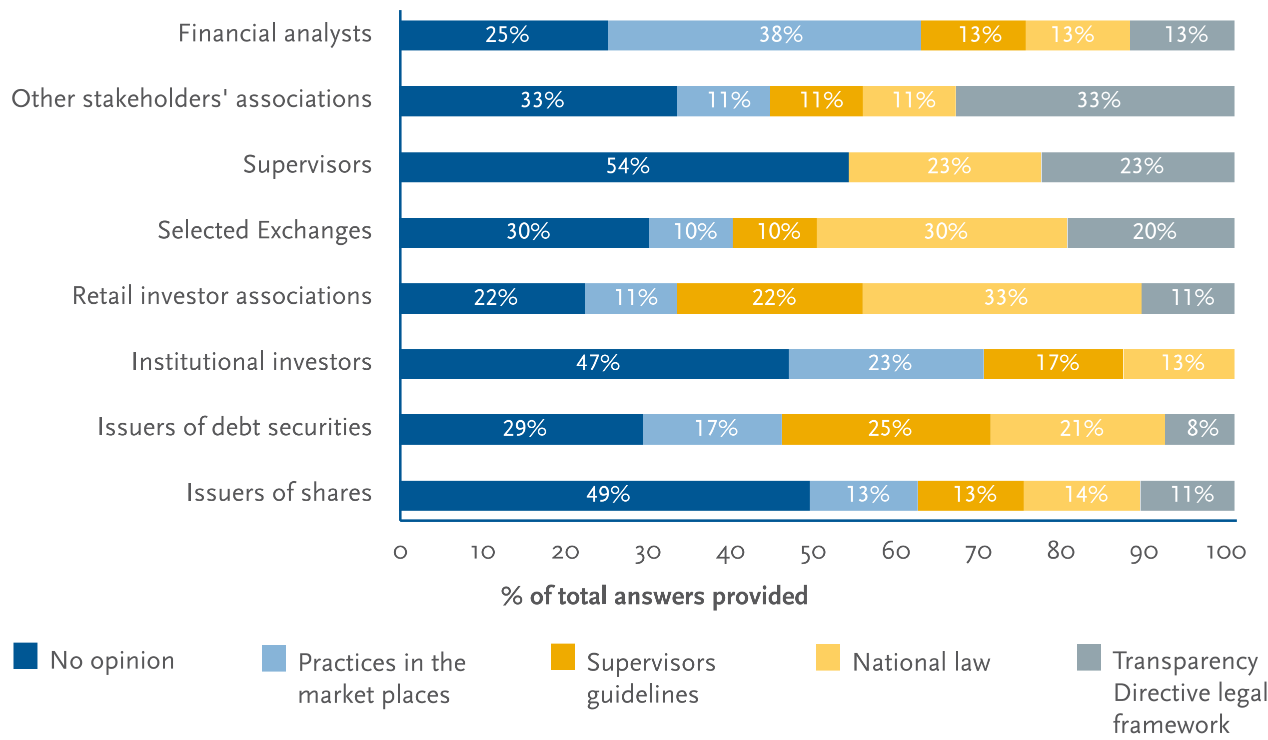
1.4.2 Explanations on the lack of clarity

45% of the respondents do not have an opinion on the causes of this lack of clarity on the obligation of the Directive. For the remaining 55%, the reasons explaining the lack of clarity are relatively mixed among the answers. Where they have expressed an opinion, the lack of clarity is more often attributed to national laws (15%), Supervisors' guidelines (14%) or market practices (14%) rather than to the Directive itself.

However, a breakdown analysis per Member State shows that local explanations can be significantly different. In Hungary, Ireland and Romania, the national laws transposing the Directive are considered to be the main reason behind this lack of clarity. In the Czech Republic, Italy and Poland, the finger is pointed at the Supervisors and in Luxembourg, Romania and the Netherlands, at the market practices.



Stakeholders consider the reasons that lead to a lack of clarity are very different. One could note that in particular Financial Analysts strongly believe that local market practices is the main factor of confusion while for Retail Investors the responsibility lies with the national transposition laws.



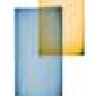
During the interviews, stakeholders very often confirmed these trends and attributed the lack of clarity to the provisions of the national laws or rules / guidance of Supervisors. It was mentioned several times that the Supervisors' rules were insufficient or even confusing. The most often mentioned other source of unclarity is the lack of harmonisation across the EU (including gold plating).

1.4.3 Assessment of legal clarity for the operational functionning of the Directive

From a legal operation standpoint, the Transparency Directive does not raise any significant general clarity issues. However, the following issues relating to the definitions may be mentioned:

- The definition of "issuer" is too narrow

Lack of clarity may come from the definition of "issuers", which may not be broad enough to address all the relevant cases. This term is defined as followed in the Directive: "issuer" means a legal entity governed by private or public



law, including a State, whose securities are admitted to trading on a regulated market, the issuer being, in the case of depository receipts representing securities, the issuer of the securities represented."

The definition is not suited to the case where fiduciary securities are issued by a fiduciary and the underlying assets are a loan or a portfolio of assets. For instance, in Luxembourg[3], in capital market transactions involving a fiduciary, the fiduciary (typically a bank) receives certain assets (typically cash proceeds from a placing), which it then applies in accordance with the fiduciary contract (typically to hold a security, to make a loan or acquire an asset or a pool of assets). These fiduciary securities are transferable securities within the definition of article Art. 4.1 (18) of the MiFID Directive and can be listed on financial markets. The assets held by the fiduciary are not liable to bankruptcy. The fiduciary has full ownership over the fiduciary assets, but they are not part of its estate in case of insolvency and they cannot be arrested by the fiduciary's personal creditors.

From a legal stand point, the issuer of the fiduciary securities is the fiduciary. The obligation to publish periodic financial information applies to the "issuer" of the relevant securities and this information must relate to that issuer. The difficulty comes from the fact that the fiduciary is the issuer of the fiduciary securities but that financial information with respect to the fiduciary is of no particular interest to the holders of the fiduciary securities because of the legal characteristics of the fiduciary arrangement.

When the assets of the fiduciary consist of shares, the provisions of the Directive dealing with depository receipts representing securities may be applied: the "issuer" will be the issuer of the underlying securities. An example of this is SES, the largest commercial satellite operator, which is a Luxembourg company listed on the regulated market of the LSE and on Euronext Paris in the form of fiduciary depositary receipts, or FDRs. Fiduciary structures, however, very often involve an underlying loan which is made by the fiduciary to a borrower, or a portfolio of assets, both of which are situations that are not specifically dealt with by the Directive.

The same difficulties arise when securities are issued by closed-ended investment funds in the form of *fonds communs de placement* (or common funds), or by securitisation vehicles set up as securitisation funds. From a strictly legal stand point, the legal entity issuing the securities with respect to those funds is the management company of the fund, since the fund is not a legal entity. Contrary to a fiduciary structure where the fiduciary will own the underlying asset (eg. securities, or claims under a loan), in a common fund the assets of the fund are not owned by the management company but are jointly owned by the holders of shares in the fund (i.e. there is a co-ownership). It is the management company who will be obliged to comply with the Directive, but the information to be provided, particularly periodic financial information, should be information relevant to the fund.

- "Financial institution" is not defined

A definition has been omitted for understanding the term "financial institution", a term used in Article 17, 2.c), and 18.2.c). Only "credit institution" is defined.

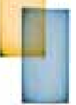
- Different terms with similar meanings

The use of different terms with similar meanings may also create some concern: for instance, it is not clear whether the term "important events" (Article 5.4) and "material events" (Article 6.1) have different or identical meanings.

- The notion of "requirements more stringent" may lead to debates regarding what rules should be regarded more leniently than the Directive.

Article 12 (2) of the Directive establishes a period of 4 trading days for notifications to be made to the issuer as

3 Pursuant to the law of 27th July 2003 on the trust and fiduciary contracts, approving The Hague Convention of 1st July 1985 on the law applicable to trusts and on their recognition.



required by Articles 9 and 10. It is not clear how a deadline computed in calendar days or in business days (as in the case in Poland, for instance) should be assessed, as it may lead to more stringent or more lenient requirements, depending on the situation. However, it may be argued that Member States should make sure that in no cases the deadlines set by national laws be more lenient that those of the Directive.

- Translation issues

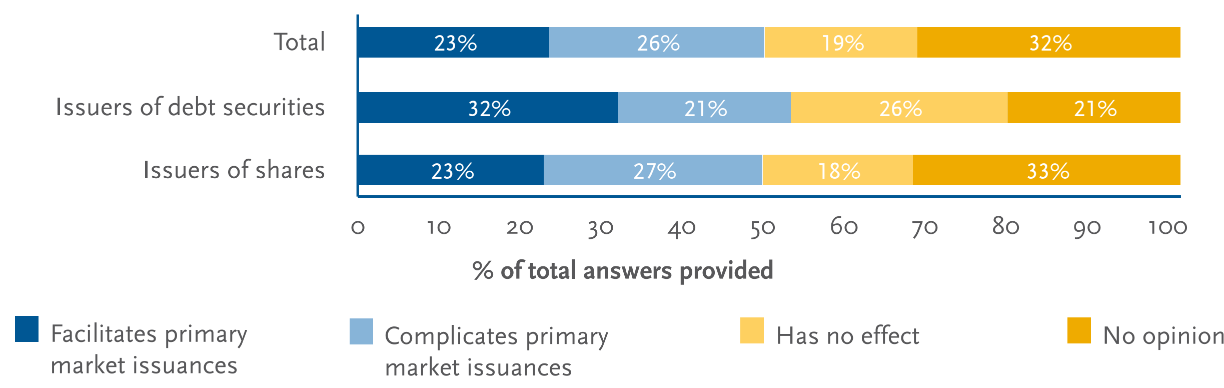
Deficient translations of the Transparency Directive may be the source of some difficulties. For instance, in the Spanish version of Article 4.3 paragraph two, "parent company" is used instead of "company", resulting in a rule which is not clearly understood.

1.5 Impact of the Directive

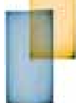
To measure the impact of the Directive on financial markets, specific aspects are examined: the issuance of securities, listings, value added to local markets and the access to information. No obvious negative impact has been reported.

1.5.1 Impact of the Directive on issuance of securities

The views from issuers of shares or debt securities seem to be quite mixed regarding the impact of the Directive on the issuance of securities. Nevertheless, it appears that for the more regular issuers (debt and other securities) the Directive is perceived as a simplifying factor for primary market issuances.



Perception differs significantly between issuers of shares. For 33.7% of Small and Midcaps, the Directive complicates primary market insurances, only 15.2% of top companies are of the same opinion. On a positive note, it must be said that recently listed companies are more inclined to underline the merits of the Directive. 23 recently listed companies in 10 Member States answered this question and 34.8% of this sample considers the Directive to facilitate primary market issuances. A majority of stakeholders in Romania, the UK, Austria and Hungary believe that the Directive facilitates primary market issuances. Clear opinion to the contrary is expressed by the Czech Republic, Poland, France, Germany and Luxembourg.



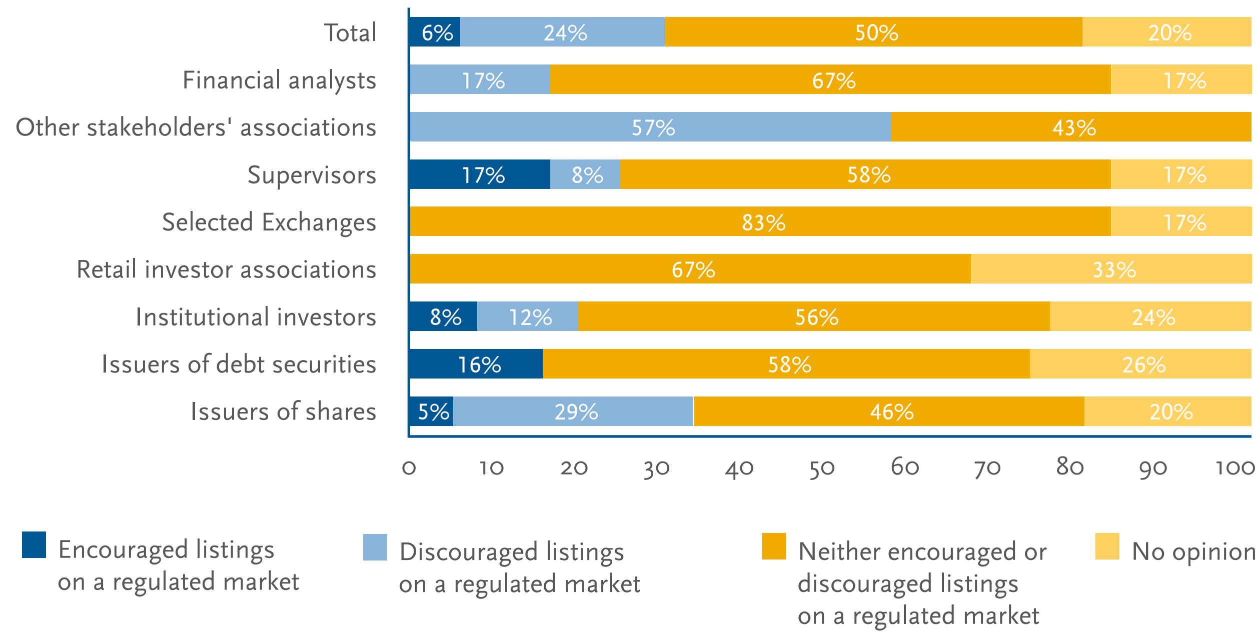
Breakdown by jurisdiction - In your experience,
do you consider that the obligations under the Transparency Directive:

	Facilitates primary market issuances	Complicates primary market issuances	Has no effect	No opinion
UK	44%		11%	44%
The Netherlands	21%	21%	14%	43%
Sweden	22%	15%	18%	44%
Spain	40%	20%	20%	20%
Slovakia	17%	17%	17%	50%
Romania	50%		8%	42%
Poland		20%	40%	40%
Luxembourg	10%	30%	20%	40%
Italy	27%	20%	33%	20%
Ireland	14%	14%	43%	29%
Hungary	50%	17%	17%	17%
Germany	22%	38%	22%	19%
France	16%	46%	14%	24%
Czech Republic		33%	33%	33%
Austria	75%	25%		

0 10 20 30 40 50 60 70 80 90 100

1.5.2 Impact of the Directive on listings on a Regulated Market

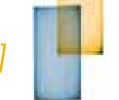
Overall, the Directive is perceived as a regulatory measure that creates neither obstacles nor incentives to listings. Indeed, 50% of stakeholders consider that it had played no role. Having said this, on the one hand, 29% of Issuers of shares believe that the Directive has discouraged listings. On the other hand, the Issuers of debt securities who think that the Directive is not neutral, are of the opinion that the Directive has encouraged listings.



For Issuers of shares, the perception is a less balanced or neutral, especially for Small and Midcaps, for whom the Directive has rather discouraged listings (respectively 38% and 34%).

When examined by Member States and when it is believed that the Directive has an effect on listings, in Italy, Poland and Spain, the Directive is considered to have an encouraging effect. Conversely, in France, Germany, Luxembourg, and the Czech Republic and, to a lesser extent, in Ireland, the Directive is strongly believed to have a discouraging effect on listings.

During the interviews, some stakeholders (in particular issuers) were of the opinion that the Directive discouraged listings. This was particularly voiced by listed SMEs, for whom the requirements are too demanding and costly. Having said that, it was recognised that the financial crisis is also a factor that explains a dry IPO[4]. The CRA study on the Evaluation of the economic impact of the FSAP (see "How to know more about the Transparency Directive, Section 5 of the Methodology Annex) underlines the strong cyclical nature of listing (see Section 5.3.2 of the CRA study).



1.5.3 Impact of the Directive for companies not listed in their country of incorporation

Though not many issuers answered this question, as most seem to be listed in the Member State where they are incorporated, for the very few that did, the Directive is not thought to be a simplification factor for listing outside the country of incorporation.

The principle defining the competent authority, as introduced by the Directive, for companies not admitted to trading in their Home Member State, does not seem to work in practice. Companies in such a situation heavily criticised the fact that, in reality, they must often respect two different sets of transparency rules (the Home Member State's ones and the Host Member State's ones) and are *de facto* reporting twice. This difficulty is reflected in answer no.6 of CESR's Questions and Answers of May 2009 (CESR/09-168).

Unfortunately there are no statistics or figures available on the number of EU companies that have their securities only admitted to trading in one or more Host Member States. It is therefore difficult to identify the Member States that attract exclusive listings from other Member States, and which Member States have companies exclusively listed in another Member State.

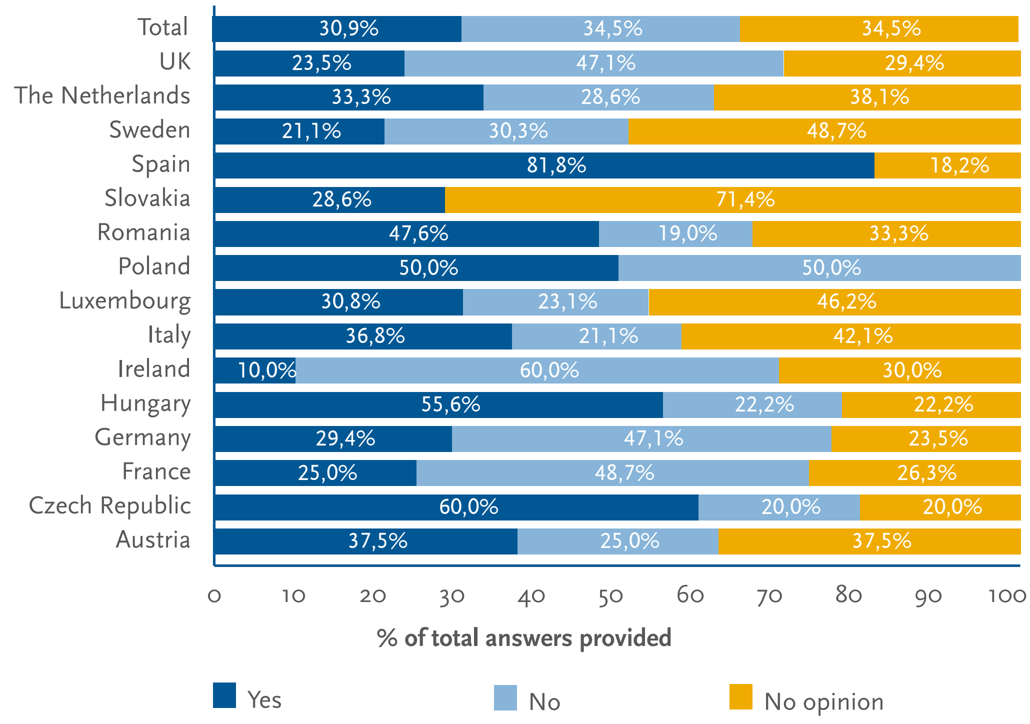
The provision of the Directive requires that a company having its securities listed exclusively in a Host Member State regulated market that discloses regulated information should also file this information with the Home Member State's competent authority. According to CESR, some Member States have introduced a requirement by which those companies that are listed in several Host Member States (but not in their Home Member State) and have to comply with disclosure rules of the Home Member State, must file their regulated information with all the Host's competent authorities. Other Member States have not envisaged such a situation in their legislation, and therefore the competent authorities adopt a "case-by-case" approach. The ensuing result from some interviews in companies in this particular situation is that they are obliged to comply with these two frameworks of rules.

1.5.4 Added value of the Directive to the local markets

A question put to stakeholders was whether the Directive has added to local markets compared to the situation existing previously. In other words, whether new obligations introduced by the Directive have created a more positive listing and investment environment.

There is a strong contrast at Member State level as regards the added value provided by the Directive whereas the overall perception is very mixed. In Spain and in the recent EU Member States (Czech Republic, Hungary, Poland and Romania) the Directive is thought to have added value to the market. In other Member States, it is felt that the Directive has not changed the situation.

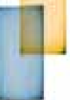
4 *Initial Public Offering*



Among Issuers of shares, there is a clear opinion expressed by Small caps compared to other subcategories of issuers of shares: 52.4% of the companies do not think the Directive added value.

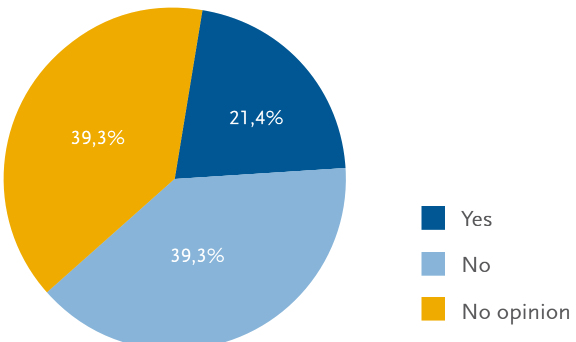
1.5.5 Help provided by the Directive to obtain and analyse more information on a cross-border basis

Overall, views are mixed on the role played by the Directive in obtaining and analysing financial information on a cross-border basis and no clear opinion from Institutional investors or retail investors can be highlighted.



1.5.6 Help provided by the Directive to obtain and analyse more information in the country of operation

On a national basis, respondents are more inclined to believe that the Directive has not created additional access to information or capacity to analyse it.



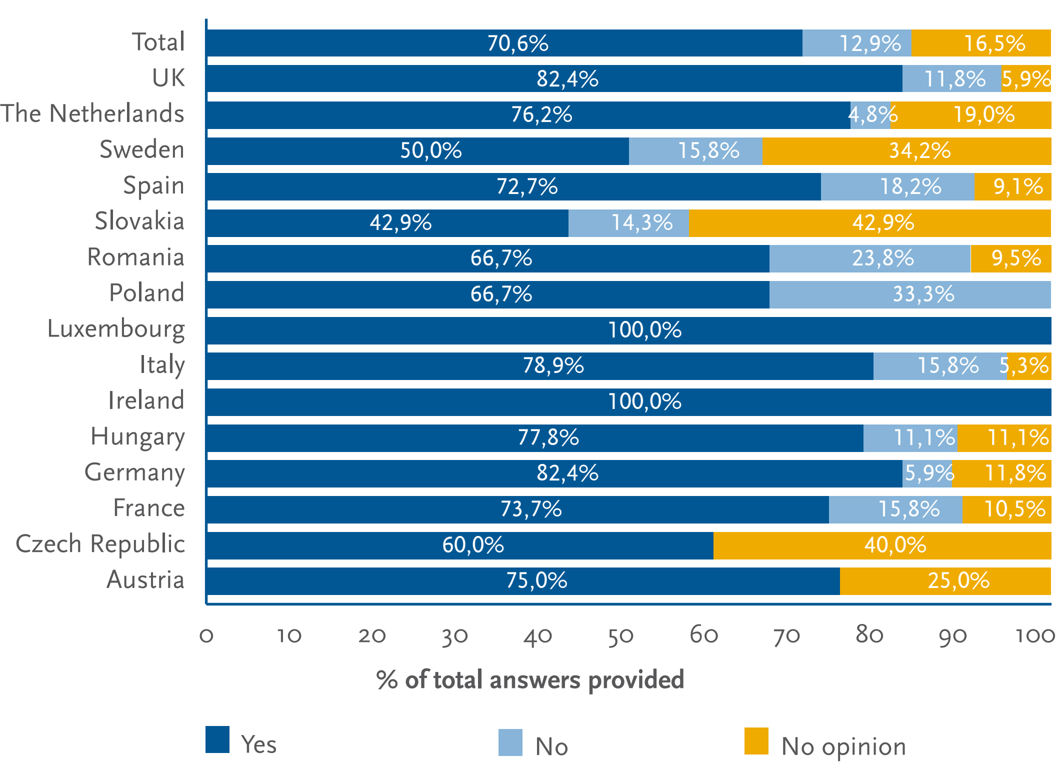
1.6 Need for additional guidance?

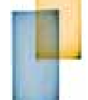
Additional guidance does not seem to be desired at EU legislative level. Stakeholders think that the Directive is, generally, sufficiently detailed. A wish for more guidance is expressed in a number of Member States, and in the recent ones in particular.

1.6.1 Sufficiency of guidance

The high level of clarity expressed by the stakeholders is strengthened by the fact that 70.3% of them think that there is sufficient guidance to apply the Directive in their respective country.

Breakdown per jurisdiction - Is there sufficient guidance in your country as to the requirements of the obligations imposed by the Transparency Directive?

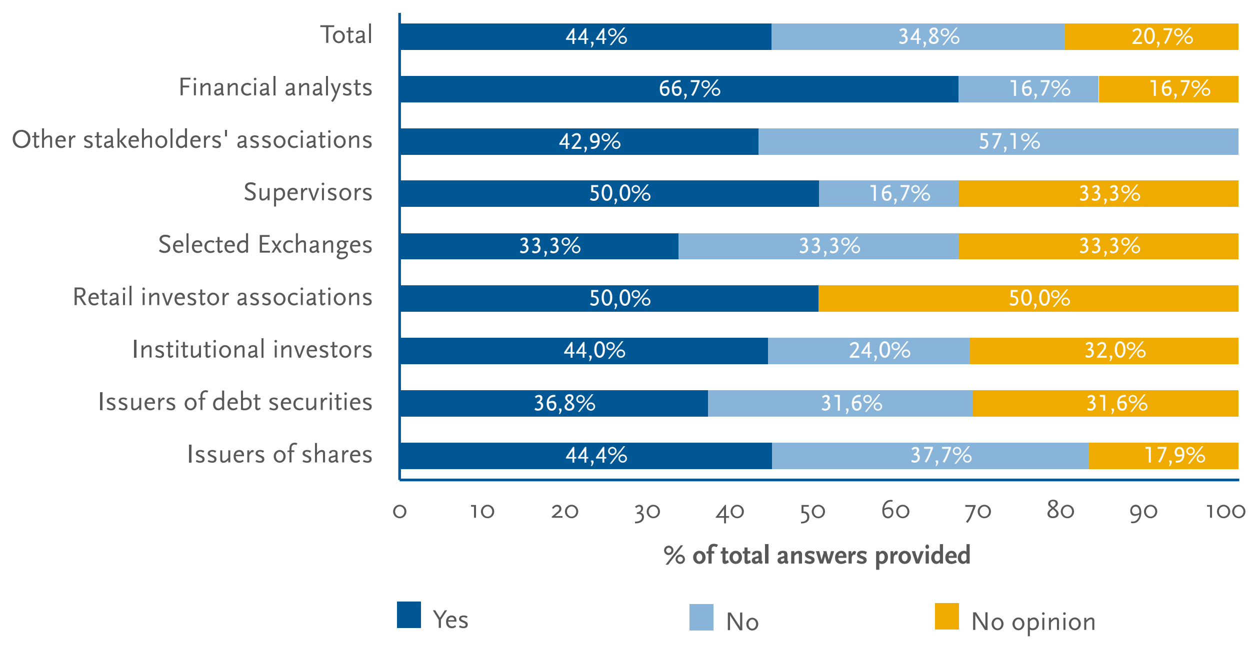




1.6.2 Wish for additional guidance

Almost 45% of stakeholders are in favour of additional guidance but 35% do not think that additional guidance is necessary. Stakeholders Associations are more against additional guidance than their members. Here again, Financial Analysts are the most vocal category of stakeholders requesting additional guidance.

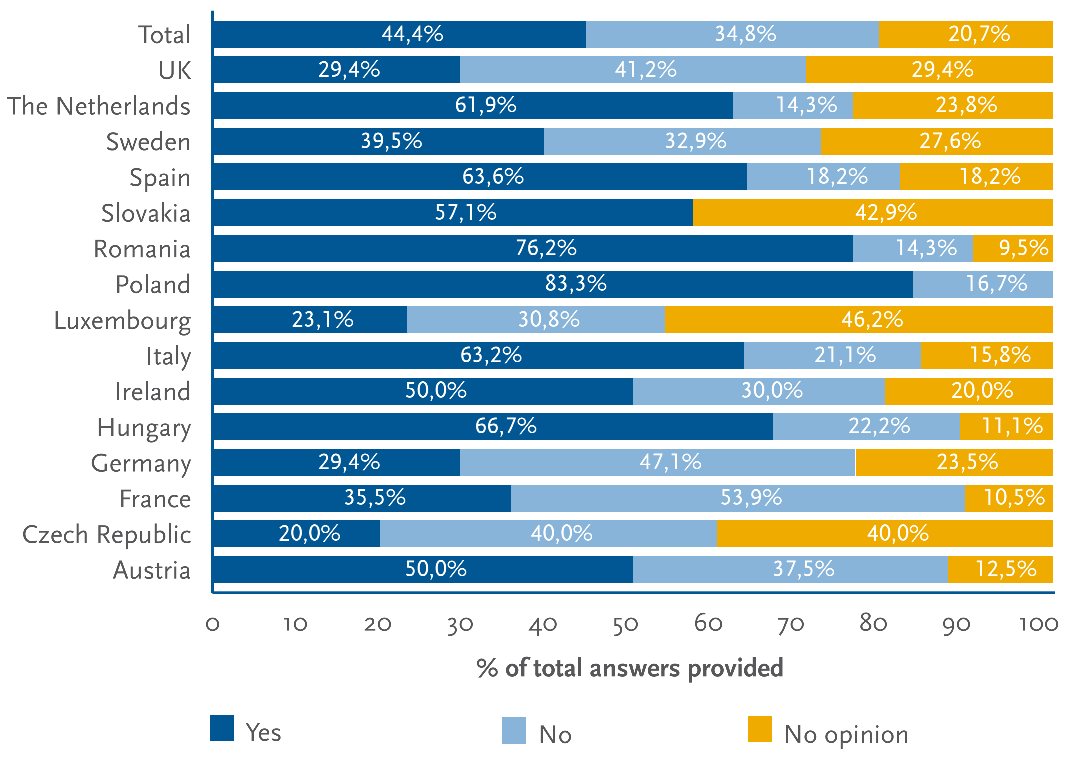
Breakdown by stakeholders category - Are you in favour of additional guidance as to the obligations imposed by the Transparency Directive?



Within the Issuers of shares category, the call for additional guidance is particularly expressed for Small and Midcaps as well as for Recently listed companies: respectively 46.4%, 55.1% and 52.2%.

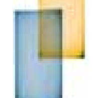
An analysis by jurisdiction shows that in the most recent EU Member States (Poland, Romania, Hungary and Slovakia) but also in Italy, Spain and the Netherlands, a majority of stakeholders favour additional guidance. The more reluctant stakeholders can be found in France, Germany, Czech Republic and the UK.

Breakdown by jurisdiction - Are you in favour of additional guidance as to the obligations imposed by the Transparency Directive?



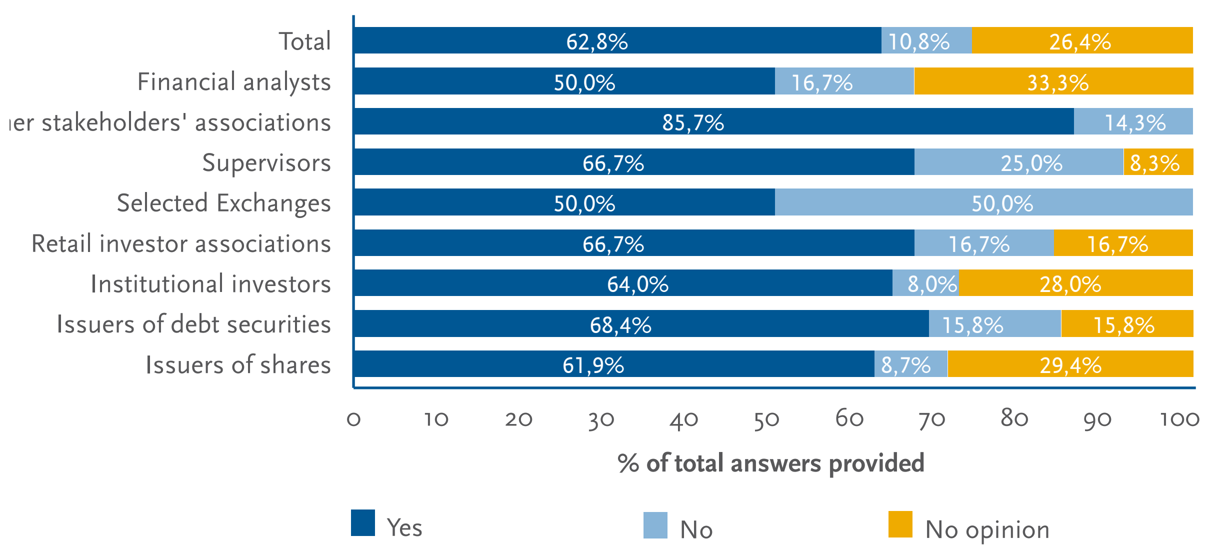
Generally speaking, during interviews, stakeholders confirmed the opinion described above. There is no strong call for further guidance but rather a real request for more straightforward requirements for very specific areas where the Directive is vague, not sufficiently harmonised and where Member States haven taken very different approaches to implement the Directive. This covers in particular definitions triggering obligations (scope and deadlines).

It has been mentioned that preparation of guidance by regulators should involve market participants (Czech Republic) and be available on the web pages of the regulators' websites (Austria, Hungary). It was also mentioned that Guidance should be available in various languages, and that the Standard Forms for notification of thresholds should be available on the regulators' websites.

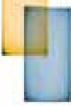


1.6.3 Level of details of the Directive

62.8% of all stakeholders think that the level of details contained in the Directive is appropriate, and only 10% of the stakeholders think that the Directive is not sufficiently detailed. Depending on the category of stakeholders, the perception of the detailed nature of the provisions of the Directive differs: Financial Analysts are once more the least convinced. Within the Issuers of shares category, Small and Midcap companies are the least convinced by the suitability of the level of detail of the Directive.



A majority of interviewed stakeholders confirmed that they consider the Directive sufficiently detailed, but at the same time they criticised the lack of harmonisation of the implementation of the Directive. There is nevertheless one item for which the Directive was criticised for not being sufficiently detailed and precise: the content of the Interim Management Statements (Article 6).

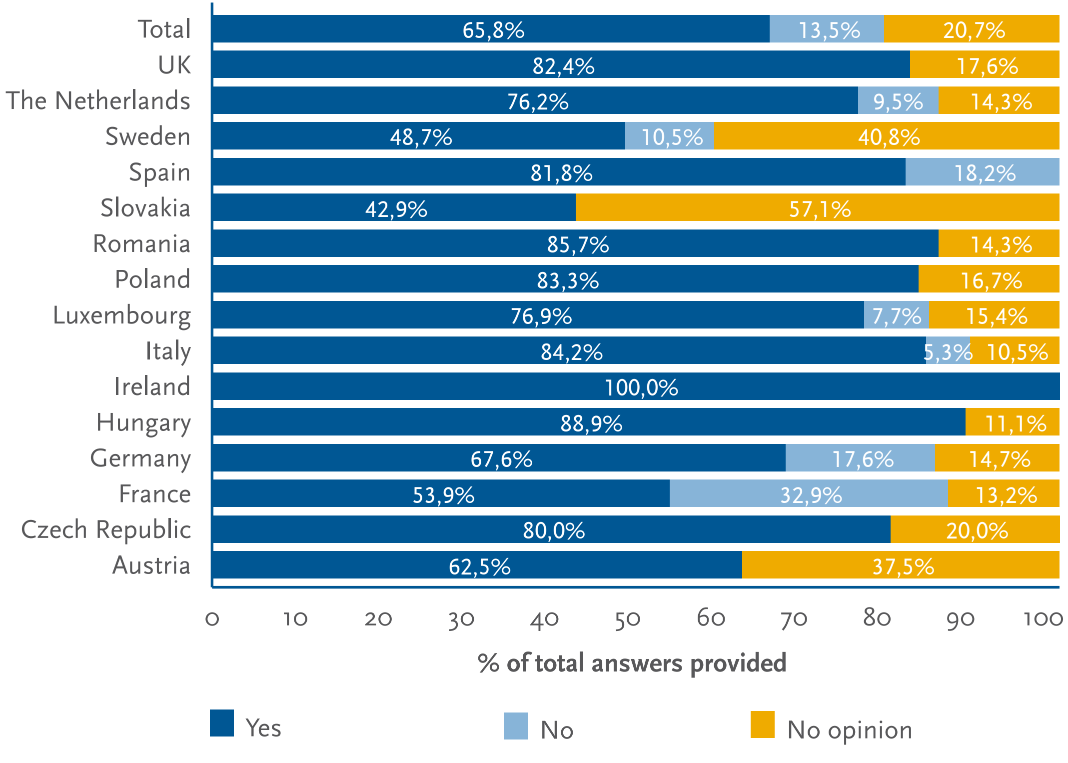


1.7 Suitability of the provisions of the Directive

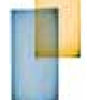
1.7.1 Suitability of the Directive rules to its objectives

Approximately two thirds of the stakeholders think that the provisions of the Directive are appropriate to its objectives. In fact, only 13.5% of the stakeholders think that it is not. This very positive opinion differs in the various Member States.

Breakdown by jurisdiction - Are the Transparency Directive rules appropriate to achieve its objective of providing accurate, comprehensive and timely information to the market?



France and Sweden are the two Member States where the positive perception is the weakest, even though the majority think that the Directive achieves its objectives; France has the highest rate of stakeholders who believe that the Directive does not achieve its objectives (1/3). The perception of the suitability of the Directive is positive for all categories, but sometimes quite different per category of stakeholder. In particular, Financial Analysts would appear to be the least enthusiastic. The focus on issuers of shares confirms the perception already visible in the first section of the questionnaire. The positive opinion on the suitability of the provisions of the Directive decreases with the market capitalisation of the companies: 77.6% of Top companies stated that they were satisfied, compared with only 54.8% Small Caps.



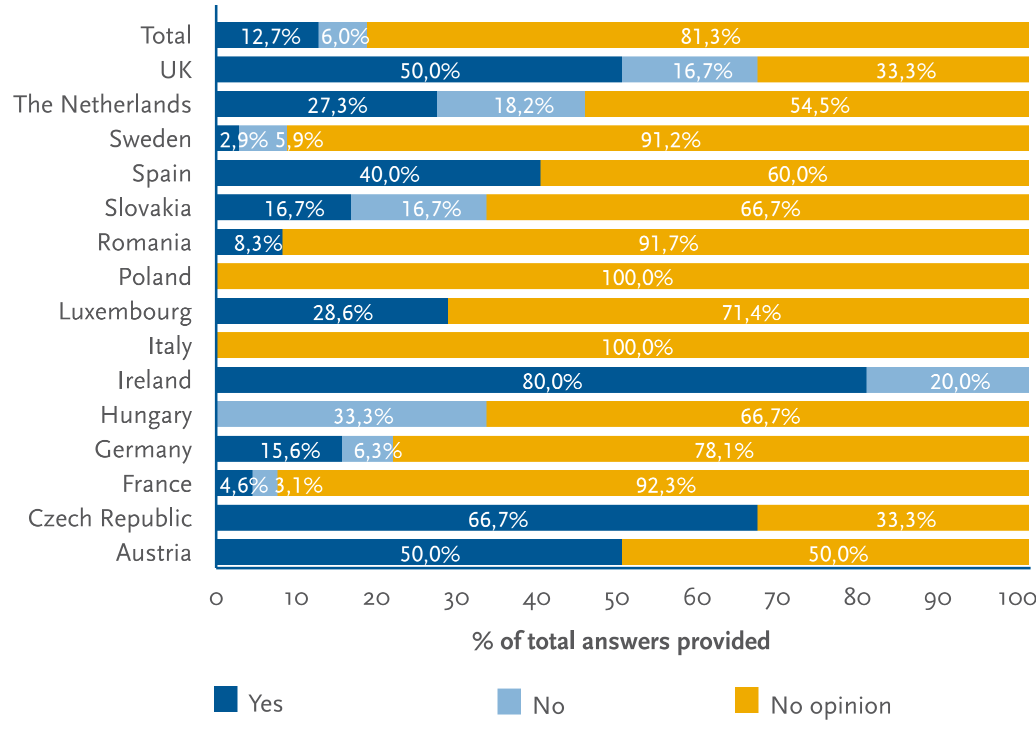
This general suitability of the provisions of the Directive to meet the objective of providing accurate comprehensive and timely information to the market was confirmed during almost all the interviews conducted. The main criticism comes from a significant number of SMEs who consider the obligations of the Directive to be too demanding.

1.7.2 Compliance with the Directive for dually listed companies

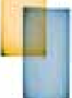
Firstly it should be noted that a significant majority of respondents are listed only on one Exchange. Therefore, not surprisingly 80% of the respondents have no opinion on the capacity of the Directive to facilitate compliance on a cross-border basis. However, when an opinion is given, clearly the Directive appears to be a simplifying factor. The breakdown per country shows that this positive common perception is particularly true in Ireland, UK and the Czech Republic.

The positive impact of the Directive on dually listed companies is higher for the Top companies and recently listed companies.

Issuers of shares - If you are listed in more than one exchange, does the Transparency Directive facilitate compliance with transparency requirements ?



During the very few interviews with the dually listed companies, it was generally noted that the Home competent authority principle introduced by the Directive is good in theory, and a simplifying factor. A radical complaint about the lack of harmonisation of rules comes from companies listed in the EU and in the US, along with a strong call for harmonisation of transparency requirements at global level.



1.7.3 Assessment of legal suitability for the operational functioning of the Directive

With the exception of rules regarding notification of major holdings (addressed in section 3), the legal analysis of the Directive does not show any significant discrepancy between its objectives and its content. The issue of the scope of the transparency requirements may, however, be addressed. However, the following may be noted:

- Scope of the Directive

The first recital of the Directive states that: *"The disclosure of accurate, comprehensive and timely information about security issuers builds sustained investor confidence and allows an informed assessment of their business performance and assets. This enhances both investor protection and market efficiency"*. The concept of "transparency" is not necessarily limited to financial information. Ethical, social and environmental information is of value to a small but significant portion of "responsible" investors, including asset managers setting up and marketing specialized SRI funds. In this respect, providing for broader transparency requirements to listed companies would appear to make sense. Currently, positions publicly taken by companies on issues regarding "responsible" investments may not easily be sanctioned if they are false or misleading as they are typically considered outside the scope of financial regulations.

However, this concern does not relate only to the Directive and should thus be addressed separately.

- Transposition issues

Although the Directive provisions are consistent with its objectives, its transposition may lead to absurd consequences if not done appropriately. For instance, in Poland, the implementation has resulted in an obligation to notify acquisition of shares in a company for 33% to one third.

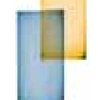
The Directive may also raise some objections when it conflicts with previous practices which were considered superior. An example of this may be found in the UK practice to publish preliminary statements ("prelim") within four months of the end of the financial year. Given that the period for year end reports under the Directive is 4 months, the FSA decided to abolish the requirement for companies to publish compulsory prelims. However, there is a strong view in the market that standard practice will be for companies to continue to issue prelims. This is due to the following factors: market demand for up to date information; the disclosure obligations in relation to insider information; and the fact that many companies published prelims well in advance of the 120 day deadline and they will, therefore, still serve as a useful update prior to the publication by the company of this final report.

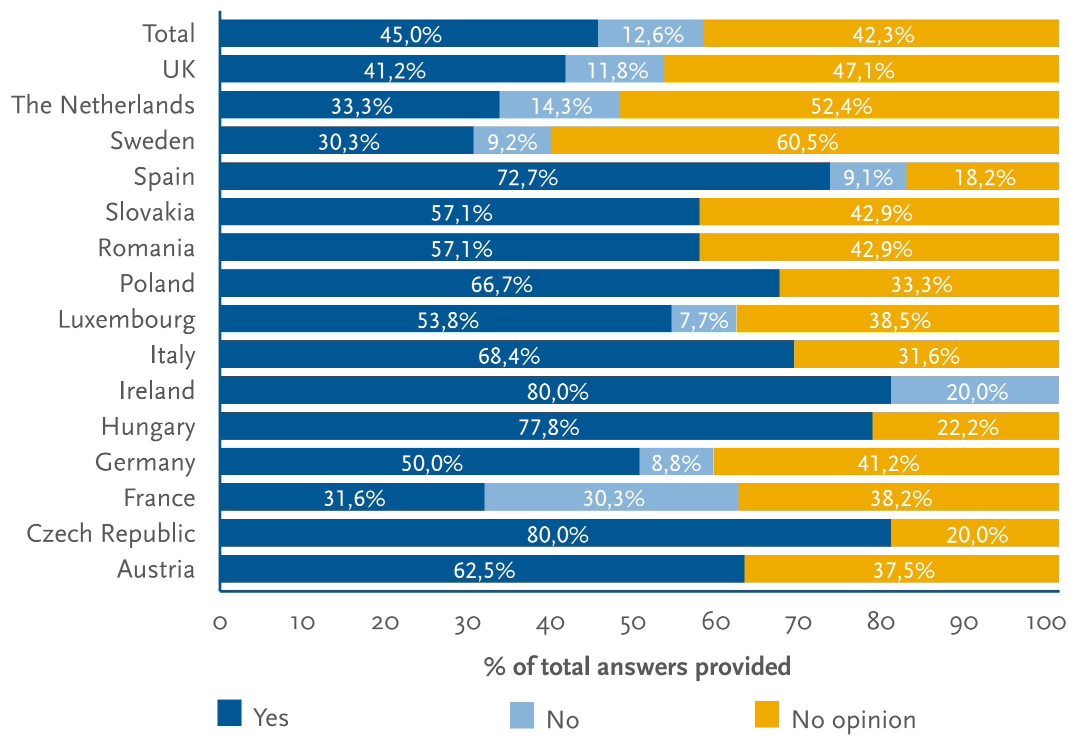
1.8 Level of harmonisation

Even if there is a general positive assessment on the suitability of the provisions of the Directive to achieve its objectives, the lack of harmonisation produces adverse effects on investors. National transpositions and market practices are considered responsible for those adverse effects.

1.8.1 Directive's allowance for sufficient harmonisation in its application

Even if 62.7% of stakeholders consider that the level of detail of the Directive is sufficient, only 45% consider that the Directive allows for sufficient harmonisation in its application. The opinion that the degree of harmonisation is low is particularly expressed in Sweden, France and in the Netherlands.

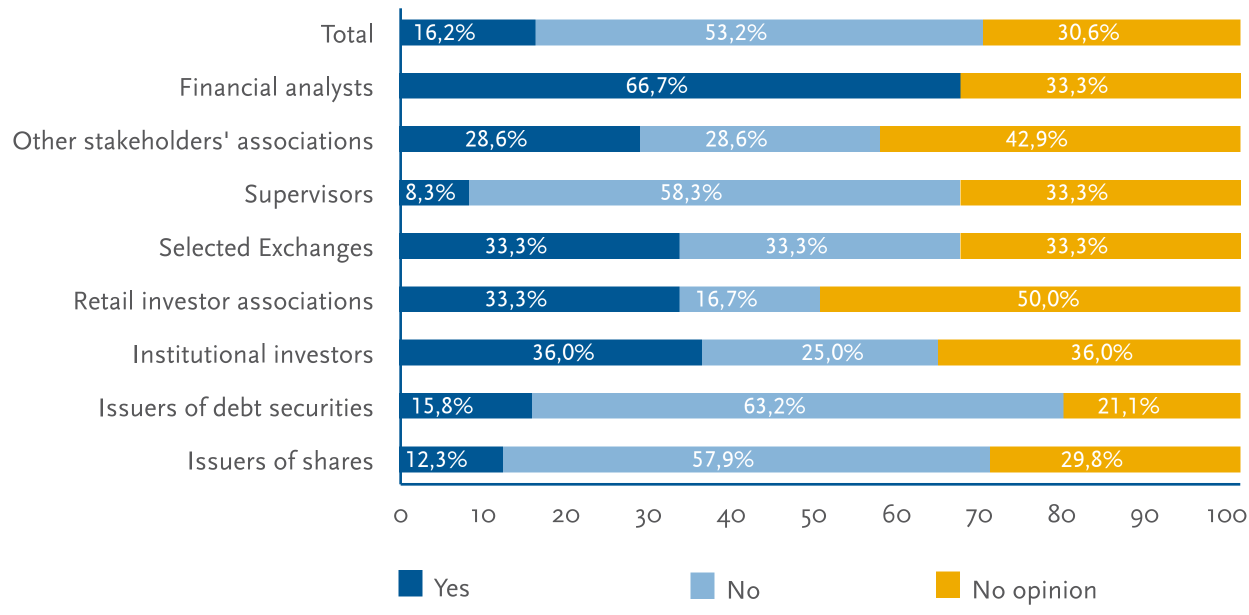




Contrary to the results of the on-line questionnaires, during face to face discussions and interviews, when coming to specific provisions of the Directive, stakeholders have very often complained about the lack of harmonisation of the Directive. This is particularly the case for cross-border market players, Investors and Supervisors. Many examples were given and in most cases it covered the notification of thresholds (definitions, scope, exemption, thresholds, deadlines, notification forms, etc.) but also the content of the Interim Management Statement and the practical functioning of the Officially Appointed Mechanisms for the storage of the regulated information.

1.8.2 Adverse effect of non uniform implementation across the European Union

A majority of stakeholders (53%) think that they are not adversely affected by a non-uniform implementation of the Directive across the EU. However, there is a clear difference of opinion between the Issuers and the users of financial information (Financial Analysts and Retail and Institutional Investors). A majority of the latter consider that a non uniform implementation across the EU has an adverse impact. It can also be noted that recently listed companies are more inclined to consider that a non-uniform implementation of the Directive has adverse effects. The Member States that show the highest number of stakeholders that feel that a lack of uniform implementation has adverse effects are the UK and Romania.

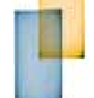


During interviews, the most vocal category of Stakeholders was the Financial Analysts. The main complaints are about the timing of the publication of financial reports (in particular half-yearly) that creates a bottleneck of information at the end of the second month and makes their ability to obtain information (in addition to the one required by the Directive) very difficult. Institutional investors also call for more uniform definitions, in particular regarding the notification of thresholds but also regarding market practices and more generally an enhanced predictability of the legislation (i.e. “acting in concert”).

1.8.3 Origin of this adverse effect

Issuers of shares, Financial Analysts and Supervisors consider that national laws are the main reason for the lack of uniform implementation. For Investors, Debt issuers and Industry associations, the responsibility lies more on the different market practices. Supervisors also believe that the Directive itself is responsible for the adverse effect due to a lack of harmonisation, but their opinion should be balanced by the fact that they contribute actively to the regulatory process. In Germany, France, Italy and Spain, the main factors considered responsible for the lack of uniform implementation of the Directive in the EU are the provision of the national laws and the practices in various markets. The finger is more significantly pointed at the guidelines of national Supervisors in the UK and Hungary.

Interviews of stakeholders clearly confirmed the results of the on-line questionnaire. National laws and rules as well as guidelines from national Supervisors are clearly identified as responsible for divergent implementation of specific provisions of the Directive. More harmonised supervisory rules and guidance via CESR were often considered necessary.

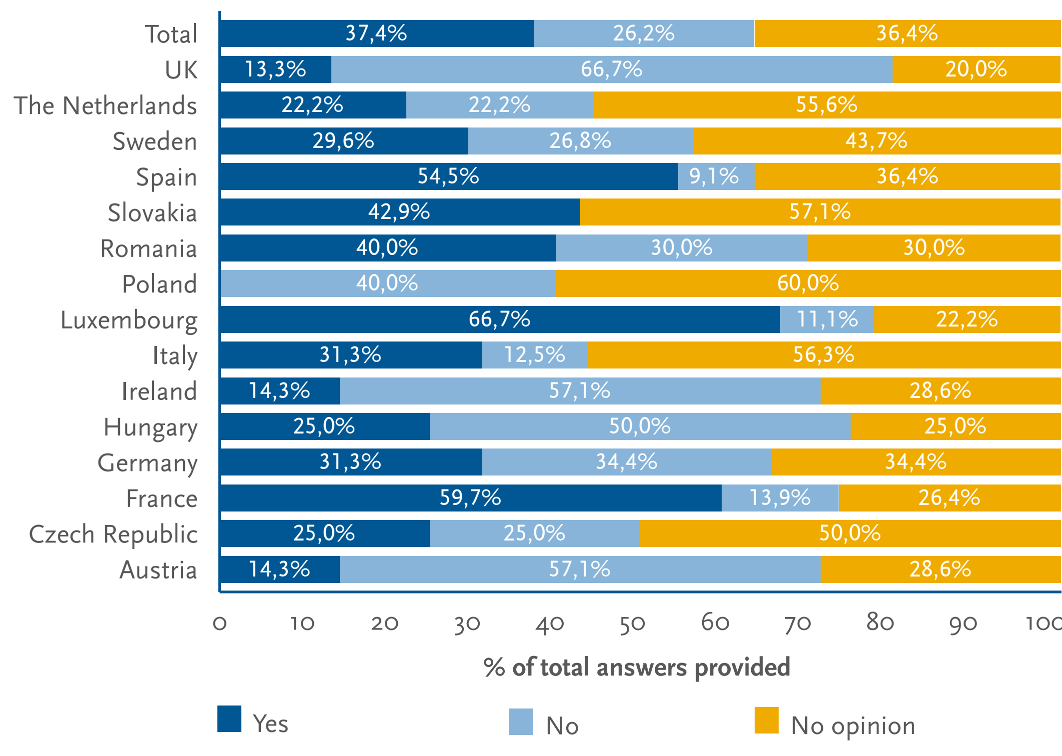


1.9 SME's and non regulated markets

The "one size fits all" approach of the Directive is criticised by listed SMEs for which a lighter regime is often supported.

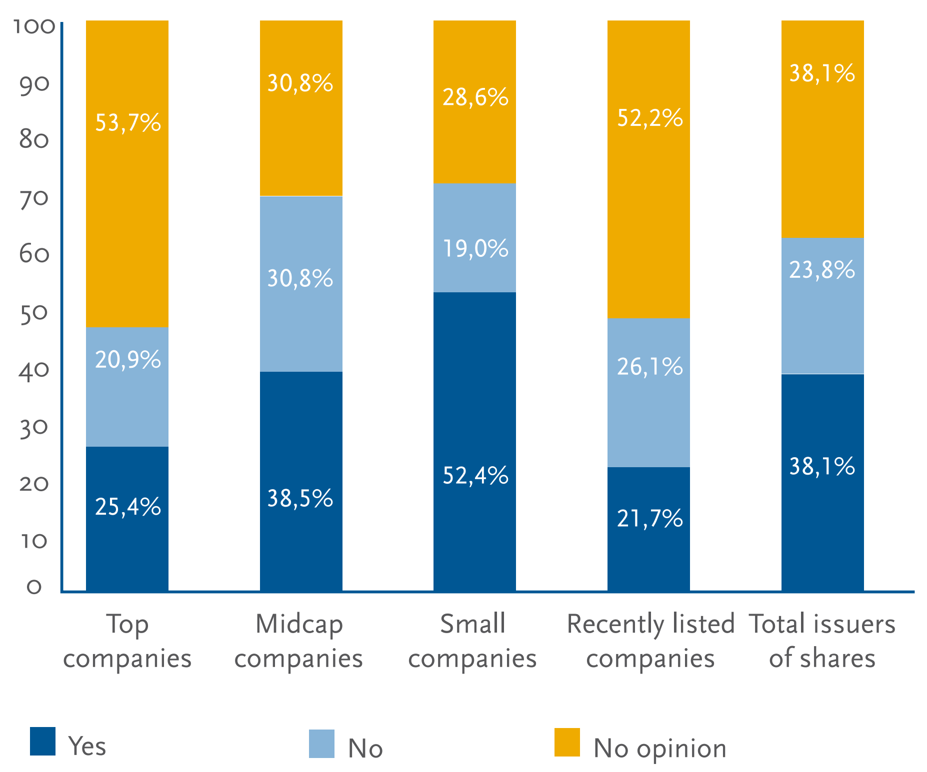
1.9.1 Relevance of a specific transparency regime for SMEs

In general terms and as a matter of principle a majority of stakeholders having expressed an opinion are in favour of a distinct transparency regime specific for small and medium size enterprises (SMEs). This is the case in most Member States and a strong opinion in Luxembourg, France, Spain, Italy and Slovakia. Member States where a clear majority of stakeholders is against a different treatment for SMEs are Austria, Ireland, Hungary, Poland and the UK. 36.4% of respondents have no opinion.

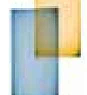


Depending on the category of stakeholder, the opinion on the relevance of a specific regime for SMEs is very different. Those in favour of a specific transparency regime for SMEs are the Financial Analysts, Retail investors and the Issuers of shares, in particular Midcap and Small cap companies. The more reluctant are the Exchanges and the Institutional Investors. Within the issuers of shares' category, a clear majority of Small caps are in favour of specific regime for SMEs.

Issuers of shares - Should SMEs have a specific transparency regime?



The view points of stakeholders as it results from the on-line questionnaire were perfectly reflected during the interviews. Small and Medium size listed companies strongly advocate a specific transparency regime. The criterion to define SME is generally considered to be the market capitalisation (between € 250 million and € 1 billion) and not the turnover nor the number of employees. A key request is an extended deadline for the publication of periodic financial information (in particular for half-yearly reports). Financial analysts strongly support this in order to better spread the flow of information during the year. Opponents to a specific regime for SMEs argue that the requirements are not too demanding, and that if a company is not able to meet this requirement then it should not be listed at all.



1.9.2 Extension of the harmonised rules to issuers listed on non-regulated / alternative markets

A clear majority (60%) favour the existence of a lighter transparency regime, or more flexible regime at national or Exchange level, for companies listed on non-regulated markets or alternative markets. Only a minority of stakeholders (18%) considers that the same rules should apply to regulated and non-regulated / alternative markets: those include mainly Retail Investors. Stakeholders in a majority of Member States favour different rules for non-regulated or alternative markets except in Spain, Italy, Ireland and Austria.

Breakdown per jurisdiction - Should the harmonised rules of the Transparency Directive be extended to issuers listed on non-regulated / alternative markets?

	Yes, the same rules than for regulated markets	Yes, but lighter rules	No, this should be left to national law	No, this should be left to the exchanges	No opinion
UK	17,6%	23,5%	17,6%	23,5%	17,6%
The Netherlands	9,5%	23,8%	9,5%	14,3%	42,9%
Sweden	9,2%	21,1%	13,2%	26,3%	30,3%
Spain	54,5%	18,2%			27,3%
Slovakia	42,9%	42,9%			14,3%
Romania	38,1%	42,9%		4,8%	14,3%
Poland	16,7%	50,0%	16,7%		16,7%
Luxembourg	15,4%	15,4%	23,1%	30,8%	15,4%
Italy	42,1%	31,6%	5,3%	10,5%	10,5%
Ireland	30,0%	20,0%		30,0%	20,0%
Hungary		55,6%	33,3%		11,1%
Germany	14,7%	26,5%	26,5%	20,6%	11,8%
France	14,5%	38,2%	19,7%	11,8%	15,8%
Czech Republic		40,0%		20,0%	40,0%
Austria	37,5%	12,5%	12,5%	25,0%	12,5%

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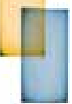
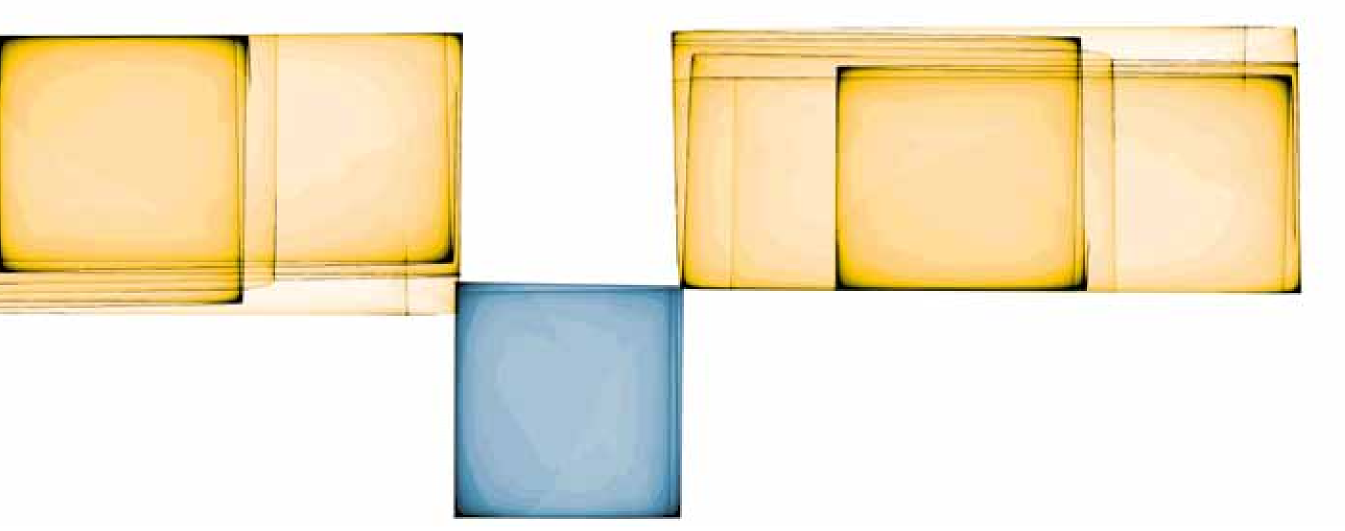
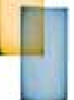


Interviews with stakeholders confirmed the results of the on-line questionnaire: there is no real support for extending the provisions of the Directive to Exchange regulated or alternative markets. In connection with the previous question, it is interesting to note the clear difference in position adopted by listed SMEs and Exchanges. For Exchanges, the differentiation line should be made between Regulated Market and Exchange regulated or alternative markets, for which rules should be much lighter. On their side, SMEs are asking for a selection of more flexible rules when listed on a Regulated Market.

2. Disclosure of periodic information





2.1 Key perceptions and implementation issues

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

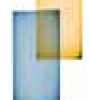
Indeed, 82% of stakeholders consider the periodic information published by the listed issuers to be useful for investment purposes. 70% of stakeholders also believe that the content of the information is pertinent to making an informed assessment as to the financial position of an issuer. Furthermore, 71% maintain that the issuers produce sufficient information compared to the requirements. A systematic review indeed shows that issuers voluntarily do more than the minimum requirement regarding half-yearly and quarterly information. In addition, 69% of stakeholders do not consider the compliance cost with periodic information obligations to be too onerous. Finally, no stakeholder has expressed a need to add new financial periodic information requirements.

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

Based on publicly available information, non-compliance rates with local legal requirements for publication deadlines are as follows:

- Annual report:
  - Main EU Member State: 1.0%
  - Other EU Member State: 16.8%
- Half-year report:
  - Main EU Member State: 4.3%
  - Other EU Member State: 5.3%
- First quarter report:
  - Main EU Member State: 0.7%
  - Other EU Member State: 10.5%
- Third quarter report:
  - Main EU Member State: 1.0%
  - Other EU Member State: 11.1%

Seen from the issuers' point of view, 69% do not experience difficulties with the publication deadlines, however this conversely implies that 26% of issuers of shares or debt securities admit having problems meeting the publication deadlines. In most cases (87%), the difficulty comes from the two month deadline for the publication of half-yearly reports. SMEs have been very vocal in expressing their dissatisfaction about this deadline. Users of financial information, and in particular financial analysts, also feel that this bottleneck of disclosure of information at the end of the second month disrupts the market, drawing the attention of analysts and financial press' away from SMEs as they focus more on the Blue chips. In addition, be it by obligation or on a voluntary basis, 80% of issuers have their half-yearly reports audited or reviewed by an external auditor (in 5 Member States this is mandatory) and this contributes to the difficulty in meeting the deadline. Spreading the publications over an extended period of time would therefore



both alleviate SMEs and contribute to a more fluid functioning of the market.The idea of having different deadlines for SMEs is supported by 26% of stakeholders. It has recently been recommended by the International Organisation of Securities Commissions (IOSCO) and is currently practised in the U.S.

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

Stakeholders have very mixed views on the use of the XBRL. Users of financial information are inclined to favour the use of a common interactive data technology (as also recommended by IOSCO), but issuers have more so adopted a "wait and see" attitude and are, in any case, against a mandatory use of XBRL. Non-EU stakeholders seem to be more familiar with XBRL than the EU market players.

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

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

Some technical improvements could be introduced regarding, for instance, the content of the statements made by responsible persons in half-yearly statements or information requirements under section 16.3 of the Directive regarding disclosure of new loans.

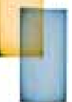
Statements made by responsible persons in the annual and half-yearly financial reports enhance the accountability of such persons but do not lead to a unified liability regime regarding false or misleading statements. An enhanced harmonisation in this area could help to ensure to a level playing field in transparency.

Possible improvements

4. Deadline for the publication of half-yearly reports: *An extension of the timeline for the publication of half-yearly reports could enhance market efficiency. An extension of the deadline could be conceived for a pre-defined category of SMEs. Alternatively, this could be made possible by allowing a different deadline for issuers that have their half-yearly report reviewed or audited by an external auditor (be it on a mandatory or a voluntary basis). A three month deadline would appear to be reasonable.*

5. Home Member state principle: *A more rigorous application of the Home Member State principle of the Directive would help to avoid discriminating companies choosing to be listed in a regulated market other than the Member State where they are incorporated.*

6. Use of XBRL: *More experience from countries where XBRL is used would appear necessary before an EU decision or recommendation on the use of XBRL is made.*



2.2 Key provisions of the Directive

The guiding principle is that the disclosure of accurate, comprehensive and timely information about issuers of securities builds sustained investor confidence and allows an informed assessment of their business performance and assets.

The Directive requires companies listed on a Regulated Market to disclose annual, half-yearly financial reports and quarterly information.

Annual financial reports should be made public 4 months after the end of the financial year and remain publicly available for 5 years. The annual financial report includes: the audited financial statements, a management report, as well as a “true and fair view” and risk Statement by management.

Half-yearly reports covering the first six months of the fiscal year should be published 2 months after the end of the period at the latest and shall remain available for 5 years. The half-yearly report should include: a condensed set of financial statements, an interim management report (covering material events and transactions, financial positions, risks) as well as a “true and fair view” and a risk Statement. The Directive does not require the half-yearly financial reports to be audited or reviewed (allowing this to be done on a voluntary basis). At a national level, a few Member States require a mandatory review of the half-yearly report.

Unless there is a national requirement to publish quarterly financial reports, an Interim Management Statement covering the first and the third quarter of the financial year should be published between a month and a month and a half after the end of the relevant quarter. This Interim Management Statement should include an explanation of material events and transactions during the period and their impact on the financial position of the issuer as well as a general description of the financial position and performance of the issuer during the period.

These periodic information requirements do not apply to sovereign issuers or to exclusive debt issuers with high denomination per unit (€50,000). Member States may choose to waive the half yearly reporting obligation for non listed banks issuing debt below €100,000,000.

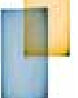
2.3 Compliance Review

As a first step to measure the suitability of the functioning of the periodic information requirements of the Directive, Mazars has conducted a compliance review by issuers of shares in all Member States covered by the study to assess the compliance of issuers of shares with legal periodic information disclosure requirement in their Member States.

2.3.1 Disclosing on a timely basis

Before describing the details of the compliance review, it should be said that the general perception by Institutional Investors, Supervisors and relevant Stakeholders' associations is that the periodic information published by issuers is disclosed on a timely basis. 82.5% have expressed this opinion.

This specific review covers 493 issuers of shares in the 15 Member States of the European Union covered by the on-line questionnaire. With few exceptions resulting from specific market conditions (already explained in the methodology appendix), the scope per jurisdiction reaches the minimum target number of issuers of shares. In some Member States, analysis was conducted for all the issuers targeted by the on-line questionnaires.



Compliance - Details of the scope of issuers reviewed

Country	Top companies	Midcap companies	Small companies	Recently listed companies
France	20	10	10	
Germany	10	10	10	10
Italy	10	13	10	14
Spain	14	18	4	
Sweden	10	10	10	10
The Netherlands	10	10	10	10
UK	14	13	14	19
Austria	5	5	5	5
Czech Republic	14			
Hungary	5	6	5	4
Ireland	8	5	7	
Luxembourg	4	4	6	
Poland	5	5	5	5
Romania	6	29	21	6
Slovakia	15	5		

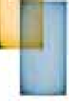
# of issuers of share

0 10 20 30 40 50 60 70

Top companies 29%, Midcap companies 28%, Small companies 22%, Recently listed companies 21%

Top companies 32%, Midcap companies 31%, Small companies 26%, Recently listed companies 11%

Top companies | Midcap companies | Small companies | Recently listed companies



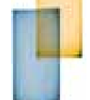
2.3.2 Annual Reports

For the requirement to publish an Annual Report, the review was conducted mainly on the annual reports for the latest financial year, which was for the majority of issuers the financial year ending December 31st, 2008 (88% of the issuers).

Annual report - Review of Compliance

	Disclosure according to legal requirement	Legal requirements not respected	Information not available
France	95,0%	5,0%	
Germany	100,0%		
Italy	100,0%		
Spain	100,0%		
Sweden	100,0%		
The Netherlands	100,0%		
UK	98,3%	1,7%	
Total Main EU Jurisdictions	99,0%	1,0%	
Austria	90,0%	10,0%	
Czech Republic	85,7%	7,1%	7,1%
Hungary	85,0%	15,0%	
Ireland	90,0%	10,0%	
Luxembourg	64,3%	35,7%	
Poland	90,0%	10,0%	
Romania	71,0%	27,4%	1,6%
Slovakia	15,0%		85,0%
Total Other EU Jurisdictions	73,2%	16,8%	10,0%
Total all EU Jurisdictions	89,0%	7,1%	3,9%

In the main EU jurisdictions, annual reports are disclosed in compliance with the legal requirements for more than 99% of the issuers. In the other EU jurisdictions, the ratio is lower due to delays in disclosure but also because of



a lack of information available at the date of this report in Slovakia and Czech Republic. Overall, the publication of annual reports, which is not an innovation of the Directive, is highly respected in the EU (89%). Difficulties to comply with the requirements within the 4 months deadline is more often experienced by issuers located in the new Member States and Luxembourg.

2.3.3 Half-yearly

The review conducted for half-yearly reports covers the same selection of companies and Member States.

Half-yearly report - Review of Compliance

	Disclosure according to legal requirement	Legal requirements not respected	Information not available at this juncture	Not covered
France	82,5%	17,5%		
Germany	100,0%			
Italy	100,0%			
Spain	86,1%	13,9%		
Sweden	100,0%			
The Netherlands				100,0%
UK	98,3%	1,7%		
Total Main EU Jurisdictions	82,5%	4,3%		13,2%
Austria	100,0%			
Czech Republic	92,9%		7,1%	
Hungary	95,0%		5,0%	
Ireland	85,0%	15,0%		
Luxembourg	50,0%	14,3%	35,7%	
Poland	100,0%			
Romania	85,5%	8,1%	6,5%	
Slovakia			100,0%	
Total Other EU Jurisdictions	78,4%	5,3%	16,3%	
Total all EU Jurisdictions	80,9%	4,7%	6,3%	8,1%

Even if this is party due to a difficulty in obtaining data in all jurisdictions, it can be noted that the level of compliance with the requirement to publish half-yearly report within 2 months is lower (80.9%) than for the publication of the annual report. The harmonised obligation to publish within 2 months was introduced in the EU by the Directive.

On average, there is no significant difference between the main EU jurisdictions and the other EU jurisdictions. In some Member States, compliance with the requirement is almost perfect, in particular in Germany, Italy, Sweden, Austria, Poland and the UK.

Real difficulties complying with the publication requirement are experienced in France, Spain, Luxembourg, Ireland and Romania. In most cases the compliance delay is experienced by Small and Midcap companies.

2.3.4 Quarterly

1st quarterly report - Review of Compliance

Jurisdiction	Values as printed on bar
France	97,5% / 2,5%
Germany	100%
Italy	100%
Spain	100%
Sweden	100%
The Netherlands	97,5% / 2,5%
UK	95,0% / 5,0%
Total Main EU Jurisdictions	98,3% / 0,7% / 1,0%
Austria	95,0% / 5,0%
Czech Republic	85,7% / 14,3%
Hungary	95,0% / 5,0%
Ireland	10,0% / 90,0%
Luxembourg	100,%
Poland	95,0% / 5,0%
Romania	85,5% / 8,1% / 6,5%
Slovakia	100%
Total Other EU Jurisdictions	59,5% / 10,5% / 12,1% / 17,9%
Total all EU Jurisdictions	83,4% / 4,5% / 5,3% / 6,9%

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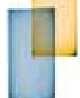
Legend: Disclosure according to legal requirement; Legal requirements not respected; Information not available at this juncture; Not covered



Compliance with the obligation to publish quarterly information for the first quarter (bearing in mind that such requirement differs in the various Member States) seems to be highly respected in the main EU jurisdictions (98.3%) but less in the other EU Member States. The main group to experience difficulties publishing within the deadline is Small and Midcaps in Romania.

3rd quarterly report - Analysis of compliance

	Disclosure according to legal requirement	Legal requirements not respected	Information not available at this juncture	Not covered
France	95,0%	5,0%		
Germany	95,0%		5,0%	
Italy	95,7%		4,3%	
Spain	97,2%	2,8%		
Sweden	100,0%			
The Netherlands				100,0%
UK	93,3%		6,7%	
Total Main EU Jurisdictions	83,2%	1,0%	2,6%	13,2%
Austria	100,0%			
Czech Republic	85,7%		14,3%	
Hungary	100,0%			
Ireland	10,0%			90,0%
Luxembourg				100,0%
Poland	95,0%	5,0%		
Romania	64,5%	32,3%	3,2%	
Slovakia			100,0%	
Total Other EU Jurisdictions	59,5%	11,1%	12,6%	16,8%
Total all EU Jurisdictions	74,0%	4,9%	6,5%	14,6%

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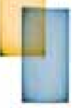
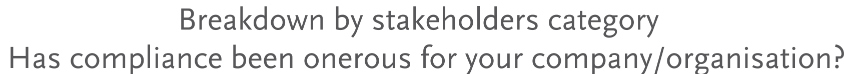


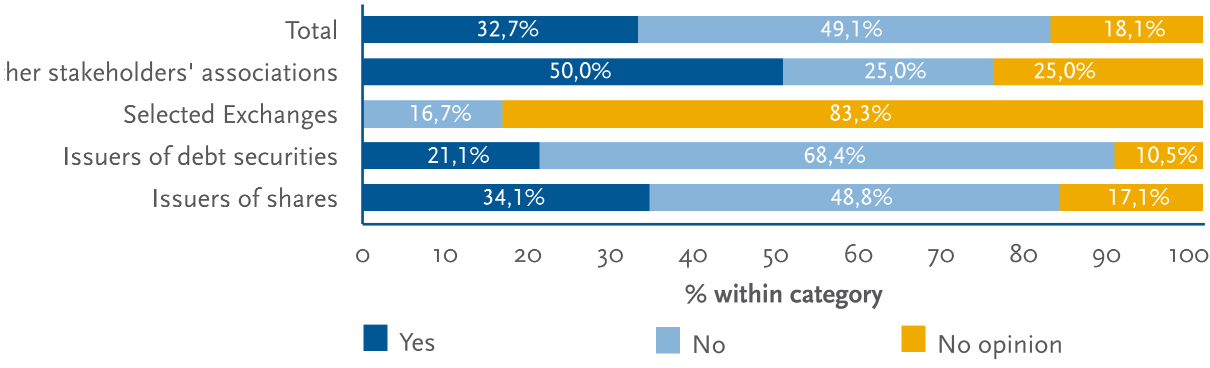
Compliance with the obligation to publish quarterly information for the third quarter within the deadline in the main EU Member States seems to be more difficult (83.2%) compared to the first quarter. Mainly Small and Midcaps have found it difficult to publish within the deadline along with recently listed companies. Delays are most often seen in Romania.

2.3.5 Compliance cost

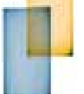
As part of the examination of compliance, stakeholders gave their opinion on the cost of compliance with periodic information requirements of the Directive.

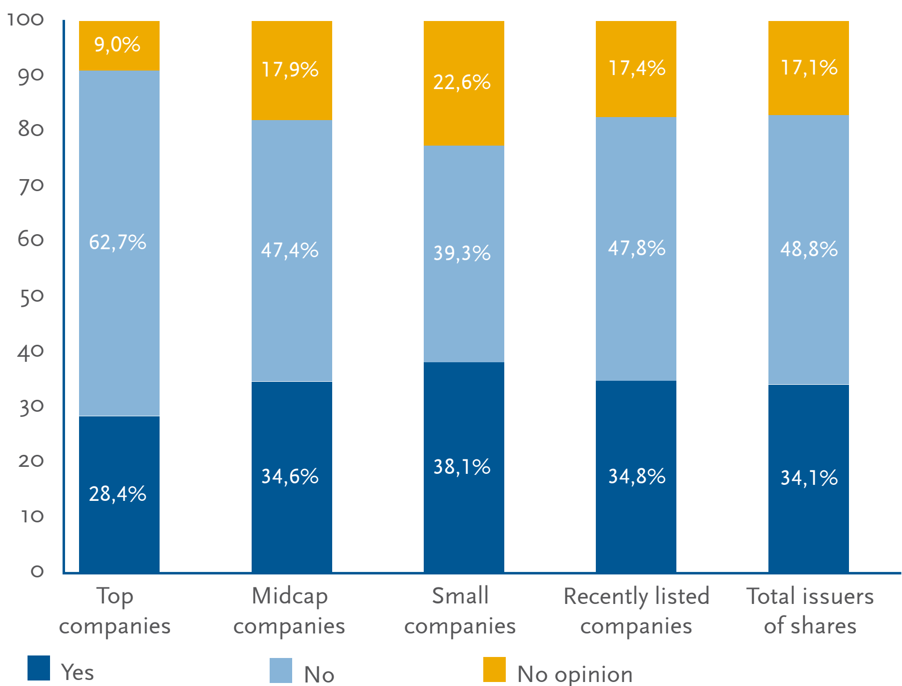
49% of stakeholders do not think that the compliance with the obligations of the Directive is onerous for their organisation. This is particularly expressed by Issuers of shares and debt securities.





Nevertheless, Small and Midcaps are more sensitive to the cost of compliance with the obligations of the Directive.





The stakeholders that consider the cost of compliance to be too high are from France, Spain and Slovakia. On the contrary, in the UK, Hungary, Sweden, Romania, Austria and Germany the cost of compliance is not considered too onerous.

During interviews, the general opinion resulting from the on-line questionnaire was confirmed. Views are mixed. SMEs can be very vocal about the cost of compliance with the obligations of the Directive. For SMEs, the more local and tight their shareholdership, the less the obligations are understood and the attached costs justified.

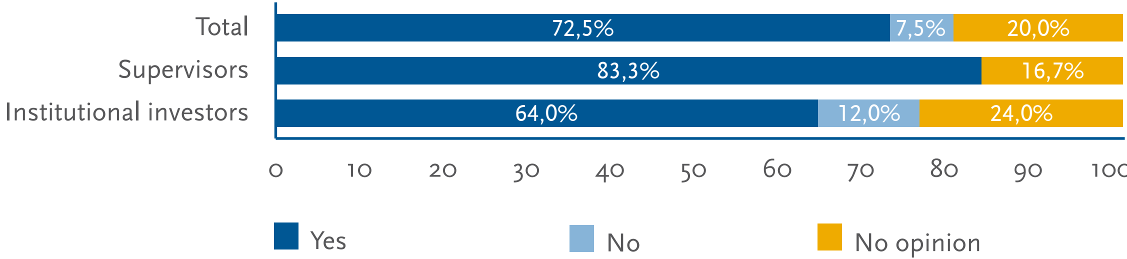
2.4 Suitability of periodic information disclosed

To measure the suitability of the periodic information disclosed, stakeholders gave their opinion on the sufficiency of the information disclosed by listed companies, in particular for investment purposes (including in non national companies). They were also asked whether the use of XBRL is desirable and whether cross-border comparability of listed companies had changed with the Directive.

2.4.1 Sufficiency of the information disclosed by listed companies

A majority of Institutional Investors and Supervisors (72.5%) think that the information published by issuers is sufficient when compared to the minimum legal and regulatory requirements. Only a minority of Romanian Institutional Investors think that more information needs to be disclosed to be fully in compliance with the requirements.

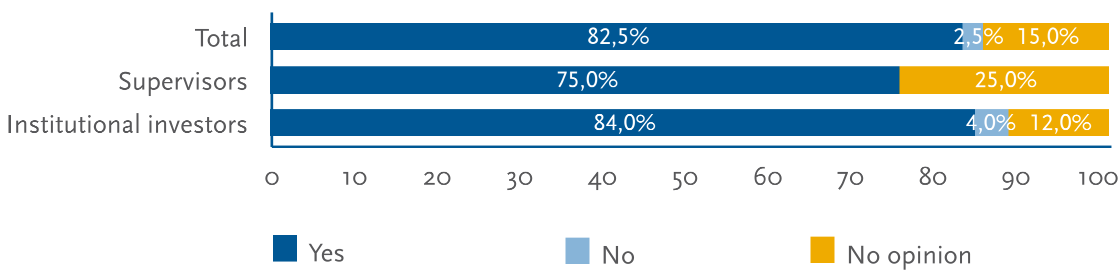
Breakdown by stakeholders category - Is the information disclosed by listed companies in your country deemed sufficient compared to the requirements?

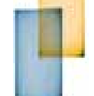


2.4.2 Usefulness of information for investment purposes

A large majority of Institutional Investors and Supervisors (82.5%) think that financial information published by issuers is useful for investment purposes.

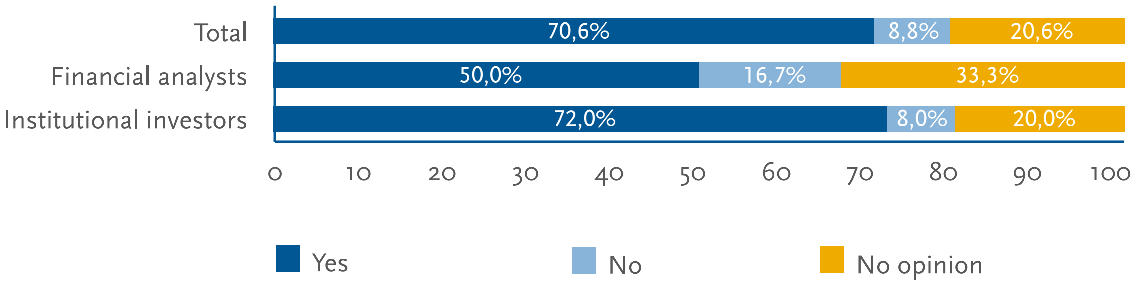
Breakdown by stakeholders category
Is the information disclosed useful for investment purposes?





2.4.3 Information allowing informed assessment as to the financial position of the issuer

Breakdown by stakeholders category - Does the information disclosed allow investors to make an informed assessment as to the financial position of the issuer?



A majority (70.6%) of users of financial information (Financial Analysts and Institutional Investors) think that the periodic information disclosed by issuers in accordance with the Directive allows them to make an informed assessment as to the financial position of the issues. Doubts are expressed by those stakeholders in Romania.

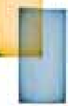
Generally speaking, this opinion was reflected during interviews. Periodic financial information is considered satisfactory by investors and no additional requirement is requested. The same opinion came from issuers for whom the requirements of the Directive are already heavy. In fact, there was not a single voice who asked for additional periodic disclosures that would improve investors' ability to make a better informed assessment of the financial position of an issuer.

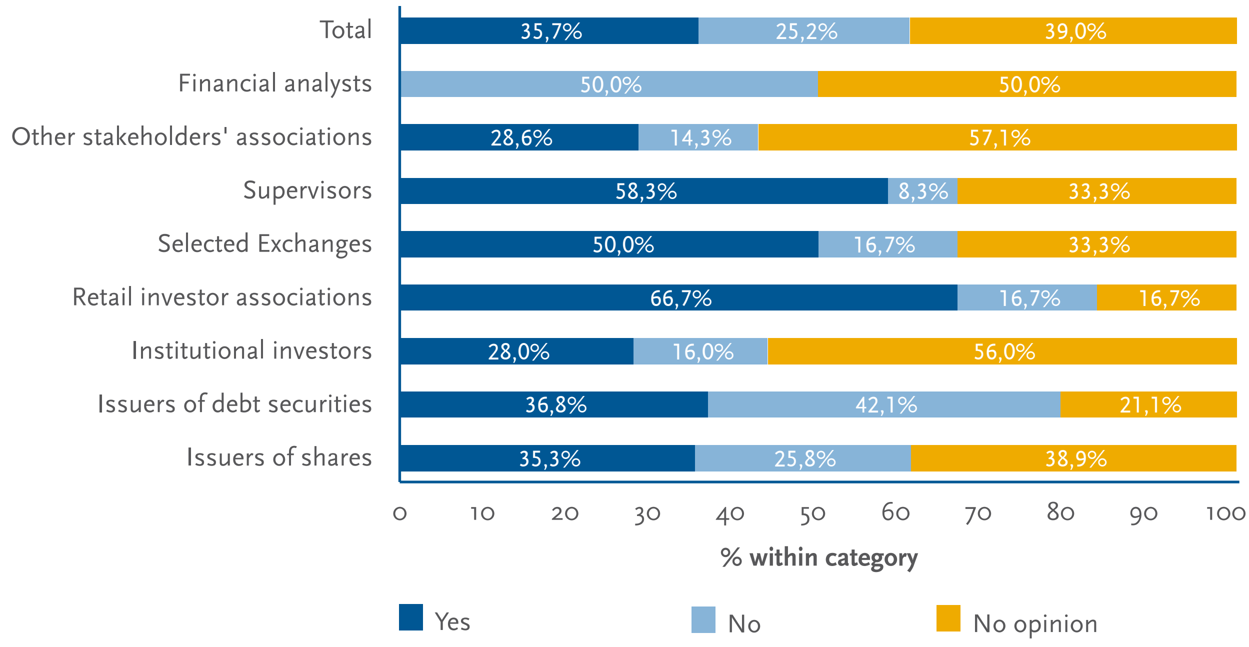
2.4.4 Investment in non-national listed companies

In EU jurisdictions, this question was answered by 6 Retail Investors associations from Spain, The Netherlands, Austria, Ireland, Luxembourg and Romania. Except for the Austrian association that consider that they do not invest more in non-national listed companies since the entry into force of the Directive, all other associations did not express an opinion on this issue.

2.4.5 Increased comparability of listed companies

Overall, stakeholders have mixed views regarding any increased comparability of companies favoured by the Directive. But this perception is extremely varied depending on the category of stakeholders: Exchanges, Supervisors and Retail Investors' associations believe that the Directive has favoured the comparability at EU level of companies acting in the same sector whilst Financial Analysts or Issuers of debt securities are not convinced.

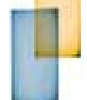




The mixed views for issuers of shares can be further detailed depending on the size of companies or history as listed companies. Once again, Small companies are the least convinced by the comparability virtues of the Directive at EU level. Recently listed companies are the most positive about it

Analysis per Member State provides an additional contrasted perception, with Ireland (80%), Spain (63.6%), Hungary (66.7%), Luxembourg (61.5%), Romania (52.4%) and Austria (50%) where a majority of respondents are a positive about increased sector comparability at EU level. The most doubtful about the comparability enhancement by the Directive are the stakeholders from the Netherlands (42.9%), Czech Republic (40%) and France (34.7%).

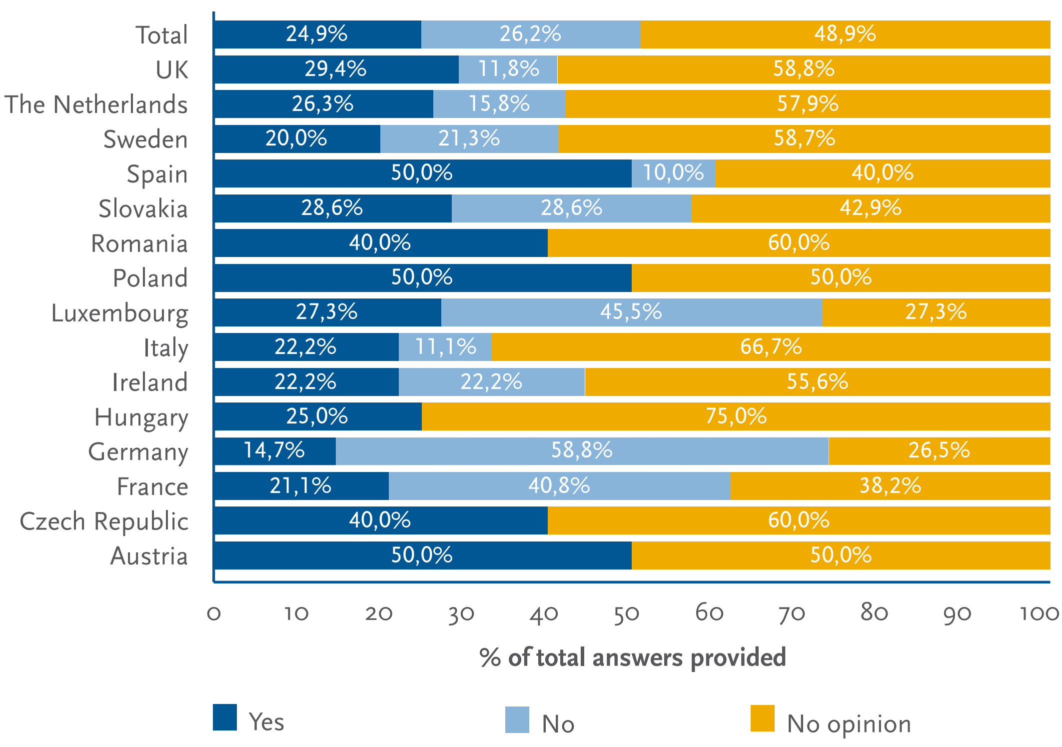
During interviews, stakeholders were still of the view that for companies other than the Top companies, markets remain very domestic. In other words, investors in SMEs primarily invest in the companies listed in their country. Cross-border comparability of companies is considered to have increased but it is more often attributed to the use of IFRS than to the Directive itself.



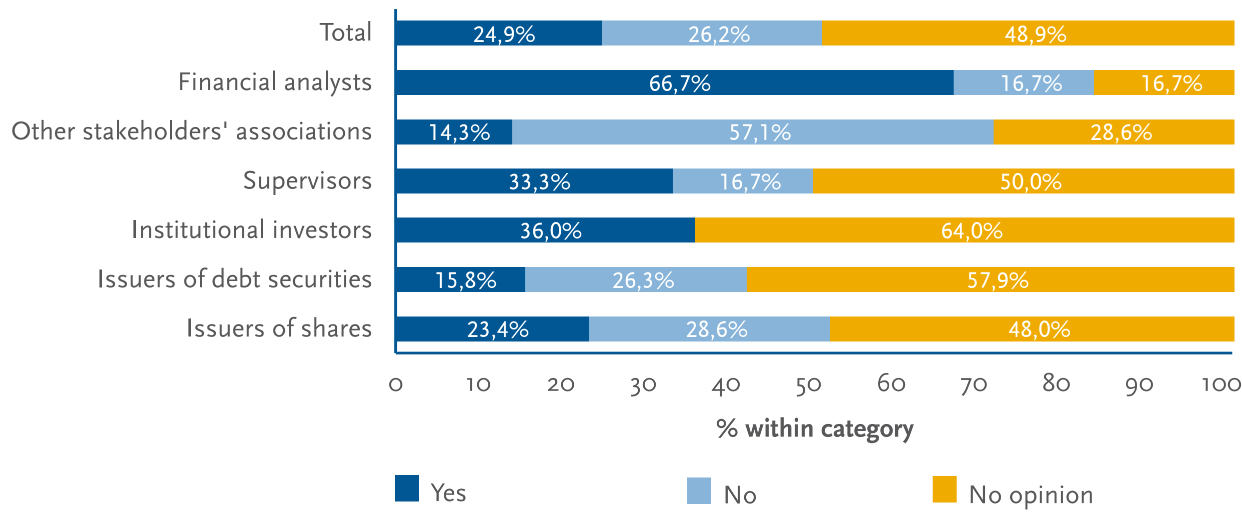
2.4.6 Use of XBRL Language

Overall, a majority of stakeholders do not seem to have a clear idea or opinion on the use of XBRL. Between those who have expressed a view, there is a split of opinions. Views against the use of XBRL are expressed notably in France, Luxembourg, and Germany and, in more relative terms, in Sweden. Stakeholders favouring the use of XBRL are from Austria, Poland, Spain, Czech Republic, Romania, the Netherlands, Hungary, and, to a lesser extent in Italy and the UK.

Breakdown by jurisdiction
Would the use of the XBRL language be desirable?



When they have expressed an opinion, a majority of Issuers of shares and debt securities are against the use of XBRL. It should, however, be noted that contrary to the average, Recently listed companies are, generally speaking, in favour of the use of XBRL. Users of financial information are, in general, the ones supporting the use of XBRL (Financial Analysts, Institutional Investors and Supervisors).



The use of XBRL has often been commented during the interviews with stakeholders. From the users of financial information view point, to the extent that this language is of high quality, there are merits in having common language that could help the collection and comparison of financial information. It was often signalled that there are in fact national versions of XBRL and that it is therefore unclear as to whether the tool allows for cross-border extensive use. From the issuers view point, a cost / benefit analysis seems to be a pre-requisite before any decision. In any event, making the use of XBRL compulsory is not supported. A number of listed companies are, in fact, waiting to hear from the experience of EU companies listed in the US.

2.4.7 Legal operation issues

When reviewing the legal operation of periodic information, provisions of the Directives, 2 points were made:

- Statements as to the reliability and fairness for half-yearly financial reports: meaning of "true and fair view.

  The half-yearly financial report comprises a statement by responsible persons within the issuer that the semi-annual report gives a "true and fair view" of the assets and liabilities, financial position etc. of the issuer. The use of the terminology "true and fair view" is in principle understood as confirming conformity of the report to the entire IFRS regulations, not to semi-annual reports. This is an area where the Directive could be clarified.

- New loans.

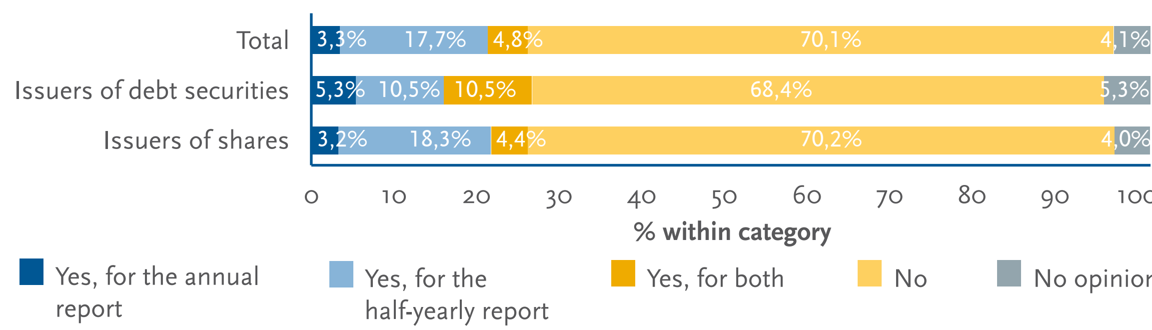
  There is a lack of clarity regarding the exact scope of article 16.3 of the Directive, as there is no definition of the "new loans" that need to be disclosed.

2.5 Publication timing

The timing of publication of periodic information poses difficulties for some issuers, in particular the half-yearly report. To better understand the difficulties experienced by those issuers, two aspects are further explored: does a specific regime for SMEs makes sense? Compared to the legal requirements, does the work performed by auditors have an impact?

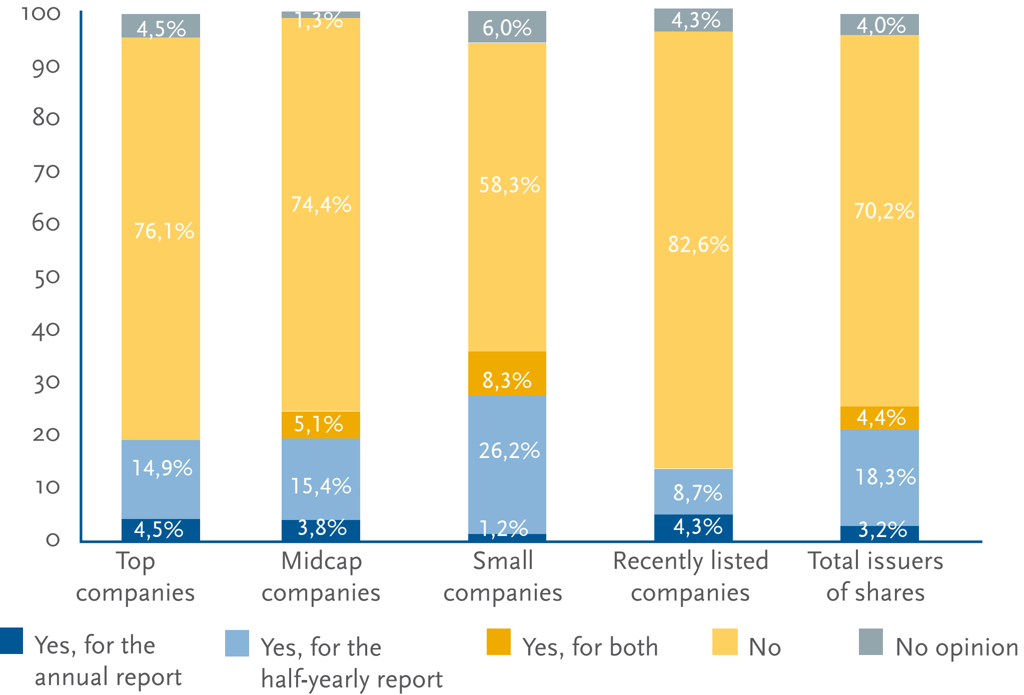
2.5.1 Experience of difficulties with the publication deadlines

A majority of stakeholders (70.1%) have not experienced difficulties with publication deadlines. For those that have faced difficulties, the deadline for the publication of half-yearly reports seems the most problematic, especially for Issuers of shares.

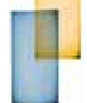


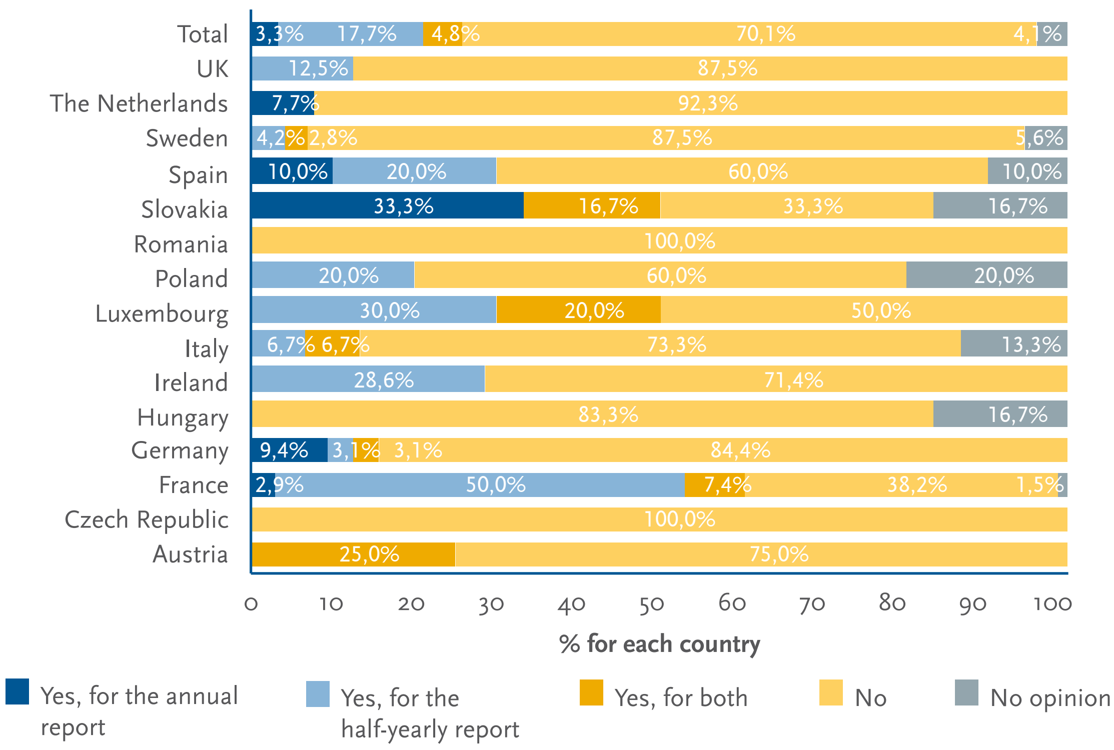
Recently listed issuers of shares are experiencing fewer difficulties than other Issuers of shares: the smaller the issuer is, the larger difficulties with the deadlines are:

Breakdown by juridiction - Do you experience difficulties with the publication deadlines?



Issuers expressing difficulties complying with the deadlines of publication of yearly and half-yearly reports are in France, Slovakia, and Luxembourg and, to a lesser extend, in Austria and Spain. The compliance with the deadline for half-yearly reports seems to be the most often mentioned. The specific case of France should be noted, where more than half of issuers are expressing difficulties with the deadline for half-yearly reports. Other Member States where issuers expressed difficulties to comply with the half-yearly reporting deadline are Luxembourg, Ireland, Poland, Spain and the UK.





The difficulties experienced with the timelines for the publication of periodic information were one of the most commented issues during the interviews.

The publication deadlines for the Annual Report do not seem to create a real problem for issuers. Some even argued that the 4-month deadline was, in fact, too long. Others called for more clarity on the exact sequence of events before publication. In particular, the issuers want to know whether the requirement is met only when the Annual Report is approved by the General Assembly and published or, if the publication following the approval by the Board is sufficient. Member States, Supervisors and market practices seem to differ across the EU.

The 2-month deadline for the publication of half-yearly reports is heavily criticised. It is generally perceived as too short, in particular when the accounts are audited or reviewed by an external auditor. The more vocal issuers are in Member States where the intervention of an external auditor is compulsory (Austria, France, Italy, Poland and Spain). SMEs favours different publication deadlines for SMEs, because they are less equipped or have less resources devoted to the production of financial information.

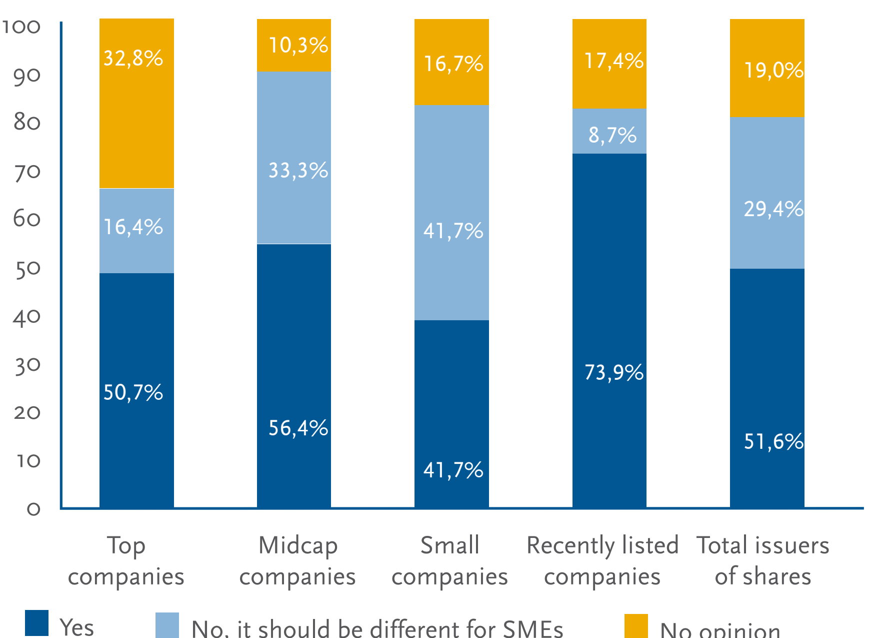
Financial analysts think that the 2-month deadline creates inefficiencies in the market. From their point of view, there is a bottleneck of financial information at the end of the second month. Because all companies publish at the same time, analysts must choose which analysts' meeting they will attend and they always favour the Top companies' ones. It is the same with press coverage according to SMEs. In other words, the 2-month deadline for half-yearly reports is described as a factor that contributes to the "black hole".

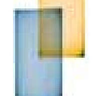
Some SMEs have tried to overcome the difficulty by publishing the half-yearly report on time, but by holding the analysts' meeting after the deadline. Sometimes, this has created artificial price movements as the judgement on the results is often different once explanations are given by the management. Therefore, SMEs are reluctant to separate the publication and the analysts' meeting. Regarding the deadline for the publication of quarterly Interim Management Statement, stakeholders consider that the deadline presented in the Directive is too complicated and should be more straightforward; in particular because it has been transposed in very different ways in the EU (but resulting more or less on the same timeline).

2.5.2 Timing of disclosure depending on the size of listed companies

A majority of stakeholders (55.3%) think that the timing of disclosure should be the same irrespective of the size of the listed company.
It should be noted however that the Issuers of shares and debt securities held this opinion less strongly. This is particularly the case for Small listed companies: half of them think that the timing of disclosure should be different for SMEs. Recently listed companies are not in favour of a two-tier regime.

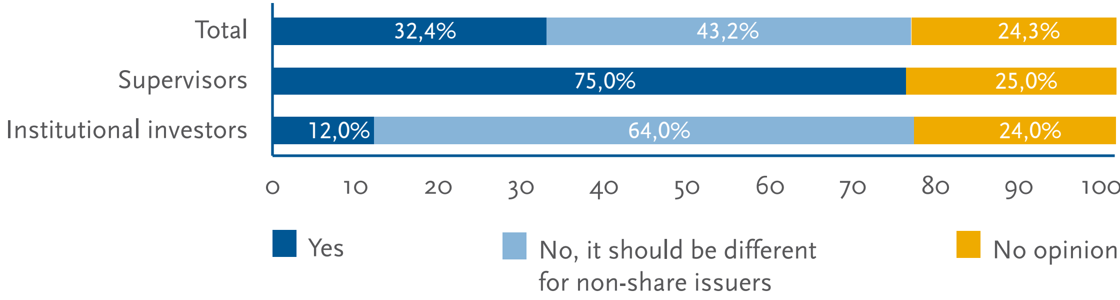
Issuers of shares - Should the timing of disclosure be the same for all listed companies? Should it be different for SMEs?





2.5.3 Acceptance of difference in timing disclosure depending on the status (listed, non-share issuers)

This question was specifically addressed to Institutional Investors and Supervisors. Amongst those who expressed an opinion, a majority (75.4%) are in favour of a specific timing regime for the publication of periodic information for non-share issuers. However, Supervisors and Institutional Investors hold one opposite view. A majority of Institutional Investors (64%) are prepared to accept a different timing for the publication of periodic information by non-share issuers. By contrast, Supervisors (75%) believe that no difference should be made.



This idea of different timing disclosure for non-share issuers is particularly supported in Romania, the Netherlands, France, Italy and Ireland. The respondents in Poland, Luxembourg, Czech Republic, Germany and Sweden are generally against it.

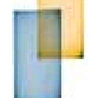
2.5.4 Audit & review of half-yearly reports

A comparison between the legal and regulatory requirement and the practice regarding the work performed by auditors on half yearly reports, shows that issuers generally do more that the national minimum obligation.

AUDIT WORK - LEGAL REQUIREMENTS FOR HALF-YEARLY REPORTS		
Minimum legal / regulatory requirements regarding half-yearly reports	**Countries**	**Comments**
Audit		
Review	Austria, France, Italy, Poland and Spain	In Spain it is mandatory to do either a limited review or an audit. Most of the companies do a limited review.
No work performed	Czech Republic, Germany, Hungary, Ireland, Luxembourg, Romania, Slovakia, Sweden, The Netherlands, UK	

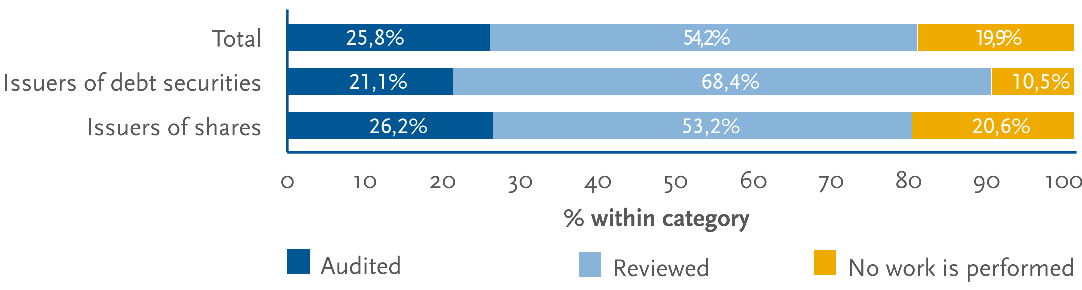
AUDIT WORK - PRACTICES REGARDING HALF-YEARLY REPORTS		
For countries where no work by auditors is required, what is the practice regarding half-yearly reports	**Practice on a voluntary basis**	**Comments**
Czech Republic	Reviewed or audited	
Germany	Reviewed	The issuers of shares listed in Prime Standard voluntarily do more than the legal requirement.
Hungary	Nothing done	Only one company has its semi-annual 2009 report reviewed by its statutory auditor.
Ireland	Reviewed	Listed banks voluntarily do more than the legal requirement.
Luxembourg	Nothing done	Usually nothing done unless the issuer is listed elsewhere with a specific audit requirement
Romania	Reviewed or audited	
Slovakia	Reviewed	Issuers which are part of an international group voluntarily do more than the minimum requirement.
Sweden	Reviewed	There is no law or other rule that specifically requires entities listed on regulated markets to have their half-year reports audited or reviewed. However, the Swedish Code for corporate governance (Issued by the Swedish "College for Corporate Governance", a private non-governmental organisation body responsible for the development of good practice in this area) includes rules about this. The Code is mandatory for entities listed on regulatory markets but it is built on a "comply-or-explain" approach. The Code says that either the Q2 or Q3 interim report is to be reviewed (or audited) by the appointed auditor. So, in practice, the half-year report does not have to be audited or reviewed provided that the Q3 report is reviewed (or audited) if the company complies with the code in this area. According to a review of 40 entities' financial reports, most entities chose to have their Q3 reports reviewed by their auditors and a few chose their Q2.
The Netherlands	Sometimes reviewed, very exceptionally audited	
UK	Reviewed	

In 10 Member States, no particular legal requirement to have the half-reports reviewed or audited exists. These tables show that in 8 of those Member States, the practice is voluntarily to have the half-yearly reports reviewed and in some cases audited.



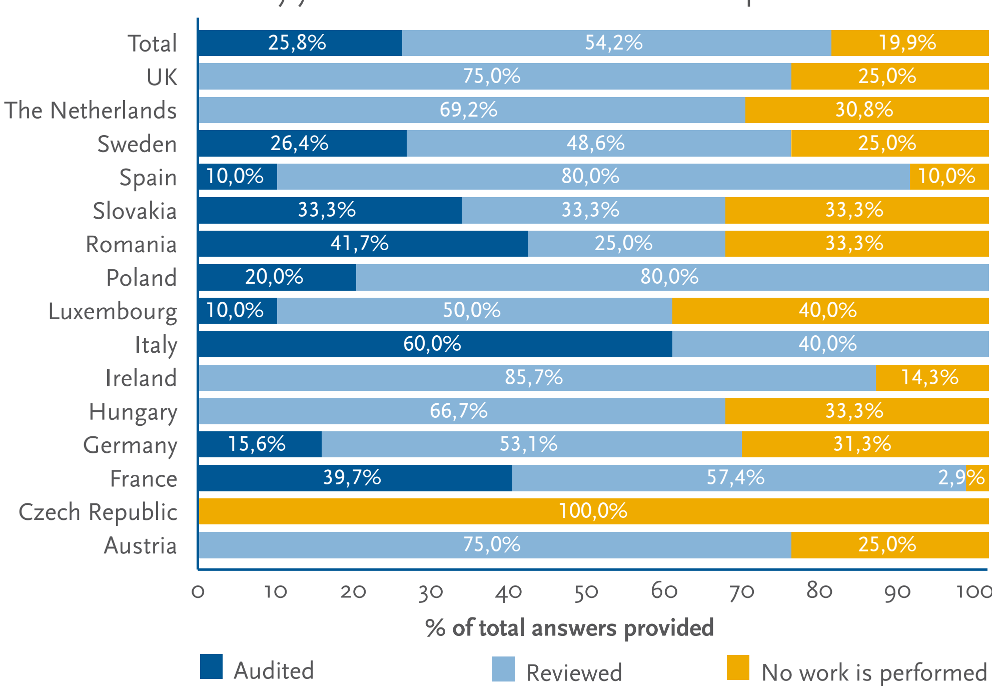
The fact that, in practice, issuers do more than the minimum requirement is confirmed by the results of the perception questionnaire. When asked what audit work is performed, a majority of EU issuers of shares and debt securities (54.2%) declare that they have their half-yearly reports reviewed by an external auditor.

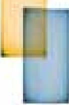
Breakdown by stakeholders category - Are your half-yearly reports audited or reviewed by your external auditors or no work is performed?



Half-yearly audited reports are usually published in Italy, Romania, France, Slovakia and Sweden. In the other Member States the common practice is to have the half-yearly report reviewed by an external auditor.

Breakdown by jurisdiction - Are your half-yearly reports audited or reviewed by your external auditors or no work is performed?





During interviews, several issuers made a clear link between the difficulty meeting the deadline for half-yearly reports and the fact that they are reviewed or audited. The argument is that market practices make a review closer to an audit and therefore, the reasons for which four months are required to publish Annual Reports should also apply to half-yearly reports.

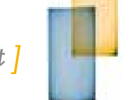
2.6 Quarterly financial information

In addition to a comparison between the legal requirements and the practices by listed companies regarding the publication of quarterly financial information, this section describes the opinion of stakeholders on the usefulness of quarterly information and the relevance of Interim Managements Statements (IMS).

Legal requirements and market practices regarding the publication of quarterly information in Member States as a result of the Transparency Directive are described in the two following tables.

LEGAL REQUIREMENTS FOR QUARTERLY FINANCIAL INFORMATION		
Minimum legal / regulatory requirements regarding quarterly reports	**Countries**	**Comments**
Full Quarterly reports	Sweden	There is no law that requires entities on a regulated market to issue a full quarterly report if a Quarterly Interim Management Statement is issued instead. However, under the listing rules for the two regulated markets in Sweden, listed entities are required to prepare all their quarterly reports in accordance with the financial reporting framework (i.e. IAS 34).
Selected Quarterly figures	France, Germany, Poland, Romania, Spain	
Quarterly Interim Management Statements	Austria, Czech Republic, Hungary, Italy, Slovakia, UK, Ireland, Luxembourg, The Netherlands	
None of the above		

PRACTICES FOR QUARTERLY FINANCIAL INFORMATION NATIONALY LISTED COMPANIES ONLY			
Countries for which quarterly financial information is required	**Deadlines**	**Voluntary Practices**	**Comments**
Austria	Within 6 weeks		Banks are required to publish quarterly reports.
Czech Republic	Within 2 months		



PRACTICES FOR QUARTERLY FINANCIAL INFORMATION NATIONALY LISTED COMPANIES ONLY			
France	45 days	Blue chips, banks and some insurance companies voluntarily publish more detailed quarterly information	
Germany	Within 2 months		If a quarterly financial report is produced, then it has to be published 2 months after the reporting period. Quarterly financial reports, however, are not mandatory. It is an "interim report" that has to be published between ten weeks after the beginning of the 1st half year and six weeks before end of the 1st half year.
Hungary	Within 2 months	Some Blue chips give more detailed quarterly data.	
Ireland	Within 2 months		
Italy	Within 2 months		Blue chips, Banks and Insurance companies publish more than the minimum required. The last two do so because they are required to give more information to their respective supervisory Authorities.
Luxembourg	60 calendar days		
Poland	45 days		
Romania	45 days		
Slovakia	Within 2 months		Additional information is required by the National Bank of Slovakia for banks - With no specific deadlines.
Spain	45 days		
Sweden	Within 2 months	See above	
The Netherlands	Within 2 months		
UK	Within 2 months		

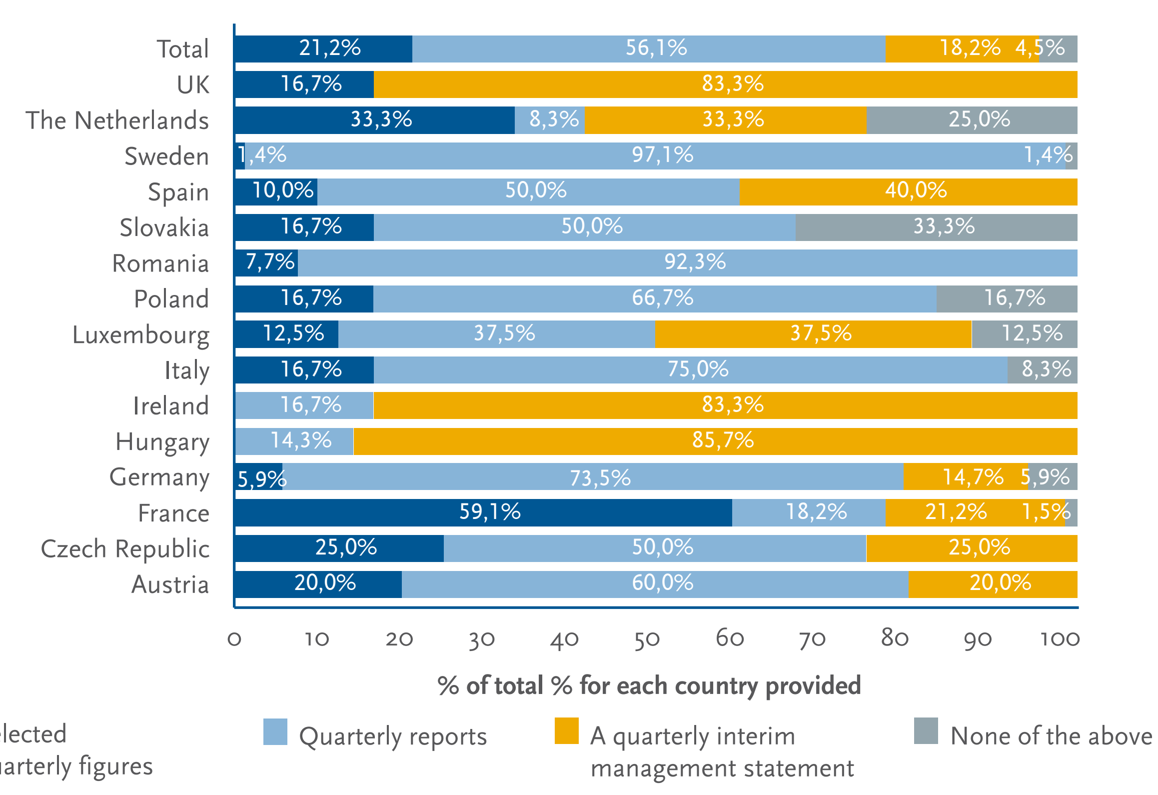
Several categories of listed companies voluntarily publish quarterly information supplementary to the legal of regulatory requirements. This is often the case for Top Companies ("Blue chips"), that are internationally traded but also for listed banks (sometimes because of a prudential regulation requirement) and insurance companies

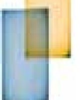
(in particular when their shareholders are banks). The publication of additional quarterly information (or even a full quarterly report as in Sweden) is often a listing requirement by the Regulated Markets. The latter have indicated in interviews that they would prefer this obligation to be inscribed in law rather than in their rules.

2.6.1 Quarterly publication requirements for listed companies

The perception questionnaire shows that stakeholders do, or say that they do, more than the minimum legal requirements of the Directive as transposed in their Home Member State. Indeed, a majority of Issuers of shares (57,5%) say that they publish full quarterly reports.

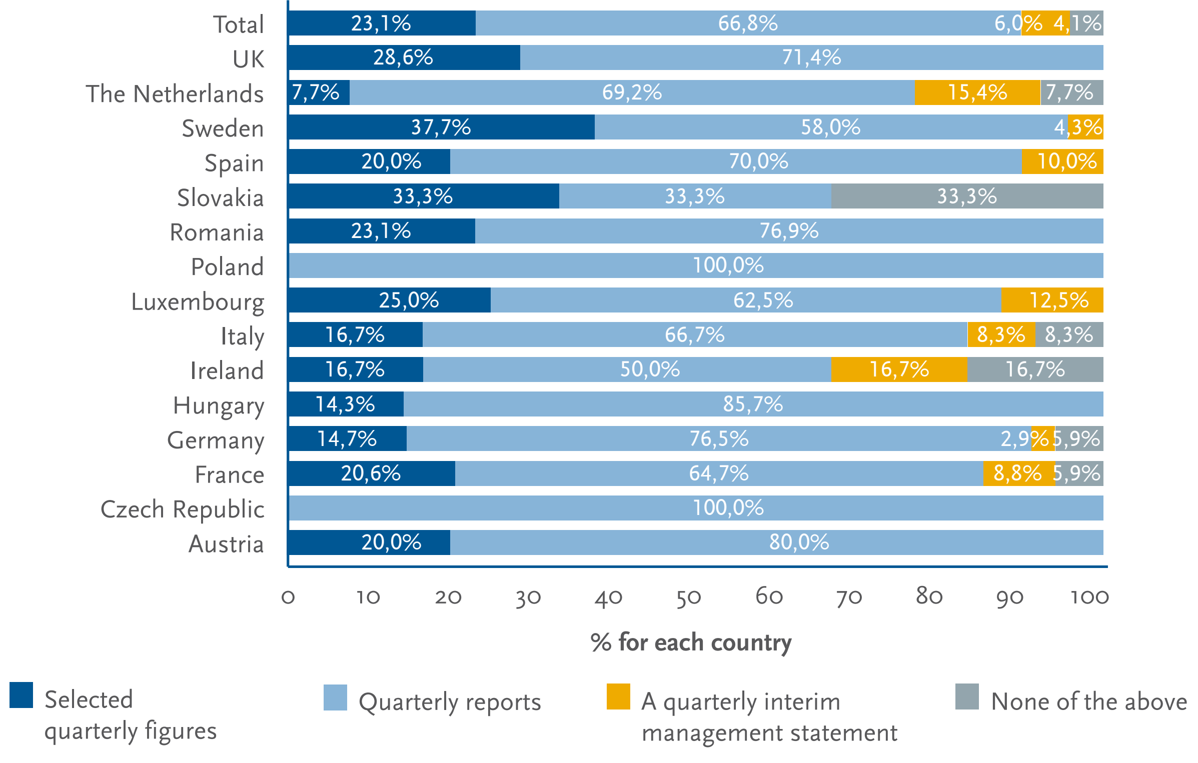
Member States where most issuers say that they publish quarterly reports are Romania, Sweden, Germany, Italy, Poland, Austria, Spain and Slovakia. Member States where most issuers say that they publish quarterly IMS are the UK, Ireland and Hungary. In France and the Netherlands, most issuers say that they publish selected quarterly figures.





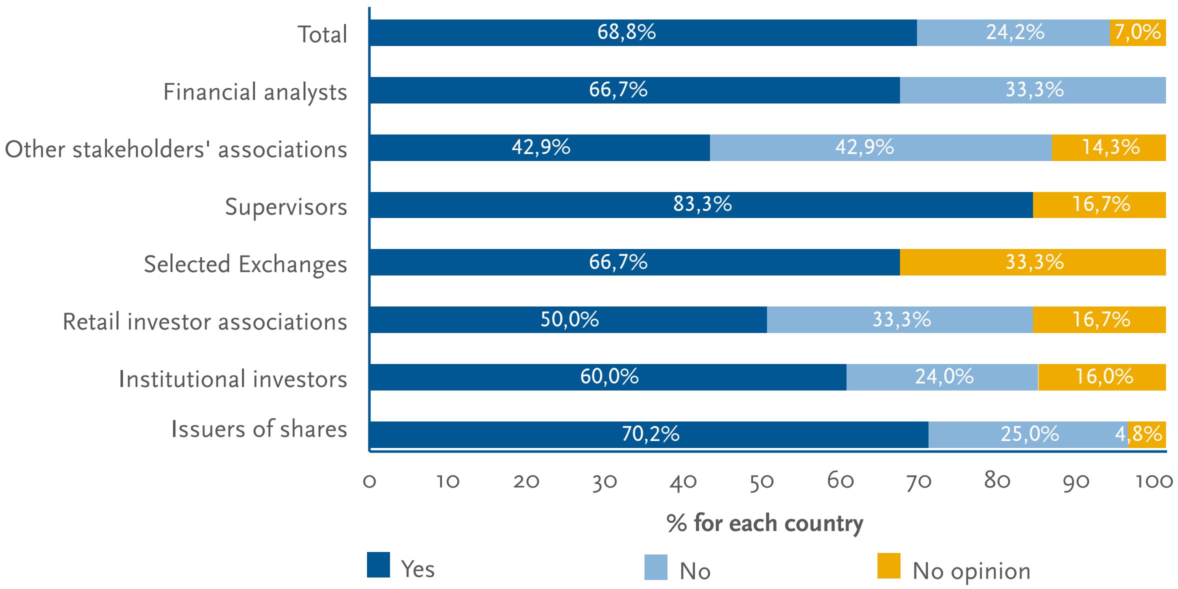
2.6.2 Deadline for publication of quarterly information

Be it compulsory or voluntarily, a vast majority of Issuers of shares say that they publish their quarterly financial information within 2 months; some even do it within one month (in particular in Sweden and Slovakia).



2.6.3 Publication of quarterly financial information

Without specifying the content of such information, a large majority of stakeholders (69%), and notably the issuers of shares themselves (70.2%)[5], think that the publication of quarterly financial information enhances the transparency and efficiency of the Market.

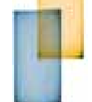


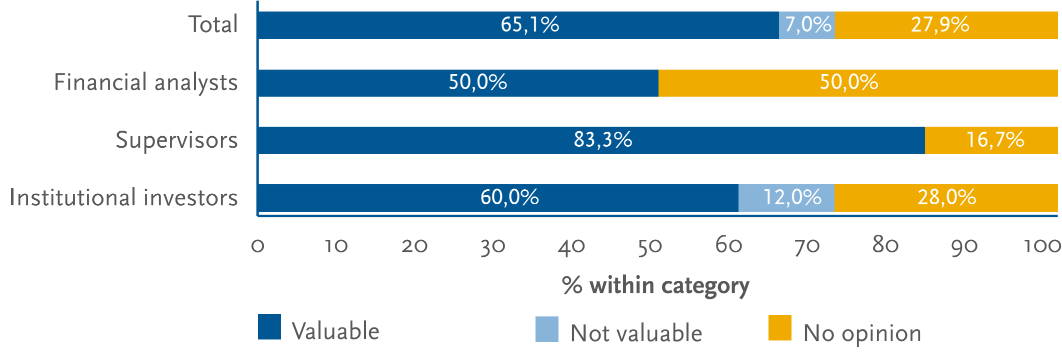
This positive perception is widely spread across the Member States with the clear exception of the UK (where 66,7% believe that quarterly information is not useful), and, to a smaller extent, in Luxembourg (50%) and France (44%).

2.6.4 Relevance of the quarterly Interim Management Statement (IMS) published by issuers

A strong majority of users of financial information (65.1%) think that the Interim Management Statements specified in the Directive, are valuable information for the market.

5 Out of the 248 issuers of shares that responded to this question, only 13 are listed in another non-EU exchange requiring the publication of quarterly reports

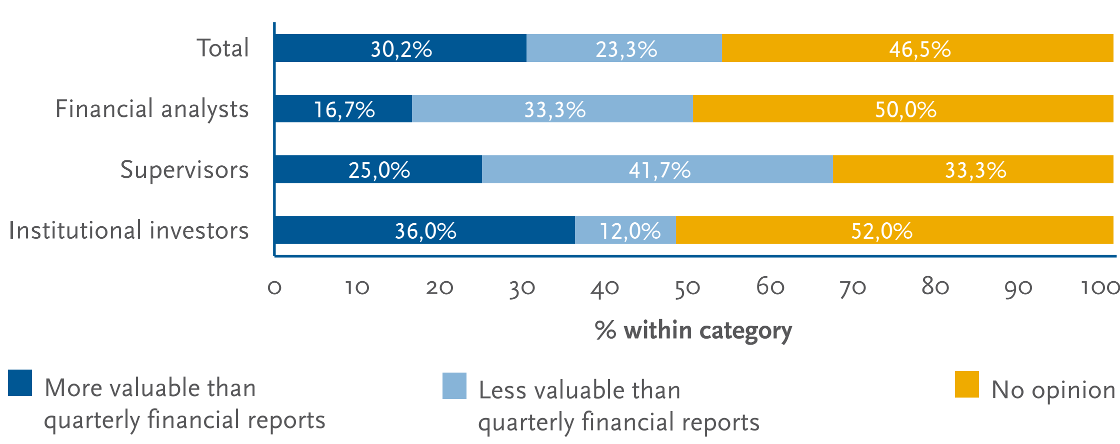




This is an opinion widely shared in the EU. A different opinion is expressed in the UK, where the case for quarterly information has yet to be made. It should also be noted that in some new Member States, no opinion has yet been formed on this issue.

2.6.5 Interim Management Statement (IMS) vs. quarterly financial reports

Amongst the users of periodic financial information, no clear opinion as to the potential added value obtained with the publication of IMS compared to quarterly financial reports has been expressed. Nevertheless, it should be noted that Institutional Investors consider IMS more valuable than full quarterly financial reports.



During interviews, most stakeholders confirmed that they believe that quarterly information is useful and contributes to the transparency and efficiency of the market. They also generally supported the balanced approach of the Directive in requiring as a minimum only the information required in the IMS. That said, both issuers and users of financial information for expressed a desire in a more detailed definition of the content of the IMS (Article 6.1) to ensure more predictability and comparability (over time, cross-border and across sector). However, there is a balance to be found, to let issuers decide which information is most relevant and pertinent and to avoid a box ticking exercise.

2.7 Use of national GAAPs

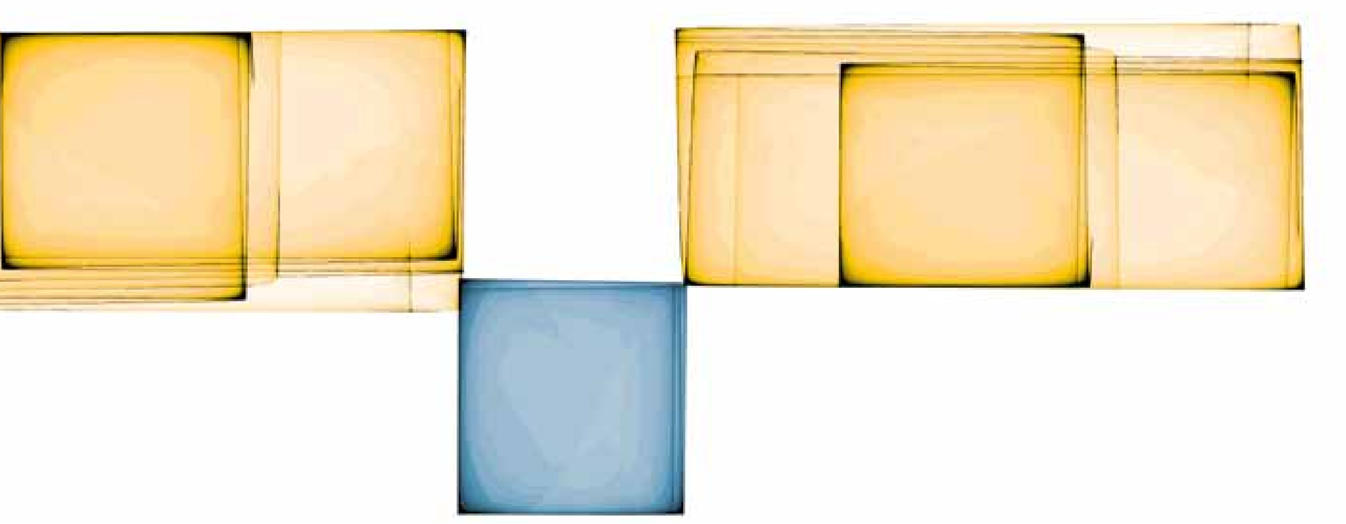
Finally, regarding the periodic information published by listed companies in the EU, the vast majority publish their accounts in IFRS in accordance with the regulation EC 1606/2002. Having said that, in 9 of the 15 Member States covered by this study, some listed companies publish their Financial Statements in local GAAPs. These exceptions to the general rule include the following cases: companies with non-consolidated accounts and companies publishing their Financial Statements (or some of the periodic information) in local GAAPs in addition to IFRS due to sector regulation. Another example can be seen in some recent Member States, where state-owned companies that are partially privatised and listed continue to publish accounts in local GAAPs. But all in all, these cases represent a very low percentage.

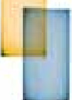
USE OF IFRS AND NATIONAL GAAPs

Countries	National companies listed in the local market not publishing their financial statements in accordance with IFRS	Comments
Austria	Yes	Companies with non consolidated accounts
Czech Republic	Yes	Less than 10% publish the financial statements in national GAAPS.
France	Yes	Companies with non consolidated accounts (1 or 2% of the full list)
Germany	No	Since 2005 it is mandatory for listed entities to prepare their financial account according to IFRS rules. For a minimum number of companies, some individual financial statements are additionally prepared according to German GAAP. Due to rules of the stock exchange, though, particularly when being listed in the Prime Standard it is a precondition that IFRS is used. Listing in the Prime Standard again is the basis for the listing in M-Dax, S-Dax, Tec-Dax and Dax.
Hungary	Yes	7 out of 43 (16%) share issuers publish their annual reports according to the Hungarian Accounting rules (HAS). These companies are listed in Category B, and a pharmaceutical company prepares its annual and semi annual report under IFRS, but it prepared its quarterly report according to HAS.

USE OF IFRS AND NATIONAL GAAPs		
Ireland	Yes	Companies that are listed as debt issuers only (this could be a 2 digit percentage)
Italy	Yes	The insurance companies are obliged to present separate financial statements under local GAAP, while consolidated FS has to be presented in accordance with IFRS
Luxembourg	No	IFRS accounts are required for issuers on the primary market (regulated Market). However, local (LUX) GAAPs are permitted for issuers on the secondary market (EuroMTF).
Poland	No	Separated financial statements can be prepared in local GAAP, in case the company prepares separated financial statements. For the consolidated ones, the IFRS application is required. No official statistics. Based on our experience, the majority of companies use IFRS. Some partially State owned companies with individual financial Statements publish their Financial statements under local GAAPs.
Romania	Yes	All the companies listed on the Exchange Romania Market are obliged to use national GAAP in relation with Romanian Public Institutions. As an exception: - the companies which are preparing consolidated financial statements are also obliged to prepare them in accordance with IFRS - Credit Institutions are required to use IFRS in preparing their Individual Financial Statements - The public interest entities (other than credit institutions) could prepare Individual Financial Statements according with IFRS, but only for their information needs.
Slovakia	Yes	Entities other than banks and insurance companies which did not meet following criteria during 2 periods which follow one after the other: Balance Sheet (gross book value) - above 165 969 594, 40 EUR Net turnover - above 165 969 594, 40 EUR; Average number of employees - above 2000 These companies represent a low percentage
Spain	No	All use the IFRS
Sweden	Yes	All companies listed on the two exchanges that are classified as “regulated markets” prepare their financial statements under IFRS. (Most companies listed on exchanges that are not classified as “regulated markets” prepare the financial statements under Swedish GAAP rather than under IFRS.)
The Netherlands	No	It is not allowed.
The UK	No	

3. Information about major holdings





3.1 Key perceptions and implemention issues

The provisions of the Directive regarding the on-going information and the notification of major thresholds are considered as the most problematic according to the perception of stakeholders and following the assessment of the legal operation of the Directive in the Member States.

1 - Stakeholders' perception

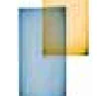
The fundamental principles of the Directive are not questioned. Indeed, 79% of financial information users (financial analysts and institutional investors) are of the opinion that the information disclosed on major holdings (including on financial instruments) is useful for investment purposes. In addition,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

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

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

- Only 15% of stakeholders believe that the Directive has facilitated cross-border declaration of thresholds;
- 83% of financial analysts as well as 87% of retail and institutional investors claim to be adversely affected by the fact that some Member States impose lower initial thresholds;
- 55% of stakeholders believe that the lending of voting rights should be made transparent;
- 86% of stakeholders with a view on the matter feel that the Directive should include provisions to prevent "empty voting";
- 90% of stakeholders expressing an opinion on this issue favour the inclusion of cash-settled equity swaps or cash-settled contracts for difference in the calculation of thresholds (fully or above a certain threshold);
- 58% of stakeholders support the fact that investors acquiring a certain significant holding (such as 10%, 15% or 20%) should be required to provide more detailed information;
- Some stakeholders are in favour of lowering the initial threshold of the Directive below 5% as has happened in several Member States.

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



2 - Legal assessment

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

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

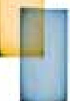
- The definition of "acting in concert" (section 10.2) should be further clarified, in particular in connection with shareholder activism. More specifically, the notion of "lasting common policy" raises a number of questions. An analysis of practical situations that may arise is necessary to provide further specifications. However, any revised legislation or set of guiding principles should remain "principle based";
- The duties of the issuers under section 12.6 of the Directive (duty to make the notification public) should be clarified, in particular when the notification form they receive from investors is not satisfactory or includes calculation errors.
- The following issues should be addressed, through a revision of the Directive or provision of further guidance:
    - In connection with article 9 of the Directive, providing for the core notification obligation: the way depositary receipts and voting caps should be taken into account, and the manner in which the denominator is computed;
    - For purposes of section 12.3, in connection with the definition of control that should be used, the case where more than one controlling shareholder exists.

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

- The extension of the exemption benefiting credit institutions acting for their own account (section 9.6 of the Directive) when acting as underwriters (and in particular for "greenshoe" options and alike);
- The ability for a credit institution to vote shares of an issuer held in the banking book while claiming the benefit of the trading book exemption for shares of the same issuer held in the trading book;
- The extension of the exemption of article 12.4 to non-UCITS Asset management firms (the current exemption applying only to management companies covered by the UCITS directive (85/611/EC).

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

- Catch-all provision: In Austria, there is a broad catch-all provision which may prove useful to avoid loopholes. It imposes notification obligations upon *"persons being entitled to exercise voting rights without being the legal owner of the respective shares."* In the US, there is also a broad anti-avoidance provision which has proved useful in the context of the abusive use of derivatives;
- Enhanced disclosure for significant holdings: It has also been shown that, in view of more complete information useful for investment purposes, acquirers of significant holdings (for example 10% or 20%) should disclose additional information. The information to be disclosed may include the potential acquisition of control, the willingness to continue to buy shares, the intention to change the composition



of the board and any plan to change the strategy of the company. If possible, the investor could also be required to disclose the time horizon of the investment, some information on the sources of financing and whether the shares are held in full ownership or through stock lending. This system, which exists in France and Germany, also bears some similarity with the US disclosure system, which requires filing of extensive information on Schedule 13 D when thresholds of 5% and each additional 1% are crossed.

In all EU jurisdictions under review, typical stock-lending agreements result in a transfer of ownership of the lent shares. Under article 9 of the Directive, the transaction should thus be notified both by the lender and the borrower. Some countries, such as the United Kingdom, consider that the lender does not need to notify.

The logic is that, under a standard stock lending arrangement, whereby the lender maintains a right to call for redelivery of the shares, there is a simultaneous disposal of rights in the shares and acquisition of a corresponding right to reacquire them. The lender under such an arrangement is permitted to “net off” the disposal and acquisition and, therefore, not count the transaction towards its disclosure obligations. There is a concern that disclosure on both sides of the transaction would lead to confusing and conflicting disclosures which may harm the market information available to third parties.

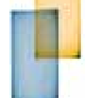
On the other hand, enhanced disclosure is supported by the need to have a full picture of the situation at any time. The only way to provide complete and consistent information to the market would be to have the transaction declared both by the lender (who would disclose his move from full owner to holder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

Regarding “*empty voting*”, i.e. voting without the economic exposure attached to shares, there is a wide consensus that such a practice in contrary to the basic principles of company law. The position in support of further regulation is based on the idea that empty voting is against the very essence of company law, which confers voting power to the shareholders in view of the fact that they will bear the positive and negative consequences of their decisions. On the contrary, empty voting entails the ability to exert influence on companies without financial consequences for the investors. In other words, the person who exercises the voting rights is not the one who bears the consequences of the decision. As a result, decisions detrimental to other investors and to the issuer could be made.

A number of high profile cases have shown the potential for abuse resulting from this type of conduct (for the instance the Laxey Partners case in the UK, the OMV / MOL case in Hungary, the Perry/Milan case in the US or the Henderson Land case in Hong Kong). Seminal research produced by Bernard Black and Henry Hu[6] and specific research in Europe by Michael Schouten provide a complete description of the mechanism and its potentially harmful effects[7]. The position taken by a number of financial industry representatives (such as the International Securities Lending Associations the International Corporate Governance Network or the Hedge Fund Standard Board) also shows that the concern regarding empty voting is widely shared in the financial community.

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

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



Positions taken in support of empty voting (in particular, the fact that it may facilitate the monitoring of the management) do not appear strong enough in view of the foregoing. As described below, we thus recommend a full disclosure of the practice (with a reservation on this option, as the creation of a disclosure regime would provide a legal framework comforting this practice), or, if a more radical approach is supported, a ban on the practice.

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

3 - Possible improvements

As a result, the following improvements may be suggested:

7. Maximum harmonisation for the notification of thresholds: *to simplify cross-border compliance with notification requirements, a number of major holding provisions of the Directive could be made of maximum harmonisation. This could include: the definition of the category of financial instruments or products to be included in the calculation of the threshold, the exemptions, the timelines for notification and disclosure as well as the threshold levels (initial and subsequent) and the content of the notification. For the latter two, specific options could be explicitly introduced as long as they add value to the functioning of the Single Market. In order to ensure validity of the legislation over time, more market-resistant principles of transparency of ownership should be included in the Level 1 Directive and the harmonised figures and practical details specified in a Level 2 implementing measure under the Lamfalussy approach. In short, a better combination of Principle and Rule based approaches.*

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

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

10. Limiting "empty voting" practices: *more transparency on empty voting could be contemplated (with a reservation on this option, as the creation of a disclosure regime would provide a legal framework comforting empty voting). The notification proposal would be to require that the economic exposure of all shareholders (above a certain threshold) be notified on the*

day of the record date of each general meeting, to the extent such net economic exposure was not disclosed pursuant to a previous notification (no double notification should be required if it does not provide new information). Any change in the net economic exposure between the record date and the date of the general meeting should be immediately notified. This system would be comprehensive and would not be very burdensome as only one extra notification would be required (subject to updates, which should be limited). This mechanism would also prevent hidden record date captures. A more straight-forward and radical response to "empty voting" practices would be a full ban. To this effect, the appropriate legislative instruments could provide for a suspension of voting rights for investors holding their shares, either directly or indirectly, on the basis of a stock loan or a similar temporary transfer.

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

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

For instance, an investor holding a 4,5% interest through derivatives and a 4,5% interest in shares would not be subject to notification requirements (provided that the specific threshold for derivatives is set at 5% but if the derivatives represent 5,5% and the shares 3%, a notification would be required

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

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

3.2 Key provisions of the Directive

The guiding principle is that information about changes to major holdings should enable investors to acquire or dispose of shares with full knowledge of changes in the voting structure and should also enhance effective control of share issuers and overall market transparency of important capital movements.

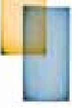
Where a shareholder acquires or disposes of shares of an issuer to which voting rights are attached and which are admitted to trading on a Regulated Market, that shareholder must notify the issuer if the proportion of voting rights they hold, reaches, exceeds or falls below the following thresholds: 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%. Some EU countries have established in addition other thresholds, for example: lower initial thresholds (2% or 3%), a requirement to disclose any subsequent 1% change after the initial threshold or other thresholds in addition to those set by the Directive (40%, 65%, etc.).

Under the Directive, the crossing of a threshold should be declared to the relevant issuer within 4 trading days. Issuers are required to disclose this information to the public within 3 trading days. In practice, a number of EU countries have shortened these two deadlines. The deadlines are therefore not harmonised within the EU. To facilitate cross-border notifications, the EU Commission has developed a non-binding Standard Form.

To avoid an unnecessary burden for certain market participants and enable greater clarity regarding who actually exercises influence over an issuer, the Directive allows for certain market participants, such as custodians and market makers, to be exempted from certain notification requirements.

Up to a certain point, the Directive specifies the voting rights that should be taken into account in the calculation of the threshold (directly owned voting rights, voting rights that can be exercised through an agreement, voting rights attached to derivative financial instruments that can be acquired at the initiative of the holder, etc.). However, markets have developed practices that have impacted corporate controls. Some market practices are used to circumvent the notification obligation, as for example: the borrowing of voting rights at the time of General Meetings, "empty voting" (voting without the economic exposure usually attached to shares), new categories of derivatives giving access to voting rights but not submitted to notification, etc.

Finally, in some countries, investors acquiring a significant holding (10%, 15% or 20%) are required to declare their intentions and provide more specific information (intention in terms of control, board composition, a company's strategy, information on its financing sources, etc.).

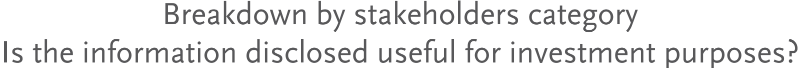


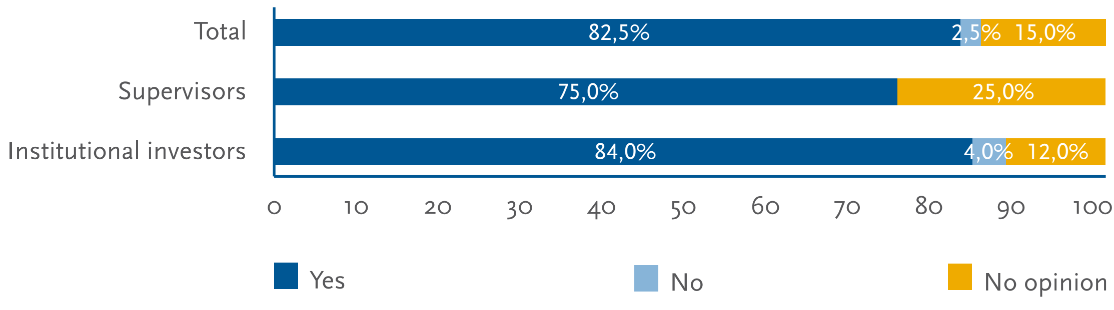
3.3 General suitability of the rules

The general perception about the information resulting from the notification of the crossing of thresholds is that this information is considered useful for investment purposes but that additional harmonisation is necessary for a smooth functioning of the notification regime on an EU-wide basis. In addition, a number of legal clarifications are necessary for a more uniform implementation of the Directive.

3.3.1 Usefulness of the information disclosed for investment purposes

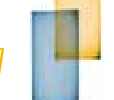
For 79.4% of the users of financial information, (Financial Analysis and Institutional investors) the information about the crossing of thresholds is considered to be useful for investment purposes.





It should be noted that during interviews several issuers stressed the fact that often notifications are of poor quality (if not wrong) and in most Member States there is no due process envisaged for the correction of errors. This also raises a question about the liability of an issuer required to publish a notification that includes calculation errors, and therefore aware of the fact that this constitutes a misleading information. In practice, issuers publish the notification with a disclaimer on responsibility. Quality information of the market is therefore not achieved. Alternatively, the issuers wait for the regulators to ask the investor to correct the error, but in this case the information is delayed.

Interviews with investors and issuers have confirmed that notification requirements regarding financial instruments result in a useful increase in transparency, although some concerns have been voiced that the notification regime is

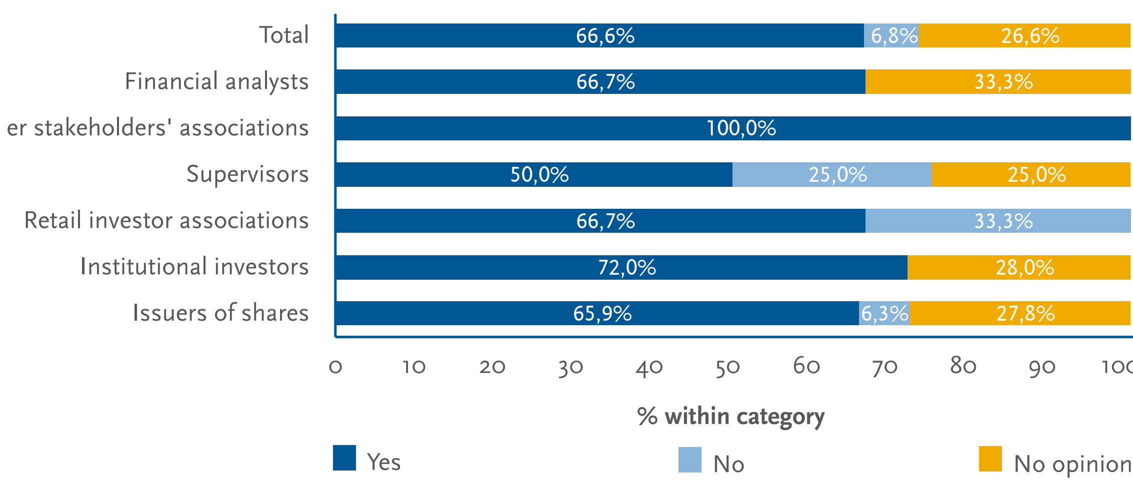


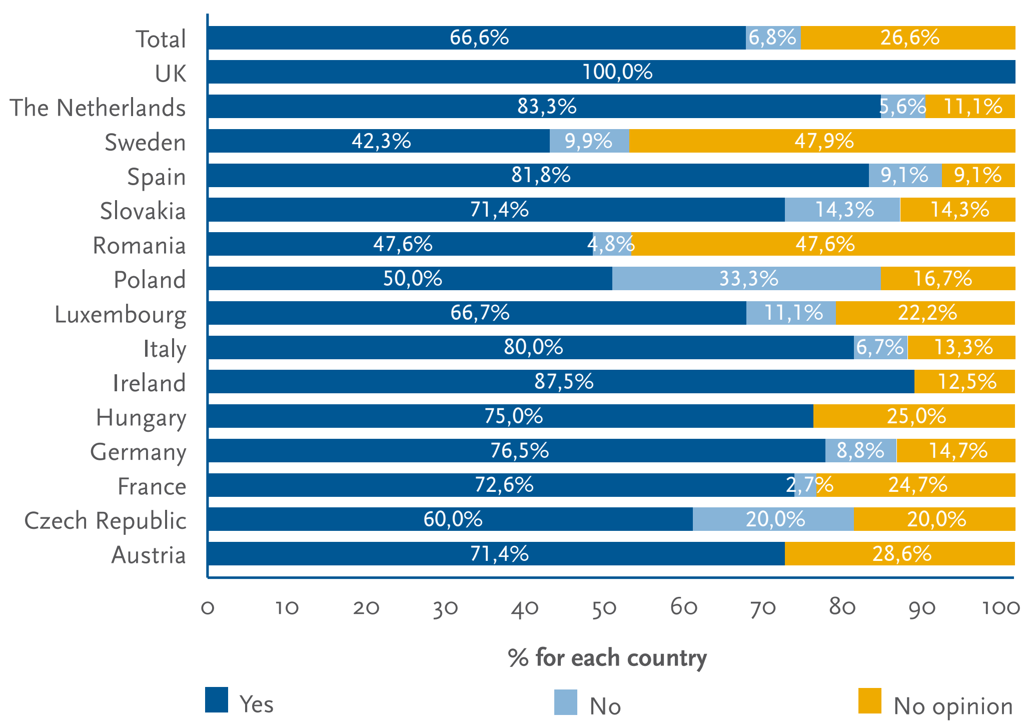
not sufficiently comprehensive and consistent. Investors acknowledge that the widespread use of derivatives should not lead to a reduction in transparency, which is considered important for the well-functioning of the markets. Issuers wish to have a clear knowledge of their investor base and an appropriate understanding of the price movements affecting their shares.
In other words, there is no voice saying that the Directive results in too much information about thresholds in the markets. There is rather a call for more situations to be disclosed in this section of the report.

3.3.2 Need for reducing national differences on notification

A clear majority of stakeholders (66.6%) consider that national differences on the notification of major holdings should be reduced. This opinion is shared across all Member States covered by the study.

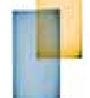
Breakdown by stakeholders category - Do you consider desirable to reduce national differences on notification of major holdings?



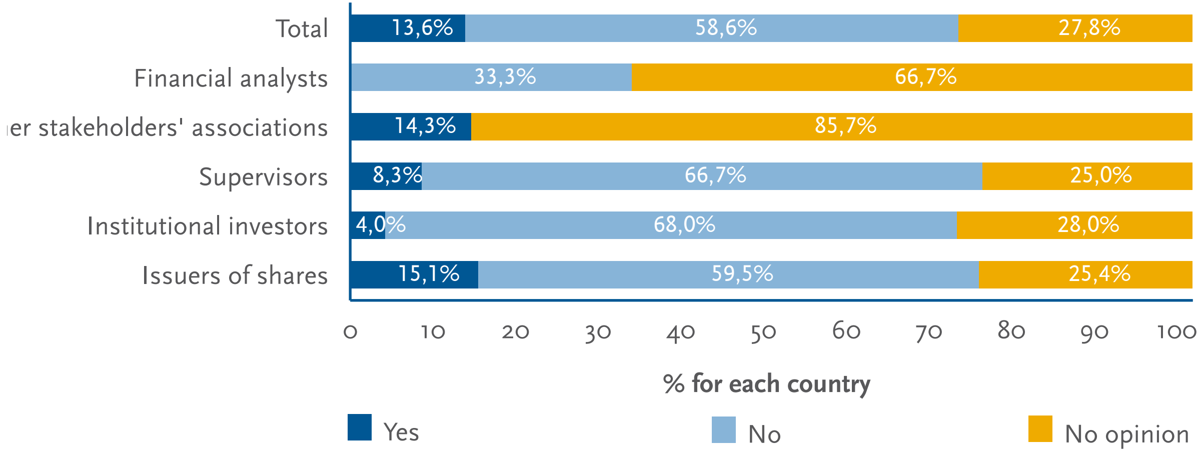


3.3.3 Obligations of the Directive are not considered as an unreasonable increased burden

The notification obligations imposed by the Directive are not thought to create an unreasonable increase of burden. Irrespective of the categories of stakeholders, 58.6% are of this opinion. This view has been confirmed by investors in interviews, in particular regarding notification of financial instruments. The Directive does not appear to have led to significant changes in this respect. At the same time, the Directive's attempt at harmonisation has not resulted in cost savings by investors required to declare the crossing of thresholds. The cost of compliance is not part of this study and has been dealt with in a separate study commissioned by the Commission (see "How to learn more about the Transparency Directive", section 5 of the Methodology Annex), but the lack of harmonisation and the existence of very different transparency regimes in Member States has left the costs of compliance at the same level as before the Directive came into force.



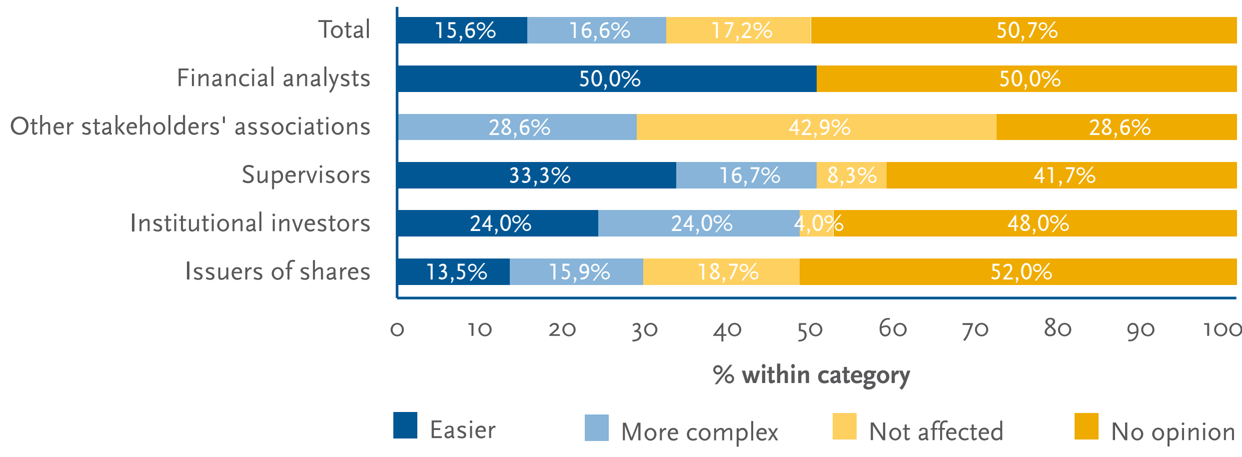
Breakdown by stakeholders category - Have the obligations of the directive resulted in an unreasonable increased burden for your company/organisation?



This view is shared by the stakeholders in all Member States except in Slovakia where the notification of obligations is clearly identified as creating additional burden.

3.3.4 Evolution of cross-border declaration of thresholds

When asked if the Directive has had an effect on the cross-border declaration of thresholds, a majority of stakeholders (50.7%) have no opinion or believe that there is no effect. Institutional investors that have to comply with the rules have very mixed views on the issue. The fact that only 15.6% of stakeholders consider that cross-border notifications have become easier is not a positive result. In other words, despite the initial harmonisation effort, the Directive has not produced savings of costs for cross-border investors.

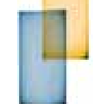


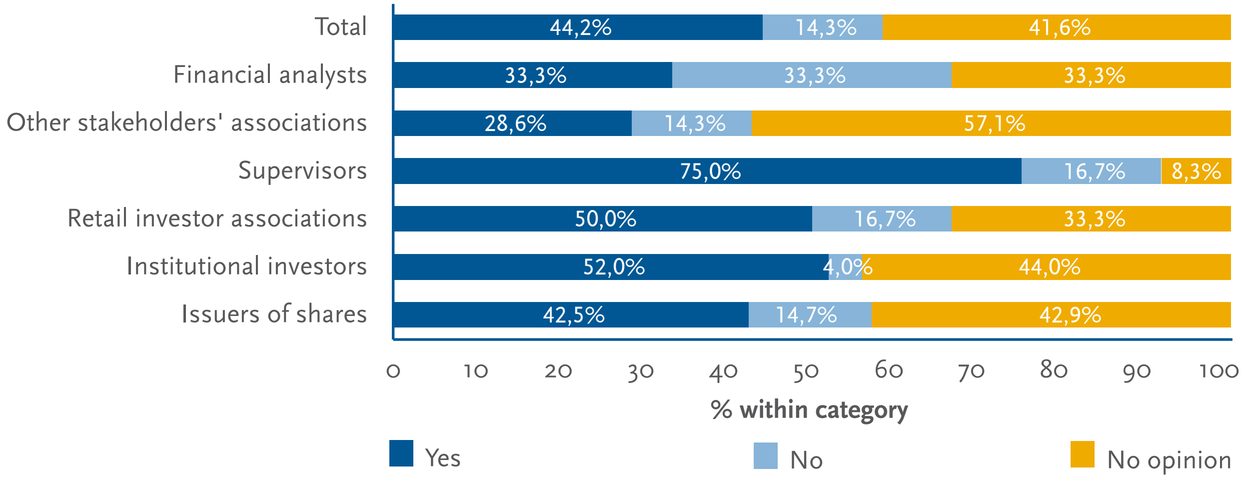
Member States where cross-border notifications are considered to be more complex with the Directive are Luxembourg, the UK, Slovakia, Ireland and Germany. Member States where the Directive is perceived as a factor of simplification are Austria, Poland, Hungary, the Netherlands, Romania, Czech Republic and Italy.

The opinion most frequently expressed by stakeholders beyond the on-line questionnaire during interviews, is that the national regimes regarding the notification of thresholds are very divergent and that the cross-border notification of thresholds is as complex as before. In short, the Directive has not succeeded in simplifying notifications in the EU.

3.3.5 Clarity of the Directive as regards positions to be included in the calculation of a threshold

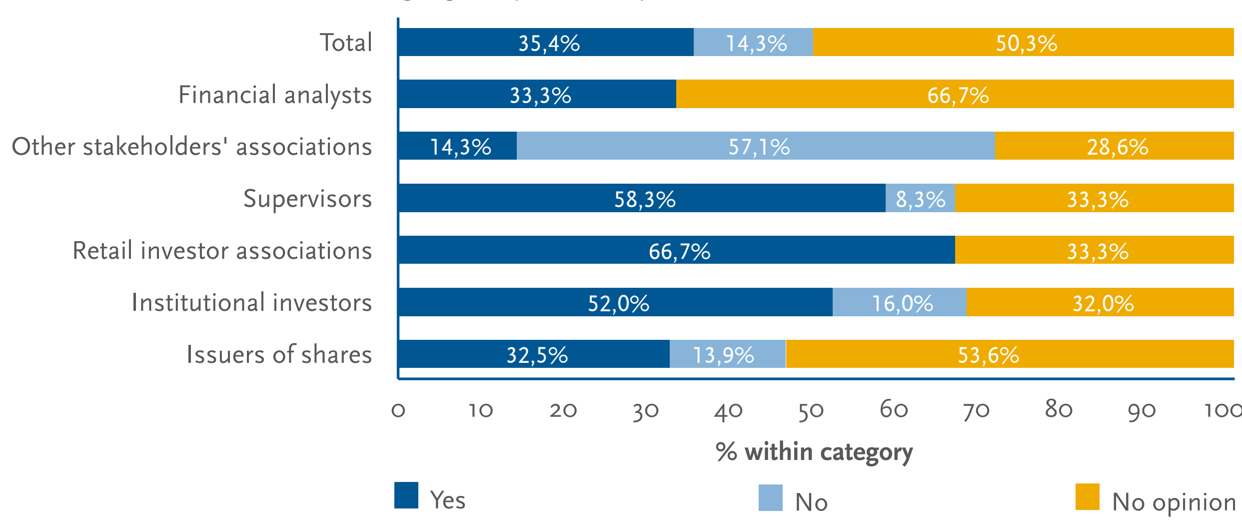
The provisions of the Directive regarding the positions to be included in the calculation of a threshold seem generally clear to a majority of Institutional Investors, Retail Investors associations and Issuers. Only 14% of Issuers of shares consider that the provisions are not clear enough. The clarity of the calculation rules are considered to be less clear for Small companies.





3.3.6 Clarity on the disclosure rules for notification

The question of voting rights detached from shares does not seem to be a major issue for stakeholders except for industry associations. Most of the stakeholders have no opinion (50.3%) or believe that the provisions of the Directive regarding the notifications of thresholds of voting rights detached from shares are sufficiently clear (35.4%).



The Member States where the stakeholders believe that the Directive does not provide sufficient clarity regarding the threshold notification of voting rights detached from shares are in the UK and Ireland, and, in more relative terms, in Germany, France and Austria.

A number of institutional investors, intermediaries and issuers expressed concern about the difficulty obtaining accurate visibility on the exact number of voting rights that are valid and can be exercised. Indeed, rules about suspension of voting rights are very different in Member States and those suspensions are not always properly disclosed. In addition, intermediaries that use the "trading book" exemption and therefore commit not to use the voting rights attached to shares included in their trading book do not disclose this information. It has therefore become very difficult to know the precise number of voting rights that can be exercised at a General Assembly.

3.3.7 General legal issues regarding the notification of thresholds

The Directive has been transposed in all Member States. As it is a "minimum harmonisation" directive, more stringent requirements have been introduced at Member State level. A comprehensive description of these "gold plating" measures has been made by the European Commission (see "How to know more about the Transparency Directive", section 5 of the Methodology Annex): they are not present in full in this report. However, some of these issues are more extensively presented when they relate to implementation issues identified during the legal operation assessment.

For clarity purposes, the issues are addressed in the order of the relevant provisions of the Directive and the relevant clauses are reproduced at the beginning of each section of the report.

a) Thresholds (art. 9.1 and 9.2)

The relevant sections of the Directive state that:

Article 9.1: *"The home Member State shall ensure that, where a shareholder acquires or disposes of shares of an issuer whose shares are admitted to trading on a regulated market and to which voting rights are attached, such shareholder notifies the issuer of the proportion of voting rights of the issuer held by the shareholder as a result of the acquisition or disposal where that proportion reaches, exceeds or falls below the thresholds of 5%, 10%, 15%, 20%, 25%, 30%, 50% and 75%.*

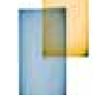
The voting rights shall be calculated on the basis of all the shares to which voting rights are attached even if the exercise thereof is suspended. Moreover this information shall also be given in respect of all the shares which are in the same class and to which voting rights are attached."

Article 9.2: *"The home Member States shall ensure that the shareholders notify the issuer of the proportion of voting rights, where that proportion reaches, exceeds or falls below the thresholds provided for in paragraph 1, as a result of events changing the breakdown of voting rights, and on the basis of the information disclosed pursuant to Article 15. Where the issuer is incorporated in a third country, the notification shall be made for equivalent events".*

The following technical issues have been identified in connection with these sections:

- **Clarification needed on the inclusion of depositary receipts**

The notification requirement refers only to the acquisition or disposal of "shares" of an issuer (article 9). Although the term "shareholder" is defined as comprising the holder of depositary receipts, the strict wording in article 9.1 does not address the acquisition or disposal of depositary receipts. It would be consistent with the purpose of the Directive to clarify that depositary receipts fall with the scope of article 9.1.



- **Impact of voting caps on computation of thresholds**

The Directive does not specifically take into account the issue of voting caps. When the by-laws of a company impose a voting cap, the computation of the threshold should take into account the fact that the total number of voting rights may be reduced as a result of the application of the cap. For instance, a shareholder holding shares carrying 25% of the voting rights shall have to notify it has crossed this threshold, although there may be a voting cap set at 20% of the voting rights. *Prima facie,* the notification may thus be misleading.

From a policy standpoint, the following is worth mentioning:

- **Use of most recent figures for the denominator**

Under Article 9(2) of the Directive, the notifications must be made on the basis of information disclosed pursuant to Article 15. Article 15 requires disclosure by the issuer of the total number of voting rights and capital at the end of each calendar month during which an increase or decrease of such total number has occurred. This rule is clear and does not give rise to any interpretation issues.

However, this may not be the most up to date figure in the public domain and the notifier may be aware of other changes which would affect the company's capital since the date of the last notification, for example where a company has undertaken a further issue of shares. It may thus be worth considering whether article 9 (2) of the Directive should provide for the use of the most recent figures when a capital increase or decrease has been completed.

- **Temporary thresholds**

In Italy, Consob is allowed to introduce "time limited" lower thresholds for companies with a high current market value or whose shares are particularly widely held.

b) Exemptions from the Notification Obligation for Certain Market Participants (art. 9.4 to 9.6)

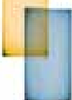
The relevant sections of the Directive state that:
Article 9.4: *"This Article shall not apply to shares acquired for the sole purpose of clearing and settling within the usual short settlement cycle[8], or to custodians holding shares in their custodian capacity provided such custodians can only exercise the voting rights attached to such shares under instructions given in writing or by electronic means."*

Article 9.5: *"This Article shall not apply to the acquisition or disposal of a major holding reaching or crossing the 5% threshold by a market maker acting in its capacity of a market maker, provided that: (a) it is authorized by its home Member State under Directive 2004/39/ EC; and (b) it neither intervenes in the management of the issuer concerned nor exerts any influence on the issuer to buy such shares or back the share price."*

Article 9.6: *"Home Member States under Article 2(1)(i) may provide that voting rights held in the trading book, as defined in Article 2(6) of Council Directive 93/6/EEC of 15 March 1993 on the capital adequacy of investment firms and credit institutions, of a credit institution or investment firm shall not be counted for the purposes of this Article provided that: (a) the voting rights held in the trading book do not exceed 5%, and (b) the credit institution or investment firm ensures that the voting rights attaching to shares held in the trading book are not exercised nor otherwise used to intervene in the management of the issuer."*

The following issues have been identified in connection with these sections:

8 Article 5 of the Directive 2007/14 laying down detailed rules for the implementation of certain provisions of the Transparency Directive has specified that "The maximum length of the usual "short settlement cycle" shall be three trading days following the transaction



- **Extension of the exemption benefiting credit institutions acting for their own account to their equity capital business (in relation with issuance of new shares)**

There is a debate as to whether existing shares acquired by a bank to be used in connection with an allotment in the course of a greenshoe option may benefit from the trading book exemption. To the extent that these shares are held on a short term basis and are not used for voting purposes or in order to intervene in the management of the issuer, including them within the scope of the exemption could be considered consistent with the overall purpose of this exemption. A clarification on this issue would thus be helpful.

- **The rules regarding aggregation of voting rights between exempt (trading) book and non-exempt (investment) book may require clarification**

There may be situations where an investment firm or credit institution holds not only shares of an issuer, which can be exempted according to article 9.6, but also other shares of this issuer. There is a debate as to whether the investment firm/credit institution is allowed to exercise factual influence with regard to the company via the voting rights attached to the shares that do not fall under the exemption of article 9.6.

The strict position is that investment firms/credit institutions, in order to benefit from the exemption, are not allowed to exercise any factual influence whatsoever with regard to the company from which they hold the shares. This seems consistent with the spirit of the exemption, which calls for neutrality from the bank / credit institution. However, the wording of the exemption seems to point to the opposite position. A clarification would thus be welcome.

Regarding the transposition of the Directive, an issue may be noted in Slovakia:

The Directive provides for an exemption regarding the custodians of shares by stipulating that Article 9 shall not apply *"to custodians holding shares in their custodian capacity provided such custodians can only exercise the voting rights attached to such shares under instructions given"* (emphasis added). The law transposing this article into Slovakia law has omitted the word *"only"*, thus creating possible grounds for misrepresentation / circumvention of the law.

c) Extensions (art. 10)

The relevant sections of the Directive state that:

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

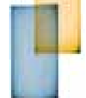
(a) voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question[9];

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

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

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

9 Article 8.1 of the Directive 2007/14 laying down detailed rules for the implementation of certain provisions of the Transparency Directive has specified that in such circumstances, "the notification obligation shall be a collective obligation shared by all parties to the agreement."



> *(e) voting rights which are held, or may be exercised within the meaning of points (a) to (d), by an undertaking controlled by that person or entity;*
>
> *(f) voting rights attaching to shares deposited with that person or entity which the person or entity can exercise at its discretion in the absence of specific instructions from the shareholders;*
>
> *(g) voting rights held by a third party in its own name on behalf of that person or entity;*
>
> *(h) voting rights which that person or entity may exercise as a proxy where the person or entity can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders."*

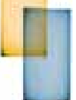
The following issues have been noted in connection with these sections:

- **Acting in concert**

The definition of "acting in concert" raises some clarity issues in connection with shareholder cooperation in view of an upcoming shareholders' meeting. When the cooperation is based only on discussions, there is no acting in concert as there is no "agreement" among the shareholders in discussion. When, however, there is such an agreement (which may signal the fact that the shareholders have moved from simple cooperation to activism), a definition issue appears: what is exactly meant by a "lasting common policy towards the management of an issuer"? For instance:

- should a policy that may be implemented quickly but which is likely to have long-lasting effects (such as a decision to split up or merge the company) be considered a "lasting policy"? Or is a "lasting policy" one which may only be implemented over time through a number of general meetings? In Poland, transposing legislation uses the concept of "permanent policy", which restricts the scope of acting in concert. In Sweden, a lasting common policy requires the parties to exercise their influence over the relevant issuer over several financial years.
- does the decision to remove one board member, or several, or a majority, or all of them, correspond to a "lasting policy"? And is the answer different if the coordinating shareholders agree to vote together in favour of the same replacing board members? And does it make a difference if the proposed new board members are, or are not, independent from such shareholders? And if this is the case, how could someone designated by shareholders in the context of a contested election be considered "independent"?
- what is exactly meant by the "management" of an issuer? Is the payment of dividends part of "management"? Dividends have an immediate impact on the financial resources of a company and thus affect its management; but it may also be argued that the relationship between an issuer and its shareholders is somehow distinct from "management" issues.

Providing some clarity on the definition of "acting in concert" may make sense, considering the number of issues left open by the definition. During interviews, several institutional investors have expressed difficulties they have experienced and highlighted the legal uncertainty in defining the legitimate boundaries within which they can discuss or take actions collectively, and engage with these with companies collaboratively without running the risk of seeing this collaboration qualified as "acting in concert". However, determining whether a concert exists is a very fact-intensive issue; moving away from a rule-based definition to a detailed set of prescriptions may not be effective.



- **Temporary transfers of voting rights**

This issue is more fully addressed in sections 3.6.1 and 3.6.2 below, regarding the duty to notify lenders and/or borrowers and the issue of empty voting. Parent company

- The situation of joint control is not clearly addressed. For instance, if an issuer is jointly controlled by two entities, should both entities assume that the controlled issuer's voting rights be taken into account for their own notification requirements? This could lead to double-counting the same voting rights and thus create a certain confusion on the market. A clarification may be useful in this respect.

- **Catch-all provision**

It may be noted that, in Austria, there is a broad catch all provision which may prove useful to avoid loopholes, and which reads as follows:

"The notification obligation is also applicable to persons being entitled to exercise voting rights without being the legal owner of the respective shares."

d) Content and procedure of the notification (art. 12.1, 12.2 and 12.6)

The relevant sections of the Directive state that:

Article 12.1: *"The notification required under Articles 9 and 10 shall include the following information: (a) the resulting situation in terms of voting rights; (b) the chain of controlled undertakings through which voting rights are effectively held, if applicable; (c) the date on which the threshold was reached or crossed; and (d) the identity of the shareholder, even if that shareholder is not entitled to exercise voting rights under the conditions laid down in Article 10, and of the natural person or legal entity entitled to exercise voting rights on behalf of that shareholder."*

Article 12.2: *"The notification to the issuer shall be effected as soon as possible, but not later than four trading days, the first of which shall be the day after the date on which the shareholder, or the natural person or legal entity referred to in Article 10, (a) learns of the acquisition or disposal or of the possibility of exercising voting rights, or on which, having regard to the circumstances, should have learned of it, regardless of the date on which the acquisition, disposal or possibility of exercising voting rights takes effect; or (b) is informed about the event mentioned in Article 9(2)."*

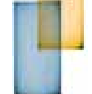
Article 12.6: *"Upon receipt of the notification under paragraph 1, but no later than three trading days thereafter, the issuer shall make public all the information contained in the notification".*

- The duties of the issuer with respect to notification are not clear:

There is a lack of clarity over the detail of the process that issuers must follow in complying with their obligations to make public the information contained in the notification received pursuant to article 12.2. In particular:

- To what extent is there an obligation on the issuer to check the accuracy of the information received pursuant to the notification?
- Where the information received from shareholders is manifestly incorrect, is there still an obligation to disclose this information even if it would be misleading to the market?
- Where the issuer receives only a description of the change which has taken place rather than a formal notification form, is the issuer permitted to pass on an incomplete notification to the regulator or must the issuer investigate the situation further in order to complete its own notification fully?

e) Segregation (art. 12.3 to 12.5)



The relevant sections of the Directive state that:

Article 12.3: *"An undertaking shall be exempted from making the required notification in accordance with paragraph 1 if the notification is made by the parent undertaking or, where the parent undertaking is itself a controlled undertaking, by its own parent undertaking."*

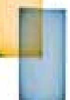
Article 12.4: *"The parent undertaking of a management company shall not be required to aggregate its holdings under Articles 9 and 10 with the holdings managed by the management company under the conditions laid down in Directive 85/611/EEC, provided such management company exercises its voting rights independently from the parent undertaking. However, Articles 9 and 10 shall apply where the parent undertaking, or another controlled undertaking of the parent undertaking, has invested in holdings managed by such management company and the management company has no discretion to exercise the voting rights attached to such holdings and may only exercise such voting rights under direct or indirect instructions from the parent or another controlled undertaking of the parent undertaking."*

Article 12.5: *"The parent undertaking of an investment firm authorised under Directive 2004/39/EC shall not be required to aggregate its holdings under Articles 9 and 10 with the holdings which such investment firm manages on a client-by-client basis within the meaning of Article 4(1), point 9, of Directive 2004/39/EC, provided that: (i) the investment firm is authorised to provide such portfolio management under point 4 of Section A of Annex I to Directive 2004/39/EC; (ii) it may only exercise the voting rights attached to such shares under instructions given in writing or by electronic means or it ensures that individual portfolio management services are conducted independently of any other services under conditions equivalent to those provided for under Directive 85/611/EEC by putting into place appropriate mechanisms; and (iii) the investment firm exercises its voting rights independently from the parent undertaking. However, Articles 9 and 10 shall apply where the parent undertaking, or another controlled undertaking of the parent undertaking, has invested in holdings managed by such investment firm and the investment firm has no discretion to exercise the voting rights attached to such holdings and may only exercise such voting rights under direct or indirect instructions from the parent or another controlled undertaking of the parent undertaking."*

The following issues have been noted in connection with these sections:

- **Management companies**

There are management companies which are neither investment firms as referred to in article 12.5, nor management companies as referred to in the UCITS directive, such as management companies of non-UCITS funds. On a technical reading, the exemption may be found not to apply to such management companies and the same issue arises with respect to management companies of securitisation funds. There seems, however, to be no reason why these companies are excluded from the exemption. The same point can be made regarding investment firms and fund management companies established in third countries. It may thus be worth considering whether these entities should be included within the scope of the exemption.

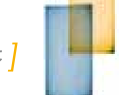


3.4 Threshold levels

The following table shows the extent to which several Member States have adopted lower initial thresholds (and additional thresholds) in addition to the minimum required by the Directive.

THRESHOLDS FOR NOTIFICATION OF MAJOR HOLDINGS APPLICABLE IN EU MEMBER STATES (THE ADDITIONAL THRESHOLDS ARE HIGHLIGHTED) ARTICLE 9(1) OF THE DIRECTIVE

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



THRESHOLDS FOR NOTIFICATION OF MAJOR HOLDINGS APPLICABLE IN EU MEMBER STATES (THE ADDITIONAL THRESHOLDS ARE HIGHLIGHTED) ARTICLE 9(1) OF THE DIRECTIVE

Threshold MS	Lower	5	10	15	20	25	30 (1/3)	35	40	45	50	55	60	65	70	75 (2/3)	80	85	90	95
PT	2%	X	X	X	X	X	1/3				X					X			X	
RO		X	X	X	X	X	1/3				X					X			X	
SE		X	X	X	X	X	X				X					2/3			X	
SI		X	X	X	X	X	1/3				X					X				
SK		X	X	X	X	X	X				X					X				
UK	3%	+1% above the initial threshold																		

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

** 3% in CZ if authorised capital >100000 CZK

*** In DE, the thresholds of 80% and 85% apply regarding REITS (real estate investment trusts) admitted to trading on a regulated market.

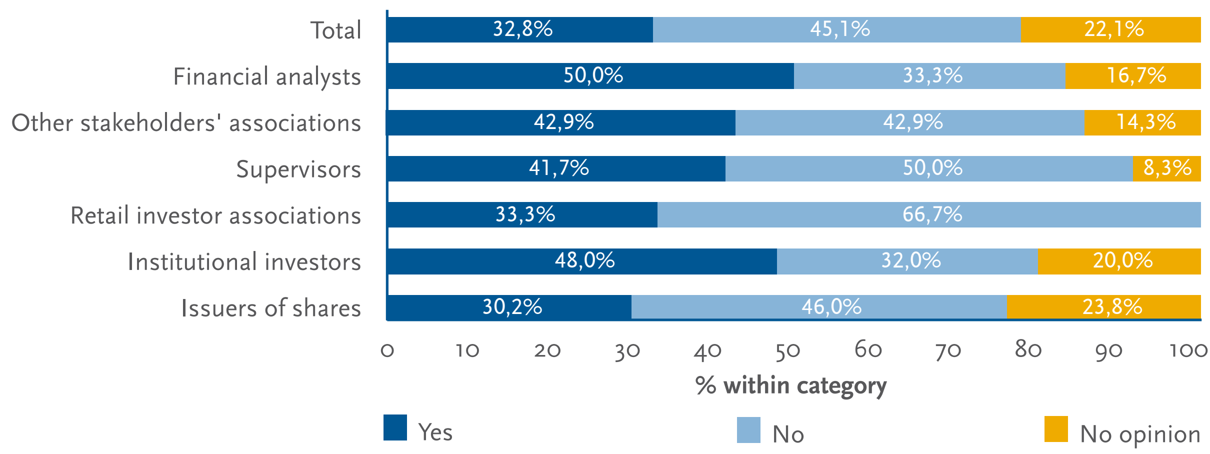
**** In EL, also all changes greater than 3% (if already over 10%)

***** In ES, for residents in tax havens, every 1%

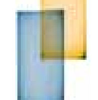
****** In PL there is legislation in preparation that will introduce disclosure obligations at 15% and 90%.
(Source: Commission Staff Working Document – SEC(2008) 3033 final – Report on more stringent national measures concerning Directive 2004/109/EC)

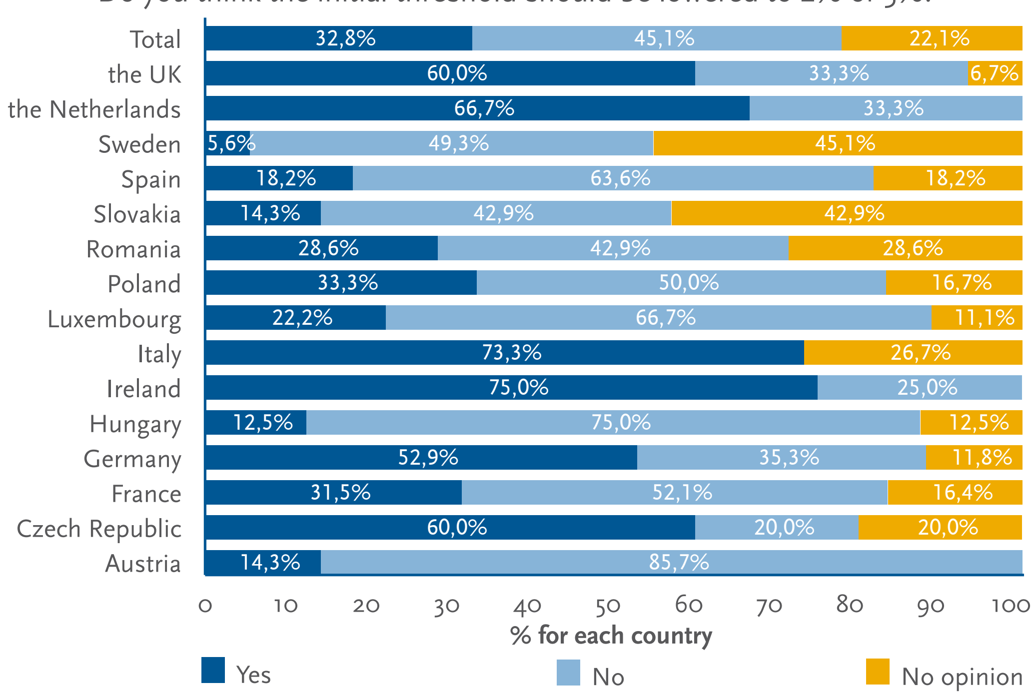
3.4.1 Initial threshold to be lowered to 2% or 3%

Views are mixed on the need to lower the initial threshold. 45% of stakeholders do not consider that lowering the initial threshold is necessary but there is some disagreement: users of information (Financial Analysts and Institutional Investors) are generally in favour of lowering it; Supervisors are split on the matter; and, on balance, Issuers of shares do not favour a lowering of the legal initial threshold to 2 or 3%.



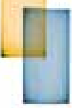
Views also differ in greatly per Member State: In Austria, Hungary, Luxembourg, Spain, Sweden, Poland, Romania and France, most stakeholders do not favour the lowering of the initial threshold. In Ireland, Italy, the Netherlands, the UK, Czech Republic and Germany, stakeholders think the opposite.





During interviews, stakeholders were more openly in favour of a harmonised lowering of the initial threshold. It should be noted that, generally speaking, issuers are indifferent as regards the level of the initial threshold. The issuers' priority is to better identify their shareholders, in order to anticipate evolutions that may impact the general strategy of the company. The legal thresholds are an important source of information but the level of granularity resulting from the Directive is not considered sufficient. Issuers use specialised procedures or require external consultants to identify their shareholders below 5% (the services are often proposed by custodians and/or data disseminators). In Top Companies, this identification of shareholders is often done twice a year.

In terms of the methodology of the study, it should be said that several issuers confessed during interviews that their main priority in participating in this study was to make sure that a revision of the Directive will not result in a new wave of requirements. In other words, they have adopted a very conservative attitude when responding to the on-line questionnaire. It was also clear from issuers and investors that their other priority is a full harmonisation of a number of provisions of the Directive. Or, in other words, if the price to pay to have a full harmonisation of thresholds is to lower the initial threshold, then a number of stakeholders would be prepared to support this. In addition, generally, issuers are of the opinion that the 5% initial threshold is too high. The most frequently figure mentioned for a harmonised initial threshold in the EU was 3%.

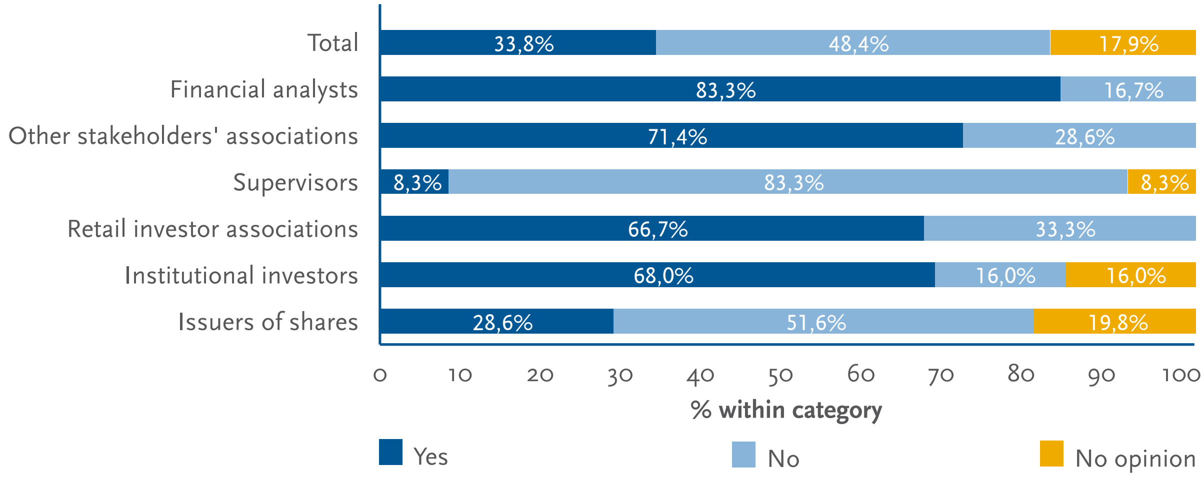


Arguments in favour of lowering the initial threshold were made by investors. They consider that transparency of ownership is one of the parameters of investment decisions and that “shareholder activism” can have significant impact even if those shareholders have less than 5% of the voting rights. As already stated, issuers are relatively neutral or have nothing against more precise requirements allowing them to identify their shareholders. Of those against lowering the initial threshold, the more cautious were intermediaries that use the “trading book” exemption. They would be against lowering the level of exemptions. Finally, intermediaries and institutional investors also reported that the lowering of the initial threshold has no effect on investment decision when the initial threshold is known. In fact, the burden to notify is not on the one that takes the investment decision but on a separate department of the intermediary or of the institutional investor or on the custodian.

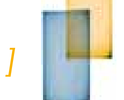
Interviews with Supervisors in Member States that decided to lower the initial threshold to 3% when transposing the Directive did not report disruptions in the market caused by such change. It is a fact that they were confronted with a wave of notifications and therefore provided for a transition period.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

3.4.2 Disclosure of holdings at additional percentage points

The users of financial information (Financial Analysts, Retail Investors and Institutional Investors) favour the disclosure of every additional percentage of holding after the initial threshold. This is not the opinion of Issuers of shares and Supervisors.



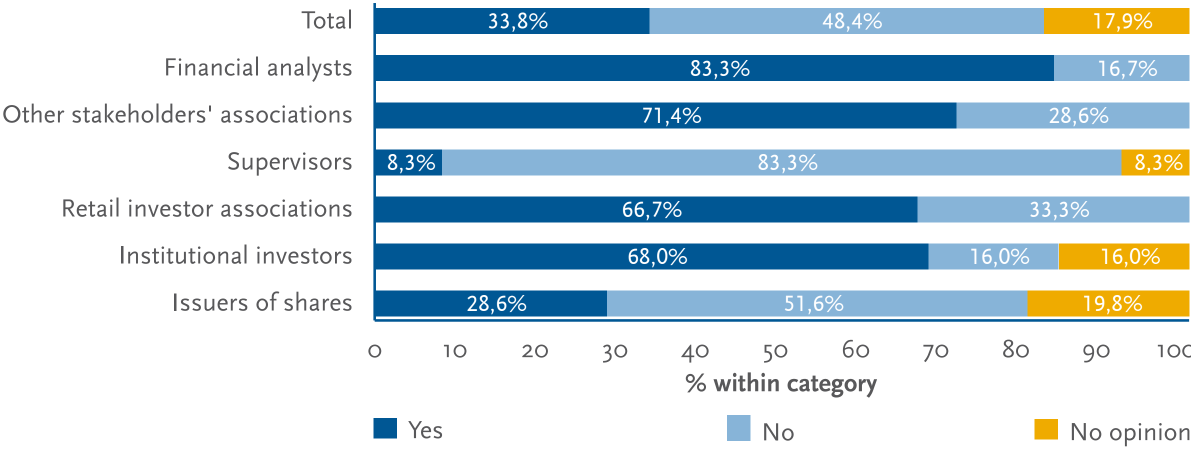
Such a new requirement is fully supported by stakeholders in the UK, Ireland, Italy, Romania and Slovakia. A majority is against in Sweden, Poland, Luxembourg, Hungary, Austria, Germany and France.



Very few of the stakeholders interviewed mentioned the issue of notification at every additional percentage. However, in several Member States stakeholders requested notification for thresholds within the intervals set by the Directive, in particular between 30% and 50%. In 5 Member States such additional thresholds have been introduced.

3.4.3 Adverse impact of lower thresholds in some Member States

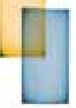
The users of financial information (Financial Analysts, Retail Investors and Institutional Investors) think that they are adversely affected by the lack of harmonisation on the Directive and the fact that the initial threshold can be lower than 5% in various Member States.

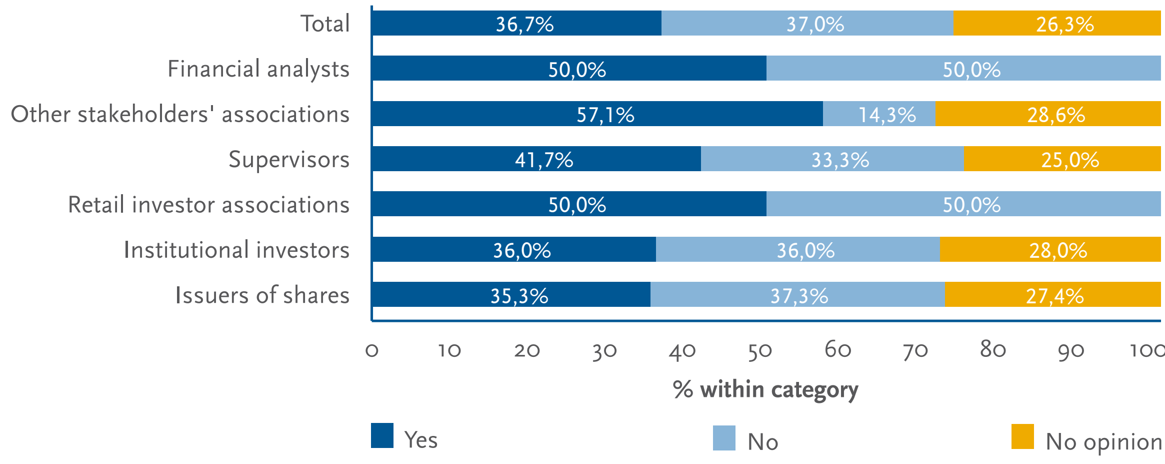


In interviews, stakeholders have more openly voiced their disappointment at the lack of harmonisation of the initial and the subsequent thresholds in the EU. According to the cross-border Institutional Investors, this creates a real and costly burden. Most of the stakeholders interviewed favour a maximum harmonisation of threshold in the EU. In addition they have a relative open mind on the definition of the fully harmonised thresholds (under the condition that there is no harmonisation on the stringent regime applicable in one of the EU Member States).

3.4.4 Setting of lower thresholds in articles of associations

There is a split among stakeholders as regards the possibility to set lower thresholds for Issuers of shares in their article of association. This split is replicated within the different categories of stakeholders.





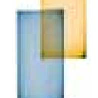
Stakeholders in the UK, the Netherlands, Spain, Ireland, Hungary and Germany are against this flexibility given to Issuers of shares. Stakeholders in France, Czech Republic, Austria, Luxembourg, Slovakia, Romania and Poland are in favour of the possibility of setting lower thresholds in a company's article of association.

3.5 Financial instruments included in the notifications: scope and exemptions

3.5.1 Capture of the financial products implying transfer of ownership and voting rights

With the exception of Supervisors, a majority of stakeholders have no specific opinion on the capacity of the Directive to include in the calculation of threshold, financial instruments implying the transfer of ownership or voting rights. When they expressed an opinion, a majority of stakeholders believe that the Directive properly captures financial instruments for the calculation of thresholds. Financial Analysts and Industry Associations are the two categories of stakeholders that have doubts about the covering of financial instruments. Supervisors, Institutional Investors and Issuers of shares are more inclined to believe that the provisions of the Directive are properly designed to include financial instruments in the calculation of thresholds. Member States where the Directive is not considered to be adequate to capture financial instruments in the calculation of thresholds are the UK and Ireland.

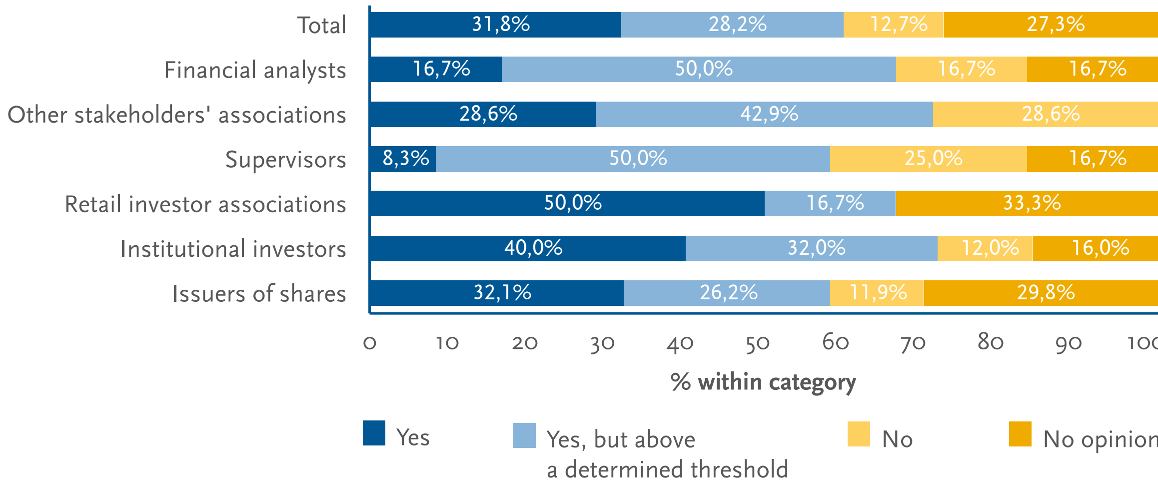
During interviews, investors expressed the view that information on financial instruments held increases transparency and is useful for investment purposes as it gives an indication of the potential evolution of the ownership of the company. In that regard, it is not felt that the Directive provides for too much transparency.



3.5.2 Declaration of voting rights attached to shares held by intermediaries in their trading book

Views are mixed regarding the need to include the shares held by intermediaries in their trading book in the calculation of a threshold.

- 31.8% believe that they should be included in all circumstances (in particular Retail and Institutional Investors)
- 28.5% consider that it is necessary only above a certain threshold (in particular Supervisors and Financial Analysts)
- 27.2% are of the opinion that those shares should not be notified.

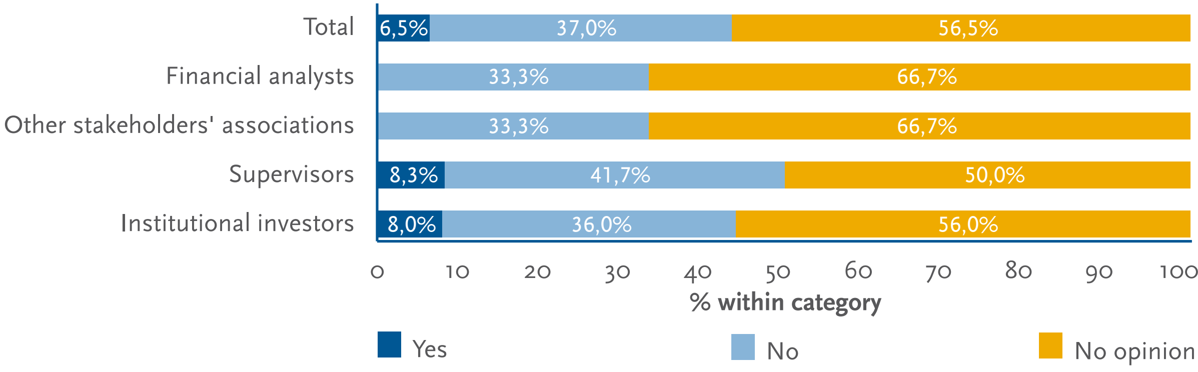


The Top companies (14.8%) are the most convinced that shares held by intermediaries in their trading book should be declared. This was confirmed during several interviews. Member States where the stakeholders are against the notification of shares included in the trading book of intermediaries are in Sweden, Poland, Luxembourg and Hungary. At the other extreme, the stakeholders that favour a declaration in all cases are Italy, the Netherlands and Austria.

All in all, however, the solution found in the Directive seems to be supported by a majority of stakeholders (40.9%).

3.5.3 Thresholds and trading practices

The users of financial information (Financial Analysts, Supervisors and Institutional Investors) have no opinion or believe that the provisions of the Directive regarding thresholds have not changed trading practices. This is the case in all Member States (with mixed views expressed by the stakeholders in the Netherlands).



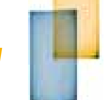
3.6 Financial innovation

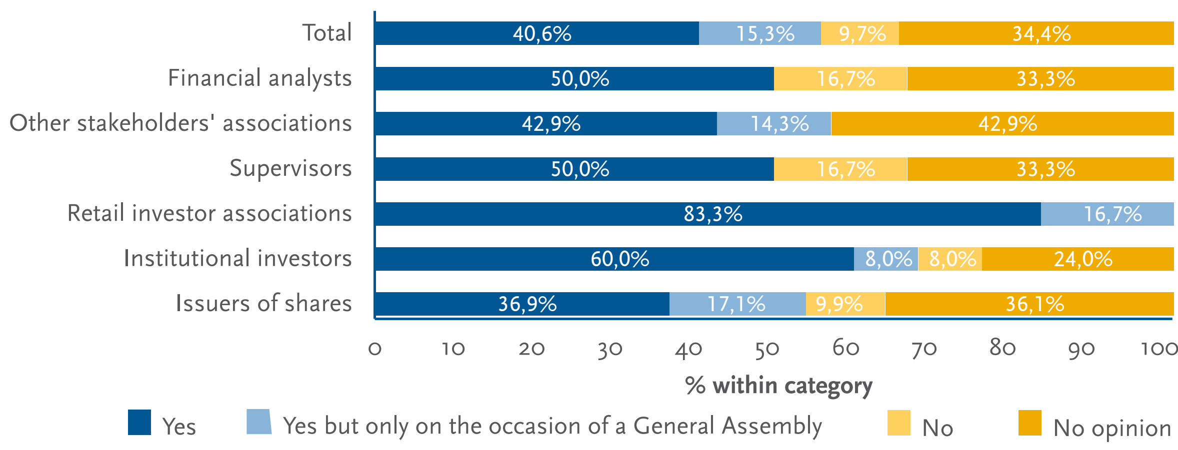
Financial innovation has an impact on the notification of thresholds. Market practices or financial products can be conceived so as not to be covered by the Directive. The crossing of thresholds is sometimes made without reflecting an economic reality or, the other way round, a reality is not notified. Three particular cases are worth exploring: stock lending, "empty voting" and cash-settled derivatives and contracts for difference.

3.6.1 Stock lending

3.6.1.1 Obligation to disclose lending of shares

A majority of stakeholders (55.9%) believe that the lending of shares should be made transparent. 15.3% consider that this is necessary only on the occasion of the general assembly. The users of financial information are most convinced by this transparency requirement (Financial Analysts, Retail and Institutional Investors, and Supervisors).

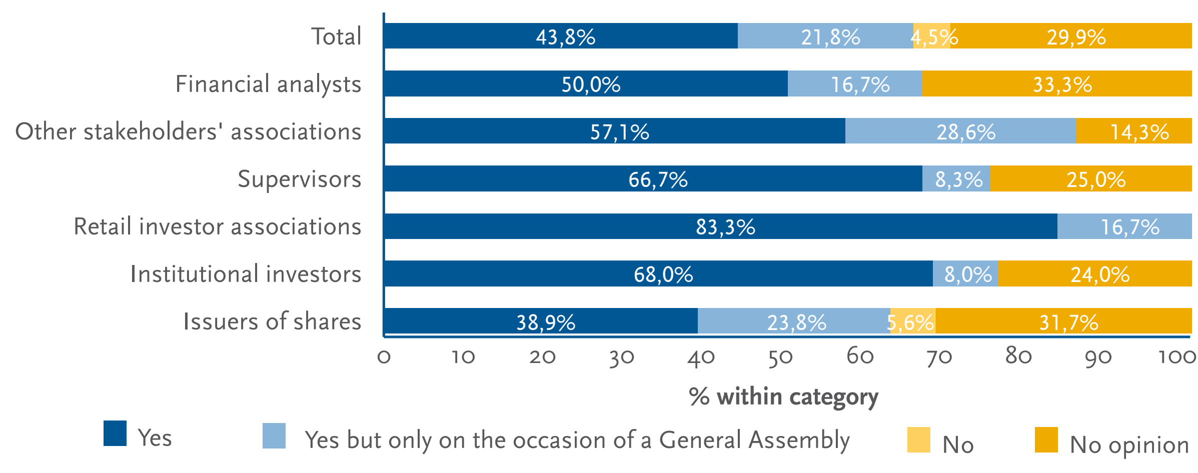




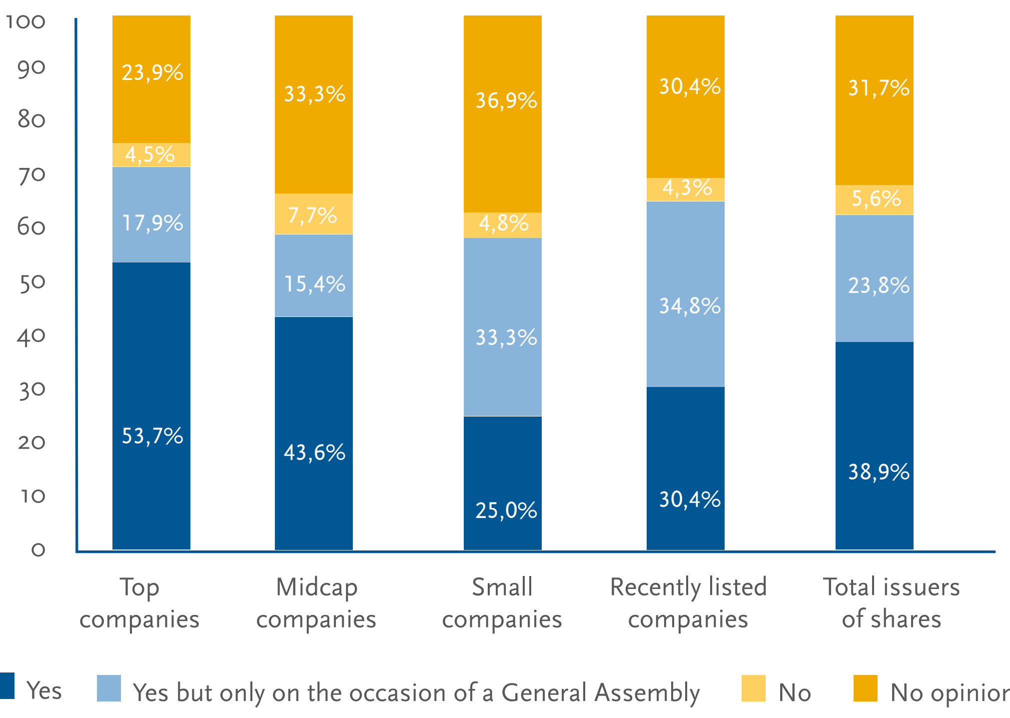
Amongst the Issuers of shares, the Top companies (50.7%) are the more supportive of transparency in lending of shares. The Member States where such transparency is strongly supported are Spain, the Netherlands, Ireland, Germany, Hungary, Austria, the UK, Ireland and Italy. A more radical opinion against such transparency is expressed in Poland.

3.6.1.2 Declaration of borrowed voting rights

A majority of stakeholders (65.6%) think that borrowed voting rights should be included in the calculation of the threshold; 22.2% believe that this is only necessary at the General Assembly. Users of financial information are most convinced: Retail and Institutional Investors, Financial Analysts and Supervisors.



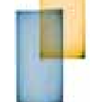
Amongst the Issuers of shares, the Top companies (53.7%) are the most supportive of inclusion at any time. The majority of Midcaps believe that borrowed voting rights should be included in the notification. Most of them consider that this is only necessary at the time of the General Assembly.

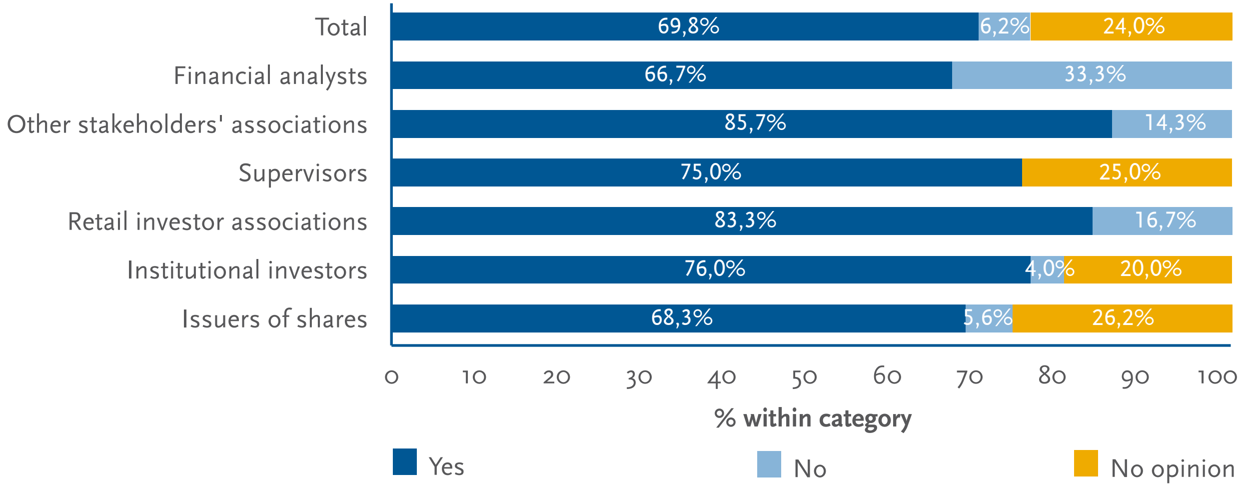


Strong supporters of the inclusion of borrowed voting rights in the calculation of thresholds can be found in the UK, Austria, the Netherlands, Spain, Ireland, Germany, Luxembourg and Italy. Those who believe that this is only necessary at the General assembly are the stakeholders in the Czech Republic and Slovakia, and, in more relative terms, in Romania and France.

3.6.1.3 Declaration of voting rights held on behalf of a third party

A large majority of stakeholders across all categories (69.8%) are in favour of including in the declaration of the thresholds, voting rights that are held on behalf of a third party by virtue of an agreement. Top companies support this most.





All Member States support such inclusion in the notification of thresholds with the exception of stakeholders from Sweden and Ireland. The stakeholders from the Czech Republic have mixed views on the issue.

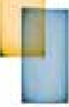
Regarding all the questions relating to possible hidden shareholdership by using innovative financial instruments or techniques, the key point made by stakeholders during interviews is that there should be transparency in all situations and that the rules of the Directive should be more harmonised and, more importantly, resistant to market changes (Principle based). One view defended, was that this transparency is only necessary at the time of corporate events (the General Assembly in particular).

3.6.1.4 Legal operations issues

The issue of stock lending is addressed in the Directive in the following article:

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

- ***Prima facie* disclosure obligation**



Following legal research, it comes out that, in all the Member States under review, typical stock lending agreements lead to a transfer of ownership of the lent shares from the lender to the borrower. This principle is applicable to shares in bearer form and to nominative shares. A prima facie application of article 9 of the Directive must thus lead to a notification obligation imposed on both the lender and the borrower.

- **Debate relating to disclosure by the lender**

However, in some Member States, such as the United Kingdom, the position has been that only the borrower has to disclose the transaction. The logic is that, a standard stock lending arrangement (whereby the lender maintains a right to call for redelivery of the shares), produces simultaneously a disposal of rights in the shares and a corresponding right to reacquire them. The lender under such an arrangement is permitted to "net off" the disposal and acquisition and, therefore, not count the transaction towards its disclosure obligations. The same rational is not applicable to the borrower. As the right to call back the shares on notice is at the lender's initiative there is no immediate corresponding disposal by the borrower and therefore the two positions cannot be netted off.

In the United Kingdom, the origin of this interpretation is the following. In its consultation paper on the implementation of the Directive, the FSA was clearly of the view that one interpretation of the wording of the Directive was that the lender and borrower of shares should both be under an obligation to aggregate the lent shares for the purposes of the calculation of the effect of acquisitions and disposals of voting rights.

This interpretation would have led to a position at odds with the UK's existing regime in relation to disclosure of substantial interests which was set out in the Companies Act 1985, under which the only obligation was on the borrower. The FSA in its consultation sought the views of market participants. It received clear feedback that the Companies Act 1985 provisions should be replicated in the new transparency regime.

Accordingly the FSA applied the aforementioned interpretation. This is one of the few areas of the transparency regime where the FSA has departed from its policy of copying out the wording of the Directive.

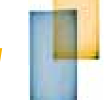
In France, the law used to be interpreted in a way that made notification compulsory for lenders. However, the transposition of the Directive has introduced some confusion in this respect, and the current interpretation of applicable rules tends now to be the reverse.

- **Underlying rationale for and against disclosure**

As this interpretation issue has led to some debates in a number of Member States, it is worth recalling the underlying rationale of both positions. In support of the "no notification" view, there is a concern that disclosure on both sides of the transaction would lead to confusing and conflicting disclosures which may harm the market information. In particular, due to the number of stock lending transactions, notifications (if required at too low a level) may swamp the market with useless information.

In addition, when stock lending is used by banks to hedge positions of activist shareholders in the setting of influence-seeking transactions, imposing notification requirements to such banks may result in both providing an advance warning to the target issuer and creating business issues for the bank in its relationship with the target issuer.

The reverse position, in favour of transparency for the two legs of stock lending transactions, is supported by the need to have a full picture of the situation at any one time. The only way to provide complete and consistent information to the market is to have the transaction declared both by the lender (who would disclose his move from full owner to holder of a right to re-acquire the shares) and the borrower (who would declare his status of owner and his obligation



to return the shares). There would be no risk of confusion in such a case. On the contrary, it would eliminate the risk of double counting the shares (a first time for the lender and a second time for the borrower, which is misleading). The system would also be simple, as the same rule would apply to all stock lending transactions, irrespective of specific contractual terms (whose complexity may always lead to diverging interpretations). Italy and Luxembourg apply a system imposing disclosure requirements to the lender.

- **Specific mechanisms in some Member States**

Recent case law in Germany has determined that the duty to notify is imposed on the lender only if it has transferred the voting rights to the borrower. In this case, both the lender and the borrower need to disclose the transaction. If control over the voting right is retained by the lender, then only the borrower needs to notify. Luxembourg has a similar system, where the transfer of the voting rights to the borrower triggers a notification requirement for both the lender and the borrower. The efficiency of such mechanism would probably be enhanced if the lender were to commit not to transfer the voting rights in a second step (much as section 10(c) of the Directive imposes a commitment regarding the exercise of voting rights in connection with collateral agreements).

It may be noted that, in Hungary, the parties of a share lending agreement are obliged to include a provision in the share lending agreement on the allocation of the voting rights attached to the shares in question. Therefore, if the parties agree that the voting rights remain with the lender, no notification obligation is triggered. If the voting rights are transferred from the lender to the borrower (together with the ownership title of the shares), the lender shall disclose a decrease, while the borrower shall disclose an increase in its voting rights.

In Luxembourg, the current position of the Commission de Surveillance du Secteur Financier (CSSF) is that where shares subject to a stock loan or a similar legal mechanism (such as a repo) are repurchased, relent and/or sold or transferred in any way by the borrower at the latest on the stock exchange day following the loan (with a delivery no later than within 3 stock exchange days) and if the borrower does not have the intention to exercise and does in fact not exercise voting rights attached to the relevant shares, he does not need to consider the borrowed shares for his calculation. Our view is that if the lender reacquires the shares within such periods it would not need to make a notification.

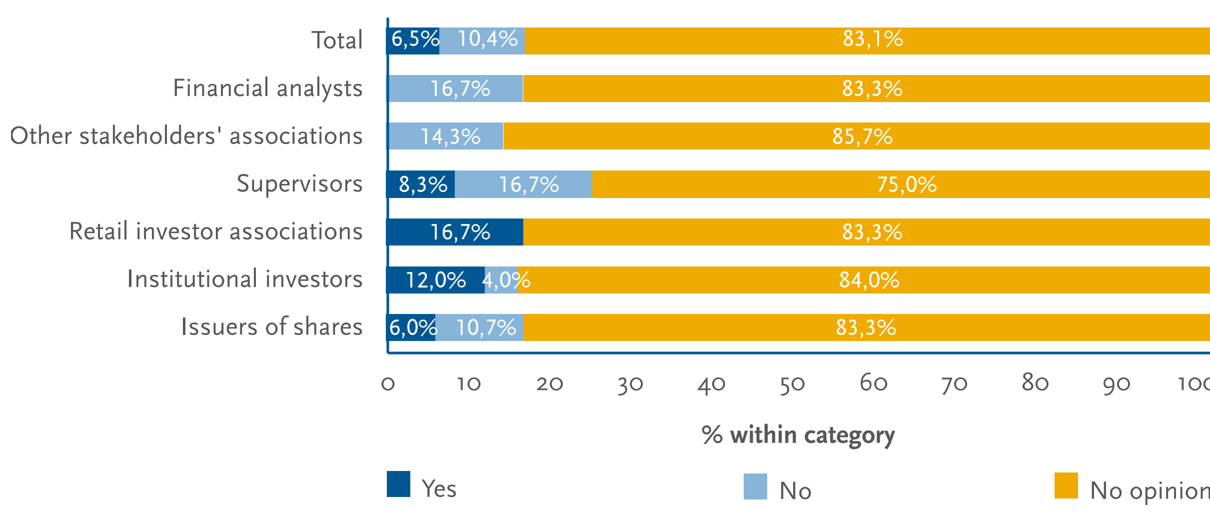
- **Proposal in the interest of market transparency**

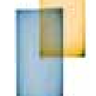
In our view, the correct application of article 9 of the Directive leads to a notification requirement by the lender and the borrower. As a result, the application of this principle should be enforced. To the extent that there is a wish to amend the Directive, the general rule regarding disclosure by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

3.6.2 Empty voting

3.6.2.1 Evolution of empty voting with the Directive

It is clearly not felt by stakeholders that the Directive has favoured the practice of "empty voting" *("empty voting" is voting without the economic exposure usually attached to shares, such as voting with borrowed shares)* as almost all of them have no opinion on the effects of the Directive or, when they expressed an opinion, think that the Directive has not favoured this practice.

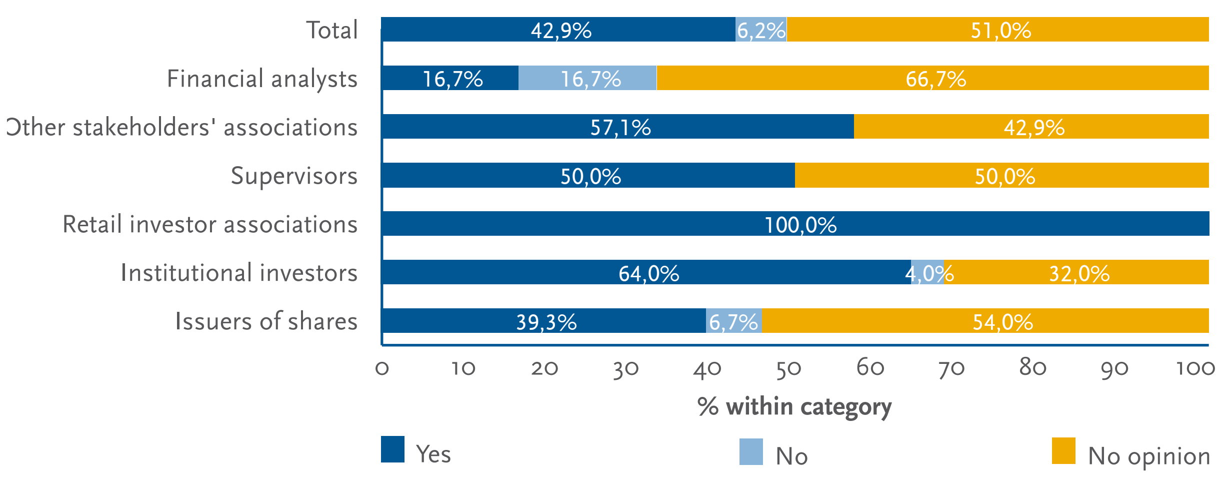




3.6.2.2 Directive and prevention of empty voting

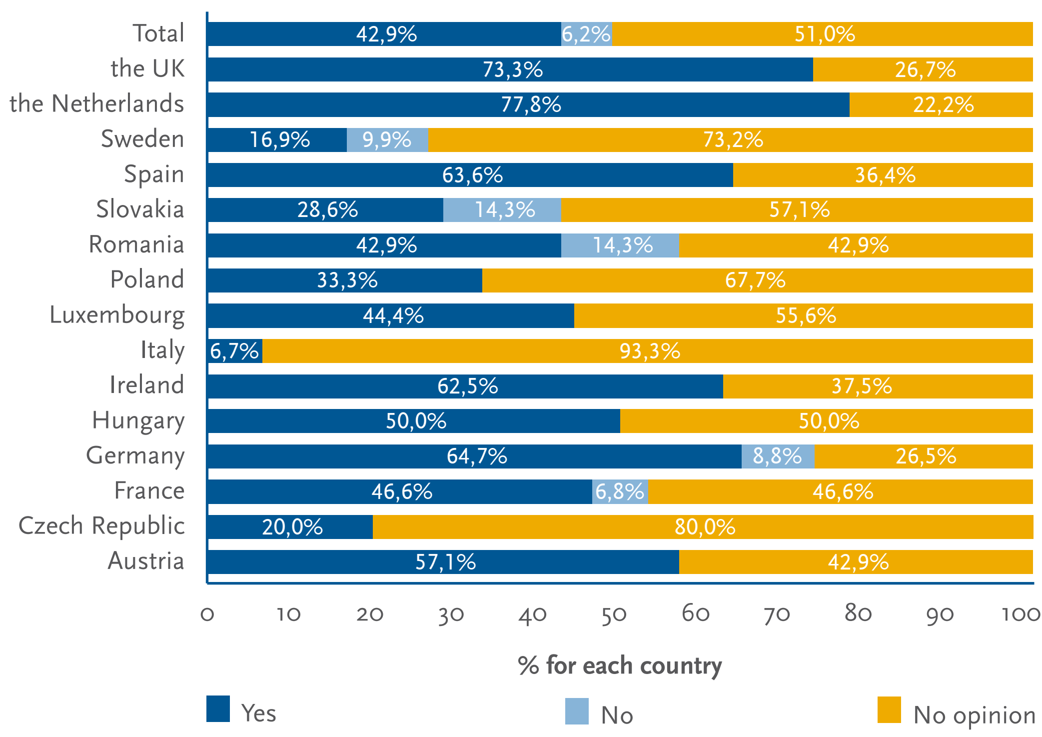
Among the stakeholders that have expressed an opinion (87.3%), a clear majority is in favour of preventing further development of "empty voting" practices by the Directive. This majority is clearly reflected in all categories of stakeholders (with the exception of Financial Analysts who have more mixed views).

Breakdown by stakeholders category - Should the Transparency Directive prevent further development of "empty voting" in the EU?



Within the Issuers of shares category, the Top companies are the most supportive of preventing further development of "empty voting". The stakeholders that most want the Directive to prevent further development of "empty voting" can be found in the UK, the Netherlands, Spain, Germany, Ireland, Austria and France.

Breakdown by jurisdiction - Should the Transparency Directive prevent further development of “empty voting” in the EU?



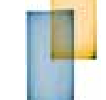
3.6.2.3 Legal operation issues

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

Although the phenomenon may not be quantified precisely as notification requirements fail to capture it precisely, there is significant anecdotal evidence that this practice is regularly used.

- **The issue at stake**

It is usually considered that company law confers voting power to the shareholders in view of the fact that they will bear the positive and negative consequences of their decisions. However, “empty voting” enables the borrowers to exert influence on companies without suffering financial consequences. In other words, the person who exercises the voting rights is not the one who bears the consequences of the decision. As a result, decisions detrimental to other investors and to the issuer could be taken.



Seminal research produced by Bernard Black and Henry Hu[10] and specific research in Europe by Michael Schouten provide a complete description of the mechanism[11]. The issue as to whether empty voting should be regulated is therefore open. It should be noted that regulating empty voting is a distinct issue from requiring better disclosure for stock lending, as will be further explained below.

Empty voting is all the more problematic as it is done by a specific shareholder without the consent of other shareholders (as the mechanisms used by "empty voters" are not included in the articles of association or the by-laws) and without their knowledge.

It should be noted that, as empty voting is not disclosed, it is not possible to have statistical data in relation to its use, although there is a widespread feeling that it is not uncommon. The number of cases which have been identified either in a litigation context or through detailed academic research is therefore likely to underestimate significantly the true number of occurrences of this practice.

- **Against regulation of empty voting**

The position rejecting further regulation is typically based on the following arguments:

- Empty voting makes shareholder activism easier and thus promotes a stronger control by shareholders on the management of companies.
- As empty voting is mostly based on stock lending, regulating the former should not result in an impediment for the latter. In particular, when stock lending is used for "tax optimisation" purposes at the time dividends are paid, there is a fear voiced by banks promoting this optimisation that any regulation in this area may jeopardise their interest.
- Generally speaking, there is also a view, mostly voiced by financial intermediaries, that more disclosure is not necessarily better disclosure.

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

- **In favour of regulation of empty voting**

- A number of high profile cases have shown the potential for abuse resulting from empty voting. Among the most famous are the Laxey case in the UK, the OMV / MOL case in Hungary, the Perry/Milan case in the US and the Henderson Land case in Hong Kong. The aforementioned authors have provided a detailed list of all known cases together with a description of the harmful effect of such practices for investors and issuers.

The position taken by a number of financial industry representatives shows that the concern regarding empty voting is widely shared. In this respect, the following position may be worth mentioning:

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

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

12 The Shareholder Voting Working Group (SVWG) is composed of members such as the Association of Private Client Investment Managers and Stockbrokers, Association of British Insurers, Association of Investment Trust Companies, Bank of England, British Bankers Association, CRESTCo Limited, Department of Trade and Industry, etc.

13 "Review of impediment to voting UK shares", the "Myners Report"

- In the United Kingdom, the Shareholder Voting Working Group[12], in a report[13] dated January 2004 stated "*borrowing of shares for the purpose of voting is not appropriate*".
- In December 2004, the Securities Lending and Repo Committee[14], chaired by the Bank of England, issued a "*Stock Borrowing and Lending Code of Guidance*" that stated the following position: "*There is a consensus, however, in the market that securities should not be borrowed solely for the purpose of exercising the voting rights at, for example, an AGM or EGM*".
- In July 2005, the ISLA[15] issued a document called "Securities Lending and Corporate Governance" stating that "*the practice of borrowing shares specifically to vote is unacceptable*".
- The International Corporate Governance Network also stated that "the exercise of a vote by a borrower who has, by private contract, only a temporary interest in the shares, can distort the result of general meetings, bring the governance process into disrepute and ultimately undermine confidence in the market[16]". As a result, according to ICGN, "the borrowing of shares for the primary purpose of exerting influence or gaining control of a company without sharing the risks of ownership is a violation of best practice" and "the borrowing of shares for the purpose of exercising the right of the shareholder's vote is to be discouraged by all lenders".
- The Hedge Fund Standard Board stated: "a hedge fund manager should not borrow stock in order to vote[17]" and added "the HFWG would welcome wider consultation with regulators and market participants to develop a regime that is applicable to all parties and ties votes to underlying economic exposure".
- In France, the *Autorité des Marchés Financiers* had set up in 2007 a working group whose report (the "Mansion Report") proposed improved disclosure of empty voting and suggested the need of an outright ban.

• The "record date capture" issue

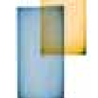
- "Record date capture" is a specific type of empty voting, which may be described as follows: an investor purchases shares on the record date of a general meeting of shareholders and sells them immediately thereafter. At the general meeting, this shareholder is legally entitled to vote although it has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

14 The Securities Lending and Repo Committee (SLRC) is a UK-based committee of international repo and securities lending practitioners, together with bodies such as CREST, the Debt Management Office, the Inland Revenue, the London Clearing House, the Financial Services Authority and the London Stock Exchange.

15 International Securities Lending Association

16 Cf Code of the International Corporate Governance Network de 2007

17 Hedge Funds Standards: Final Report, Standard n°28.



- **Two options**

As a result of the foregoing, two options may be presented by those who wish to limit the impact of "empty voting":

- One is an improved transparency system, allowing for a clear identification of "empty voters" in general meetings.
- The other is a ban on "empty voting", based on appropriate disclosure obligations.

- **Providing more transparency on empty voting**

There are several ways to address disclosure of potential "empty voting" positions:

- In order to address empty voting resulting from stock lending, it could be required that the borrower specifies that it holds its shares as a borrower (or, more generally, under a temporary transfer agreement). This would be simple but would not address all empty voting issues.
- Regarding the specific issue of "record date capture", the disclosure issue may be easily fixed: any sale of shares (or other reduction in the net economic exposure of a shareholder of record) between the record date and the date of the general meeting should be immediately notified to the issuer and to the market in such a way that the relevant information is fully disclosed prior to the date of the general meeting.
- In order to address empty voting from a more general standpoint (which would include record date capture), it could be required that, within a certain period of time before and up to a general meeting of shareholders (for instance, during the 30 days preceding a general meeting), the shareholders notify immediately any change (above a certain threshold) in their net economic exposure. This requirement would provide a complete picture of the shareholder base at the time when the information is most meaningful. This system would be comprehensive but may be viewed as burdensome.
- Another way to improve transparency would be to require that the economic exposure of all shareholders (above a certain threshold) be notified on the day of the record date, to the extent such net economic exposure was not disclosed pursuant to a previous notification (no double notification should be required if it does not provide new information). Any change in the net economic exposure between the record date and the date of the general meeting should be immediately notified. This system would be comprehensive and would not be very burdensome as only one extra notification would be required (subject to updates, which should be limited). This mechanism would also prevent hidden record date captures. This is the option we would recommend if more transparency on empty voting is contemplated (with a reservation on this last option, as the creation of a disclosure regime would provide a legal framework comforting empty voting).

- **Restricting or prohibiting empty voting**

- Disclosing empty voting would make it more apparent but, if it is considered an improper practice, would not provide an adequate remedy. Prohibiting empty voting should therefore be considered, although the legislative instrument to achieve this result would obviously not be the Transparency Directive.
- There are two main ways to restrict or ban empty voting:
    - A classical proposal is to require shareholders who have lent their shares to recall them before any general meeting. There are three limits to this option: first, it is generally considered burdensome; second, it may be overreaching, as it would prevent stock lending at the time of the general meeting,

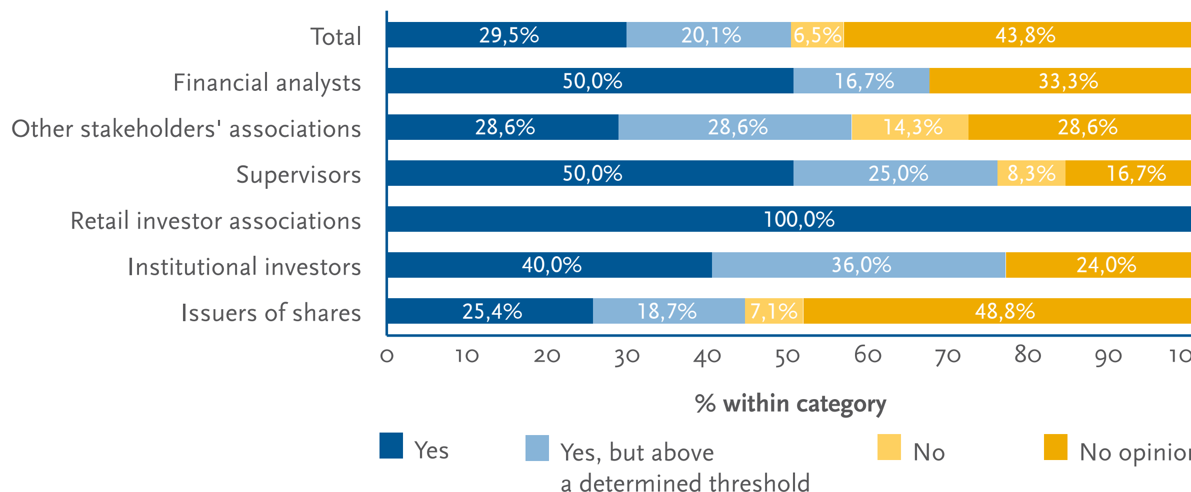
whereas it is not the stock lending per se which is wrong but rather the use of borrowed shares to vote; third, this option would only address empty voting based on stock lending and would thus be limited in scope.

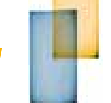
- A more radical system would be to ban empty voting altogether. In particular, voting with borrowed shares (or shares held under a temporary transfer agreement or pursuant to a scheme having a similar impact) could be prohibited. This would be the most consistent decision to be taken in view of the principles at stake.

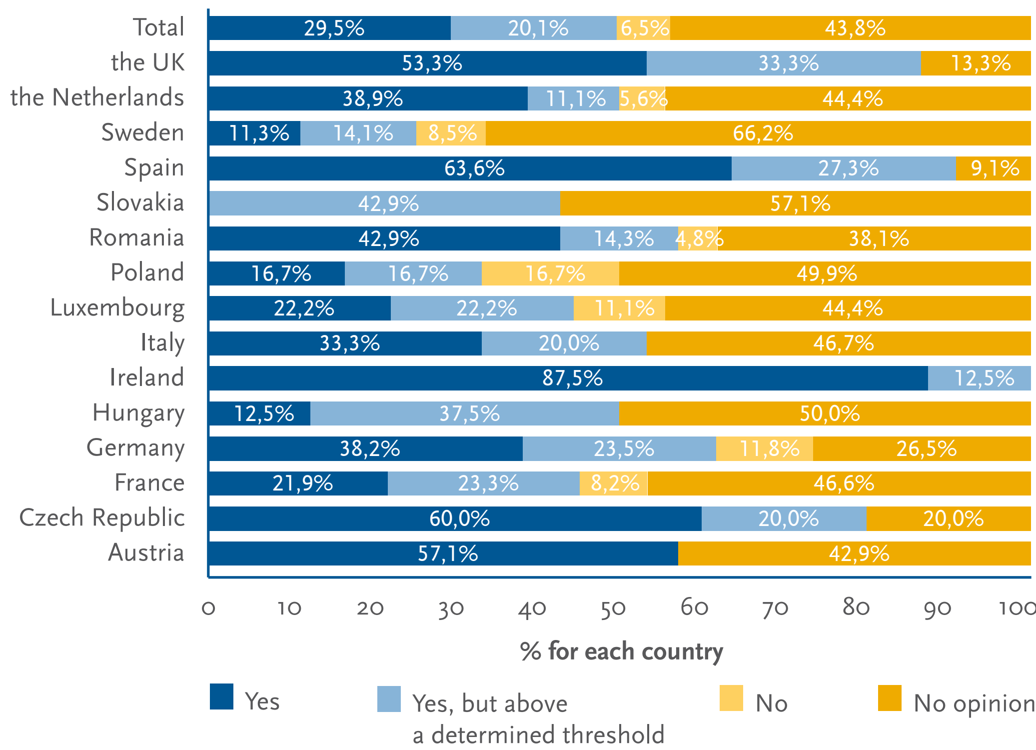
3.6.3 Cash settle derivatives and contracts for difference

3.6.3.1 Declaration of cash-settled equity swaps or cash-settled contracts

There is a clear majority (48.6%) in favour of including cash-settled equity swaps or cash-settled contracts for difference between the stakeholders that have expressed an opinion. Amongst those, a distinct minority believe that this is only necessary above a certain threshold. This option is favoured in Slovakia and Hungary, and in more relative terms in France and Sweden.







3.6.3.2 Legal operation issues

The issue of derivatives is addressed in the directive in the following article:

Article 13.1: *"The notification requirements laid down in Article 9 shall also apply to a natural person or legal entity who holds, directly or indirectly, financial instruments[18] that result in an entitlement to acquire, on such holder's own initiative*

18 Article 11.1 of the Directive 2007/14 laying down detailed rules for the implementation of certain provisions of the Transparency Directive has specified that "transferable securities, and options, futures, swaps, forward rate agreements and any other derivative contracts shall be considered to be financial instruments, provided that they result in an entitlement to acquire, on the holder's own initiative alone, under a formal agreement, shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market" and that "the instrument holder must enjoy, on maturity, either the unconditional right to acquire the underlying shares or the discretion as to his right to acquire such shares or not".

The Preamble of the Directive 2007/14 has specified that "For the purposes of Directive 2004/109/EC, financial instruments should be taken into account in the context of notifying major holdings, to the extent that such instruments give the holder an unconditional right to acquire the underlying shares or discretion as to whether to acquire the underlying shares or cash on maturity. Consequently, financial instruments should not be considered to include instruments entitling the holder to receive shares depending on the price of the underlying share reaching a certain level at a certain moment in time. Nor should they be considered to cover those instruments that allow the instrument issuer or a third party to give shares or cash to the instrument holder on maturity."

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alone, under a formal agreement[19], shares to which voting rights are attached, already issued, of an issuer whose shares are admitted to trading on a regulated market [20-21]."

Statistics provided by the Bank for International Settlements (BIS) show that derivative transactions remain at a very high level: in December 2008, the outstanding amounts of OTC equity-linked derivatives were equal to 6,498 billion USD. It should be noted, however, that statistical data are not precise enough to provide a quantitative analysis on how specific types of derivatives (such as cash-settled derivatives) may be used.

- **General issues regarding financial instruments**

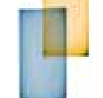
- Article 13.1 is not comprehensive
- Article 13.1 of the Directive leaves out a number of instruments and has thus only a limited impact on transparency. It does not take into account all types of financial instruments, without providing a clear view as to why some types of instruments have been included or excluded. The so-called "synthetic trading" is thus not fully captured.
- For instance, the following may be noted:
  - Financial instruments giving a right to shares to be issued are not included. However, when the exercise period is open, this information is valuable for the market. When an investor holds, for instance, a convertible bond, the relevant information for the market is whether this investor is entitled at any moment, or in the near future, to become a shareholder entitled to vote. In this respect, whether such shares already exist or will be issued upon exercise does not appear specifically relevant. In this respect, it may be noted that such instruments trigger notification requirements in the United States when the instrument is exercisable or may be exercised within the next 60 days. From a transparency standpoint, the US approach seems more consistent than the EU one.
  - In case conditions such as consent by a third party or achievement of a certain stock price that has to be fulfilled in order to exercise the derivative, the notification obligation does not apply. Such derivatives have to be notified only when the condition for exercise of the option is fulfilled. Information on these instruments may also be useful, however, in particular when the condition has been fulfilled.
  - As will be discussed in more details below, cash-settled derivatives are not included.
  - The Directive does not specify whether holdings of shares should be aggregated with holdings of financial instruments. Certain Member States have taken the view that Articles 9 and 10 on the one hand and Article 13 on the other hand should be applied in parallel, whereas other Member States require investors to aggregate the holdings of shares/voting rights with the holdings of qualifying financial instruments. As a result, when no aggregation is required, a shareholder may potentially hold 4.99% voting rights though shares and another 4.99% through financial instruments without any notification.

19 Article 11.1 of the Directive 2007/14 laying down detailed rules for the implementation of certain provisions of the Transparency Directive has specified that "a formal agreement means an agreement which is binding under the applicable law"

20 Article 11.3 of the Directive 2007/14 laying down detailed rules for the implementation of certain provisions of the Transparency Directive has specified that "the notification required shall include the following information: (a) the resulting situation in terms of voting rights; (b) if applicable, the chain of controlled undertakings through which financial instruments are effectively held; (c) the date on which the threshold was reached or crossed; (d) for instruments with an exercise period, an indication of the date or time period where shares will or can be acquired, if applicable; (e) date of maturity or expiration of the instrument; (f) identity of the holder; (g) name of the underlying issuer.

For the purposes of point (a), the percentage of voting rights shall be calculated by reference to the total number of voting rights and capital as last disclosed by the issuer under Article 15 of Directive 2004/109/EC."

21 Article 11.5 the Directive 2007/14 laying down detailed rules for the implementation of certain provisions of the Transparency Directive has specified that "the notification shall be made to the issuer of the underlying share and to the competent authority of the home Member States of such issuer" and that "if a financial instrument relates to more than one underlying share, a separate notification shall be made to each issuer of the underlying shares".



- **The impact of article 13.1 has been limited**

- As a result of the foregoing, and as has been represented to us during interviews, the overall impact of Article 13.1 on transparency, although useful for investment purposes, is not considered a decisive step forward. The more comprehensive rules adopted by some major markets (such as the United Kingdom) have a more significant impact. In this respect, article 13 provides for too little transparency.
- In particular, such notification requirements have not led to significant changes for investors. There have been no drastic changes of processes. Institutional investors need to monitor notification rules in all Member States in which they invest: these rules are much wider than those relating to financial instruments only and present a number of national specificities. The most significant issue for investors is not whether a specific rule has been added at the EU level but whether or not there is a higher degree of harmonization. The workload of dedicated teams is mostly impacted by two factors: the rules which are applied by the most significant markets, which affect the day-to-day notification work, and the diversity of the rules throughout the EU, which makes it more complex to follow up regulatory changes and to include all relevant rules in their IT systems.
- The most significant impact is felt in smaller jurisdictions for which such obligations are new, such as the Czech Republic.

- **Specific issues regarding cash-settled derivatives**

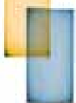
- Abusive use of cash-settled derivatives

Cash-settled derivatives have raised a number of comments following their use in various jurisdictions to avoid notification requirements. Examples of such use include Porsche / VW, Schaeffler / Continental, SGL Carbon / SKion, TCI / CSX, Laxey Partner / Implenia, Victory / Sulzer, Glencore International / Austral Coal and Fiat.

Typically, a scheme used to avoid notification requirements through the use of cash-settled derivatives could work as follows: An investor wishing to acquire, for instance, 25% of the voting shares of an issuer would enter into cash-settled derivative agreements with five financial intermediaries. As no physical delivery of the shares is provided for, the investor is not required to notify the crossing of a threshold to the supervisor. Each financial institution will typically hedge its position, which in itself is a standard and non-controversial practice. Hedging may be done through the acquisition of shares. If shares representing no more than 4.99% of the voting rights of the issuer are acquired, none of the five financial institutions will be subject to notification requirements. At maturity of the transaction, when the derivatives are settled, the investor will know that the five financial institutions have the relevant shares at hand. It will thus be possible to unwind the transaction in cash and, at the same time, to purchase the five blocks of shares. At the end of the day, without any prior information to the market, the investor will hold almost 25% of the shares of the issuer.

There are a variety of other ways to structure this type of transaction. They have been described both in academic literature and in widely disseminated economic and financial magazines; they are also taught at university.

- This new technique, which was not as widely used and known when the Directive was discussed and adopted, should thus be addressed.



- **If there is a wish to require notifications of cash-settled derivatives, four main issues should be considered**

The first one relates to aggregation of shares with derivatives: The most transparent system would be to provide for full aggregation: the number of shares corresponding to the derivatives is aggregated with the number of shares held by the same investor, as in the UK system. A less transparent system would be to provide for a separation of the two notification requirements: when a threshold is crossed in shares or in derivatives, a notification is required. The least transparent system would provide for information on cash-settled derivatives only when a threshold in shares is crossed, as in the French system. This system would however be misleading, as any further acquisition or disposal of derivatives would not be notified. If no update is required, the market would remain with stale information.

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

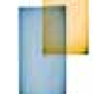
The third issue is how the equivalence between the cash-settled derivatives and the number of underlying shares should be established. In the United Kingdom, the computation is made on a "delta-adjusted" basis, which takes into account the potential variations in the hedging position. In France, the notional amount is used, which is simpler but leads to disclosure of a higher number of shares.

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

- **Another way to address cash-settled derivatives exists**

In the US, in a case involving the use of cash-settled derivatives to avoid notification requirement, it has been held that this conduct was fraudulent (CSX/TCI Case, see section 6.3 on non-EU jurisdictions). A way to address the issue would be to have a broad anti-fraud provision stating, in substance, that cash settled derivatives may not be used when the purpose or effect of such use is to avoid the applicable notification requirements. Under such provision, the Courts would be left with the task to decide, on a case by case basis, which conduct is acceptable or not. This may act as a potentially strong deterrent against sophisticated fraudulent practices but may not best serve the transparency requirements of the market.

It should be noted that Member States that have not introduced specific legislation regarding cash-settled derivatives have not been able to rely on general principles or fraud theories to curb practices such as described above. This is particularly the case in Germany where the Bafin, after a close investigation, did not find that Porsche or Schaeffler were in violation of their disclosure requirements. In contrast, specific rules have been introduced in the United Kingdom, after a detailed preparatory work made by the FSA. How the FSA came to introduce these rules is detailed below:



The FSA position on cash-settled derivatives

In its consultation paper CP07/20 on the subject, the FSA reached the view that the Directive was sufficiently clear about when such financial instruments were disclosable.

However, the purpose of the consultation was to consider the question of whether the regime as set out in the Directive was open to abuse and whether specific rules should be introduced to legislate for the potential loopholes. This resulted in the FSA revising the applicable rules to include cash settled contracts for difference (CFDs) and similar instruments in the obligation to notify interests.

The consultation focused on CFDs, specifically when they are cash settled. These instruments, the FSA considered, were not presently disclosable under the terms of the Directive (as implemented by UK rules) given that they do not constitute a legal right to acquire the underlying share.

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

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

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

In relation to the problem noted at 1. above, this resulted in the following potential harm to market transparency:

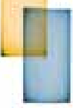
- The situation where a CFD, although intended to be cash settled, is in fact physically settled. By this route the person taking the derivative could instantly take ownership of a substantial percentage of the shares in the company with no disclosures having been made during the building of the stake. The ownership could potentially be as large as 10% if the issuer of the CFD has taken advantage of various exemptions when purchasing the underlying shares for hedging purposes. This also means that potential bidders for the company may be put off by the idea of competing with an unknown person who already has a substantial undisclosed interest, or toe-hold, in the company.
- The majority of issuers of CFDs claim that they do not exercise the votes attaching to the shares they hold for hedging purposes and, specifically, do not follow the instructions of those holding the relevant CFDs. However, there is widespread recognition that, where issuers have no real interest in the affairs of the company whose shares they hold, they can easily be influenced by the holder of the CFD.
- Even if the issuer of the CFD does not vote its hedged shares, this can take a large proportion of the votes out of the voting pool, effectively increasing the significance of other holders.

In relation to the problem noted at 2. above, the main issue is the cost in management time of investigating enquiries and demands from those who claim to hold an interest in the company to verify their equity with little information.

These arguments demonstrate the loopholes in relation to the Directive drafting as it relates to such instruments and convinced the FSA to introduce new rules requiring CFDs and similar instruments to be disclosed from 1 June 2009.

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

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



- The majority of issuers state that they do not vote shares which they hold in relation to hedge positions and do not allow themselves to be influenced in this regard by the holders of CFDs;
- Too much disclosure can cause problems for market participants in their understanding of the true position in relation to control of companies and can, therefore, harm transparency. Specifically the disclosure could lead to:
  - *confusion of the investor community as to who holds underlying interests and the motives behind acquisitions and disposals;*
  - *complex situations where the community tries to second guess potential shareholdings creating a false feeling of interest/disinterest in the market;*
  - *increasing volatility in the market; and*
  - *the additional costs associated with the extra disclosure burden.*

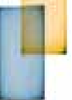
The FSA clearly saw the merit in many of these arguments. However, it was ultimately convinced by the view in the market that, whatever CFD issuers may imply about their practices, taking positions in CFDs is an effective and widespread method for building a stake in a company without the burden of disclosure.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

- **Whether cash-settled derivatives should fall within the scope of article 13.1 depends on an assessment of the following criteria**

- Whether it is acceptable to keep such a significant loophole in the notification regime provided by the Directive, in particular in view of Recital 18 which states that *"The public should be informed of changes to major holdings in issuers whose shares are traded on a regulated market situated in or operating within the Community. This information should enable investors to acquire or dispose of shares in full knowledge of the changes in voting structure; it should also enhance effective control of share issuers and overall market transparency of important capital movements"*.
- The question remains as to whether imposing disclosure would have an adverse impact on contestability of control and would outweigh the benefit of increased transparency. It has been argued, for instance, that during a takeover bid, the obligation to disclose interests in derivatives at an early stage could detrimentally increase the price of shares in the target company, rendering it unviable, and that if the target company is on notice, it may wish to defend the bid.

- **Our proposal for increased transparency**

Based on the magnitude of the loophole, which clearly goes against the very principles of the Directive and has permitted the development of improper conduct in several highly visible cases involving major companies, and in consideration of the position taken by the respondents to our questionnaire, we believe the loophole should be closed. For consistency purposes, a revised mechanism should address both cash-settled and physically-settled derivatives and any other future financial product leading to similar result in terms of transparency but excluding pure and exclusive traded cash-settled derivates.

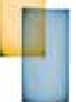


We believe the most appropriate system would be the following:

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

For instance, an investor holding a 4,5% interest through derivatives and a 4,5% interest in shares would not be subject to notification requirements (provided that the specific threshold for derivatives is set at 5%) but if the derivatives represent 5,5% and the shares 3%, a notification would be required.

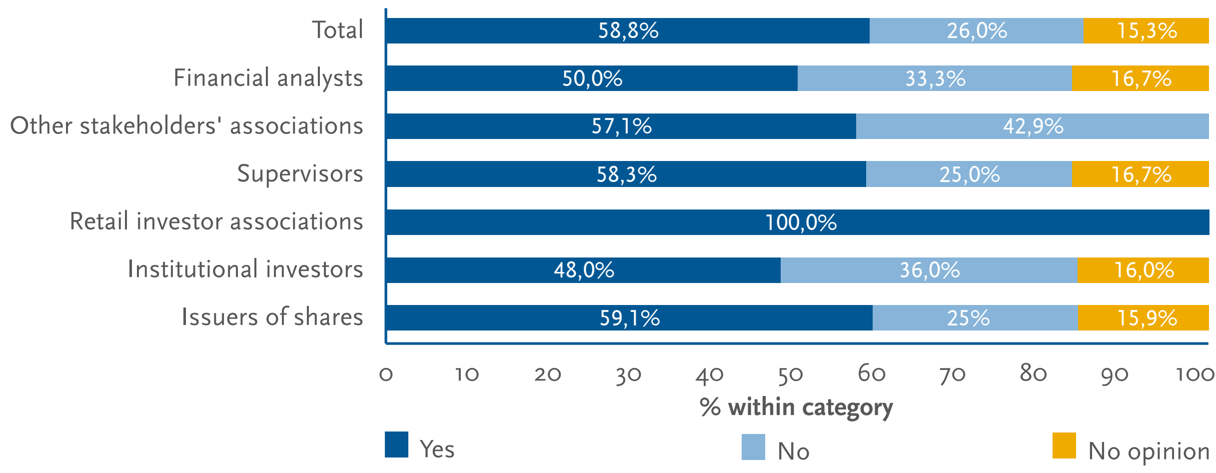
This solution has a lot in common with the one suggested by EMSE in its paper, “Views on the issue of transparency of holdings of cash-settled derivatives (see “How to learn more about the Transparency Directive”, section 5 of the Methodology Annex).



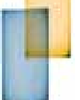
3.7 Significant holding and intention pursued

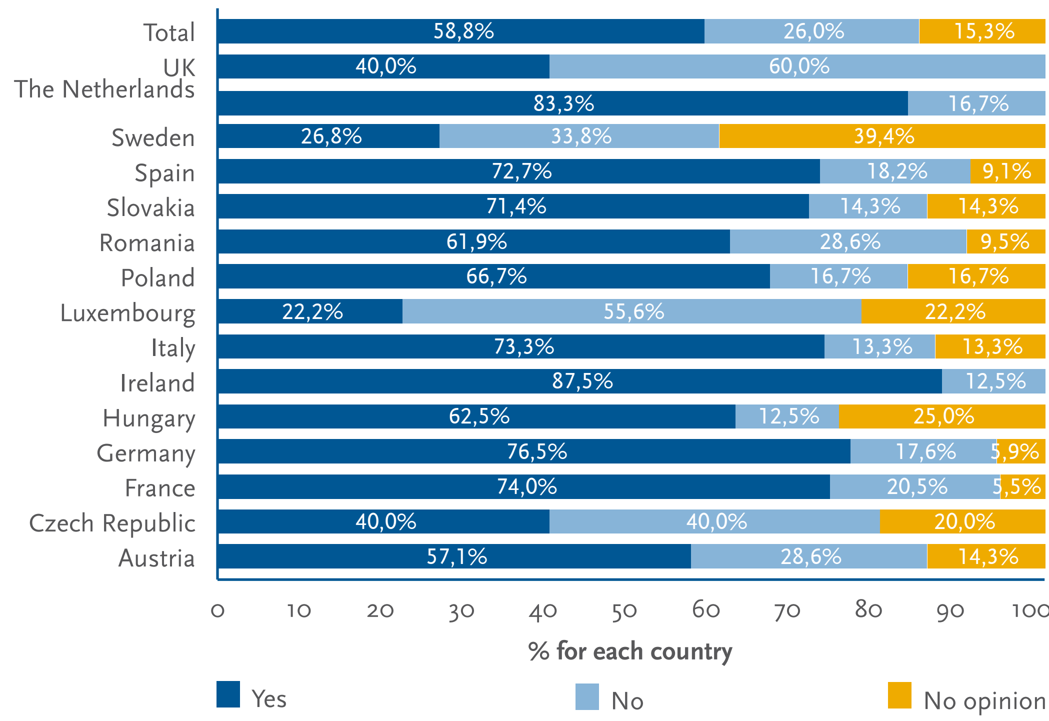
3.7.1 More detailed information for certain significant thresholds

A clear majority of stakeholders (58.6%) are in favour of the fact that investors acquiring certain significant holding (such as 10%, 15% or 20%) should be required to provide more detailed information on the intention pursued with the investment. Only Industry associations have mixed views.



This idea is strongly supported by stakeholders from Ireland, Germany, France, Spain, Italy, Hungary, Slovakia, Poland, Romania and Austria. A majority of stakeholders do not support the idea in the UK, Luxembourg and Sweden.





Almost all stakeholders interviewed considered that the declaration of intent was a good idea. Some said that if this provision is implemented it should be accompanied by a clear statement that declarations of intent should not be used by national authorities as a protectionist tool.

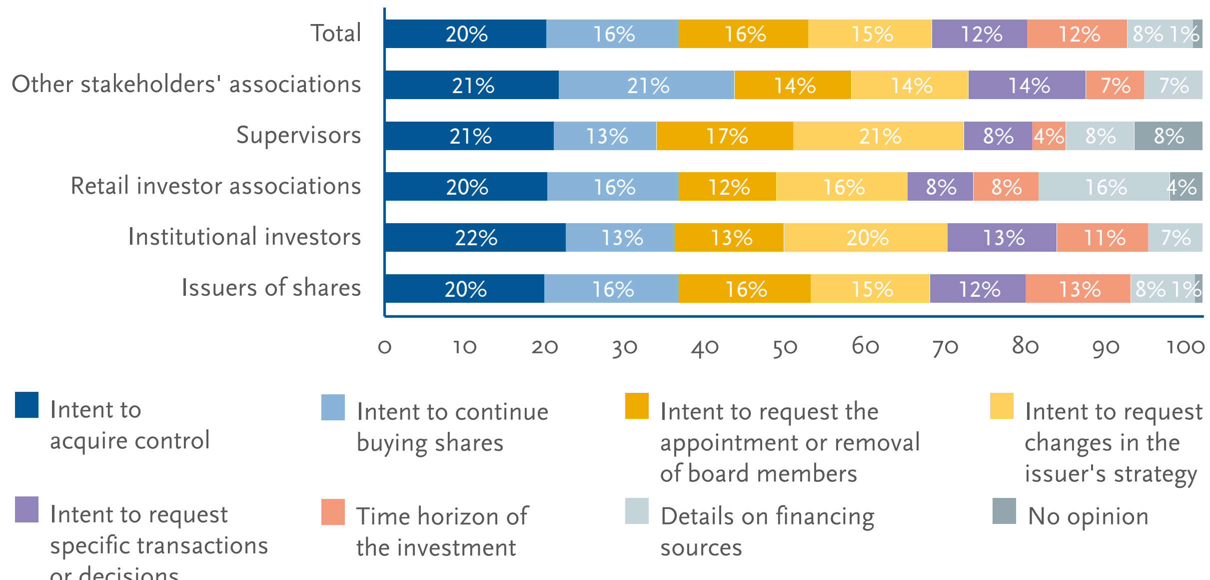
3.7.2 Type of information to be disclosed

Of the information that could be disclosed when acquiring certain significant thresholds, stakeholders favour the following (by order of priority):

- 1 - Intent to acquire control (20%)
- 2 - Intent to continue to buy shares (16.4%)
- 3 - Intent to request the appointment or the removal of Board members (15.8%)
- 4 - Intent to request changes in the issuers' strategy (15%)

- 5 - Time horizon of the investment (12.3%)
- 6 - Intent to request specific transactions or decisions (11.4%)
- 7 - Details on the financing sources (8.2%)

It can be noted that Supervisors and, to a lesser extent, Institutional Investors consider the "intent to request change of strategy" and the "intent to acquire control" to be equally important. For Retail Investors associations, the information on the "source of financing" is considered of high importance.



A reading of stakeholders' opinions per Member State does not show strong differences except that the "intent to change the Board composition" is viewed to be more important by stakeholders in Czech Republic, Hungary, the UK and Romania. The same is true for "changes of strategy" in the Czech Republic, Austria, the Netherlands, Hungary and Romania. Information on the "source of financing" is considered of higher importance by stakeholders in Luxembourg, Poland, Romania and Austria.

Interviews confirmed that declarations of intent are considered useful. Although these declarations may be worded in such a way as to preserve some flexibility for the declaring investor, it is generally acknowledged that they provide some valuable information. It is considered that the declaring investor must be reasonably serious in its declaration and consistent in its subsequent behaviour. This declaration is seen as important information for investment purposes, because they give an indication to existing shareholders on the likelihood of a take-overbid and, to non-existing shareholders, on the estimated future value of the company.

3.7.3 Legal aspects

It may be noted that it is on the basis of such an assessment that in France, pursuant to a long-standing regime, which has been tightened in 2009, enhanced disclosure is required when certain thresholds are met, i.e. 10%, 15%, 20% and 25%.

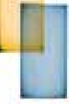
The information to be disclosed includes how the acquisition of the shareholding is being financed, guarantees given in this respect and the acquirer's planned strategy with regard to the issuer. The investor needs also to disclose whether the shares are held in full ownership or through stock lending.

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

This reform has been implemented in consideration of the need for enhanced transparency for large holdings and in view of a number of other legal systems, including the US disclosure system which requires filing of extensive information on Schedule 13 D when thresholds of 5% and each additional 1% are crossed.

In Germany, pursuant to the German Risk Limitation Act dated 27 June 2008, investors who are holding 10% or more of the voting rights in a company have to disclose the intentions they pursue with this investment within 20 trading days following their reaching or exceeding any threshold. In particular, they have now to provide information about (i) their strategic aims or expected commercial gains, (ii) envisaged further acquisition of voting rights within the next 12 months, (iii) intended influence on the nomination of the managing and supervisory boards of the issuer and (iv) any material changes to the capital structure of the company, namely with respect to equity and debt financing and dividend policy.

Based on the position taken by the respondents to the study, we recommend enhancing disclosure requirements for significant holdings. The applicable thresholds should be significant enough to be meaningful (for example 10% and 20%). Information could include a statement regarding the intent of the investor (regarding the potential acquisition of control, the intention to continue to buy shares, the intention to change the composition of the Board, the intention to change the strategy of the company), if possible, some information on the sources of finance and the time horizon of the investment, and the status of the investor (fully exposed to the economic risk of the shares or not).



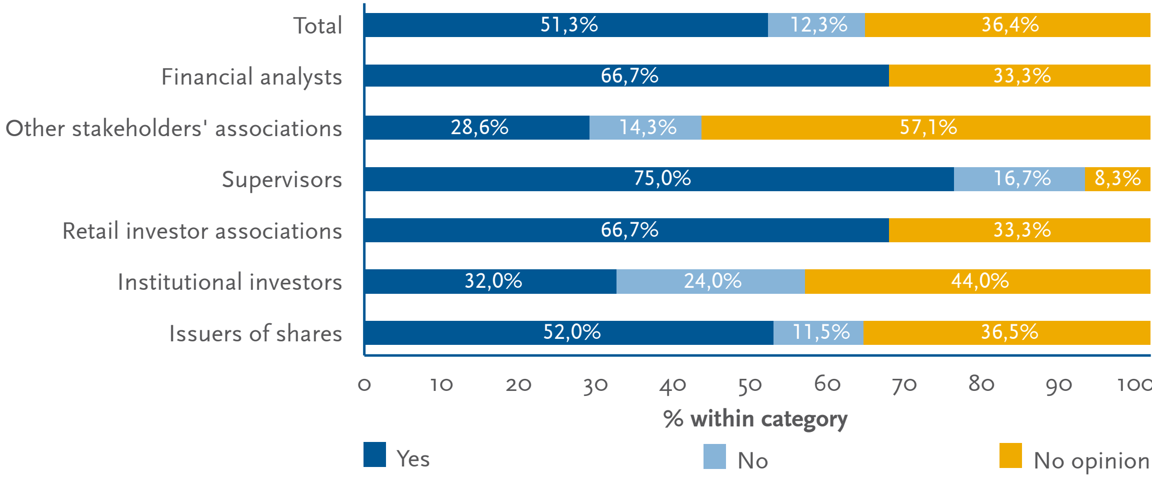
3.8 Practical notification

In addition to key issues on the content of the notification of the crossing of a threshold, specific practical issues regarding such notifications have been examined, in particular: the timing, the disclosure method and the notification forms. In all cases, full harmonisation across the EU is requested.

3.8.1 Timing for notification

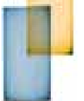
3.8.1.1 Timing of disclosure of the crossing of thresholds

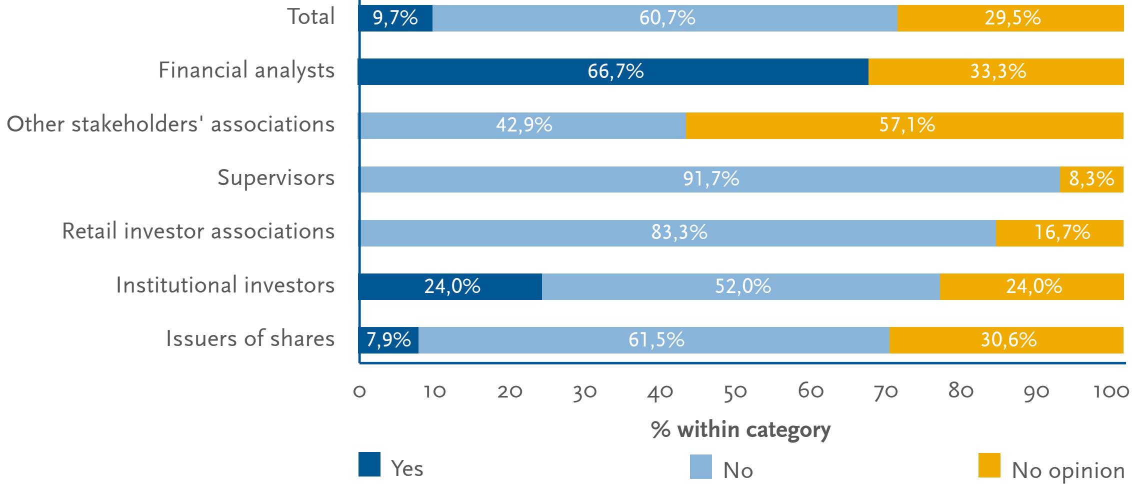
A majority of stakeholders (51.3%) considers the crossing of thresholds by investors is disclosed in due course. Amongst the Issuers of shares, the more convinced of a timely disclosure of the crossing of thresholds are the Top companies. This opinion is widely shared across the EU Member States except in Slovakia and, in more relative terms, in Luxembourg.



3.8.1.2 Shortening of the timing of disclosure

Except for the Financial Analysts, the general view (60.7%) is that the timing for disclosure of the crossing of thresholds should not be shortened.

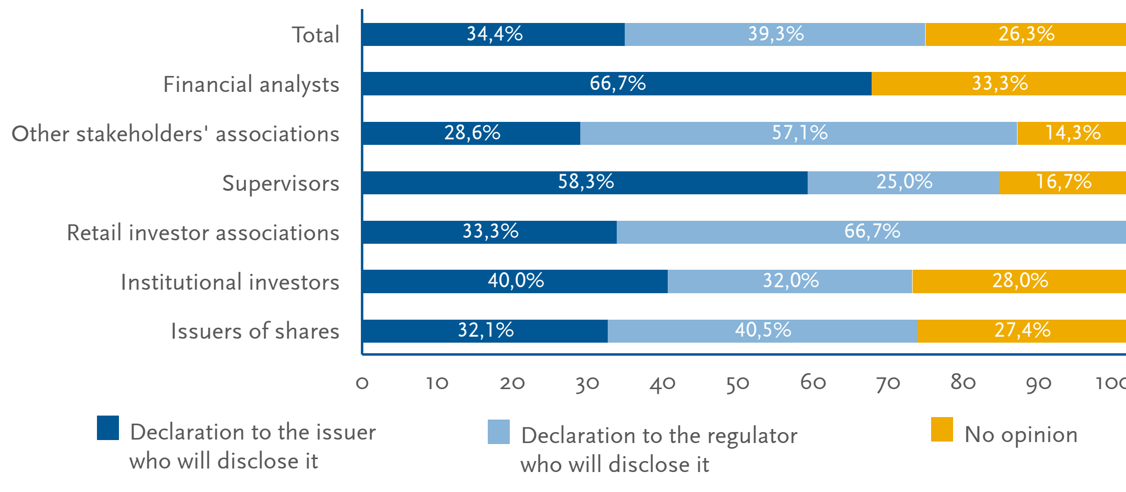




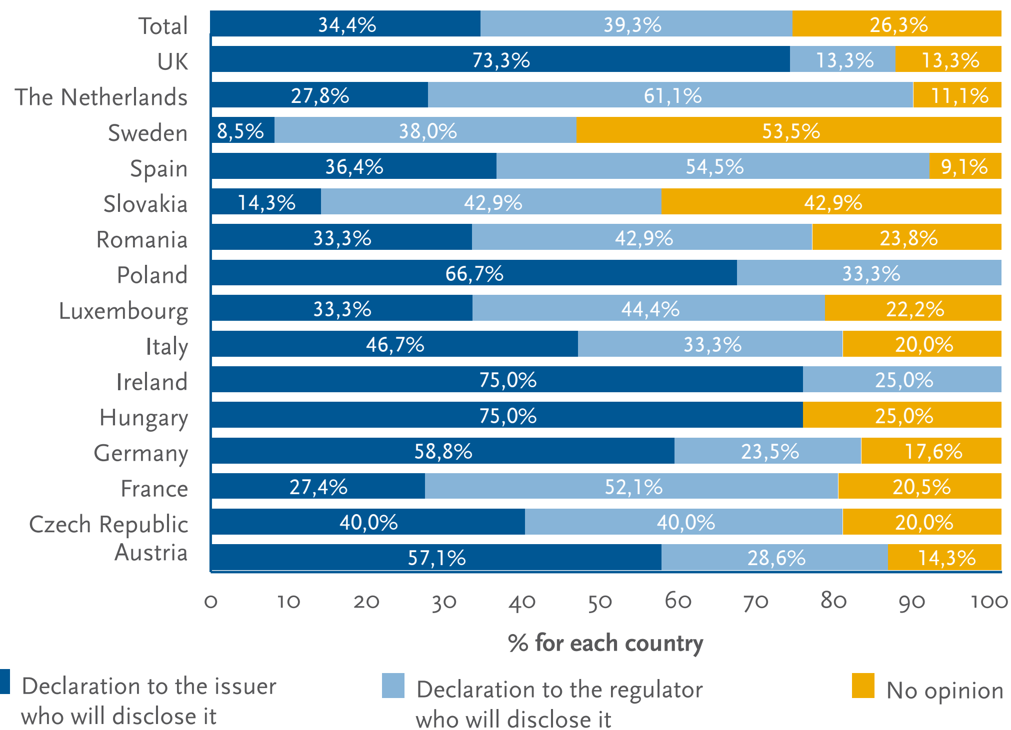
This view is also shared in all Member States except in Slovakia where a majority of the stakeholders who expressed an opinion are in favour of the shortening of the timing of notification. During interviews, the key concern expressed by investors was the need to have the same deadlines applicable across the EU.

3.8.2 Disclosure method

There is a split of views between the stakeholders on how the crossing of threshold should be disclosed. A small preference is expressed in favour of a system by which the investor declares the crossing of a threshold to the supervisor who will then disclose it to the public. This solution is favoured by Issuers but not by the Supervisors, who prefer that the declaration is made to the issuer who will then disclose it.

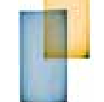


Declaration to the Issuers is favoured by stakeholders in Hungary, Ireland, the UK, Poland, Germany, Austria and Italy, whilst declaration to the supervisor is preferred by stakeholders in the Netherlands, Spain, France, Slovakia, Romania and Luxembourg.

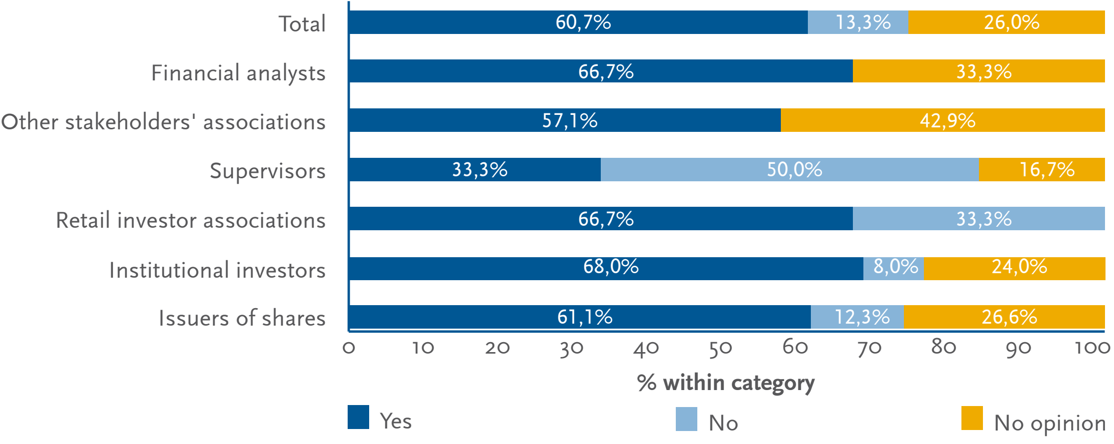


3.8.3 Standard Notification Form

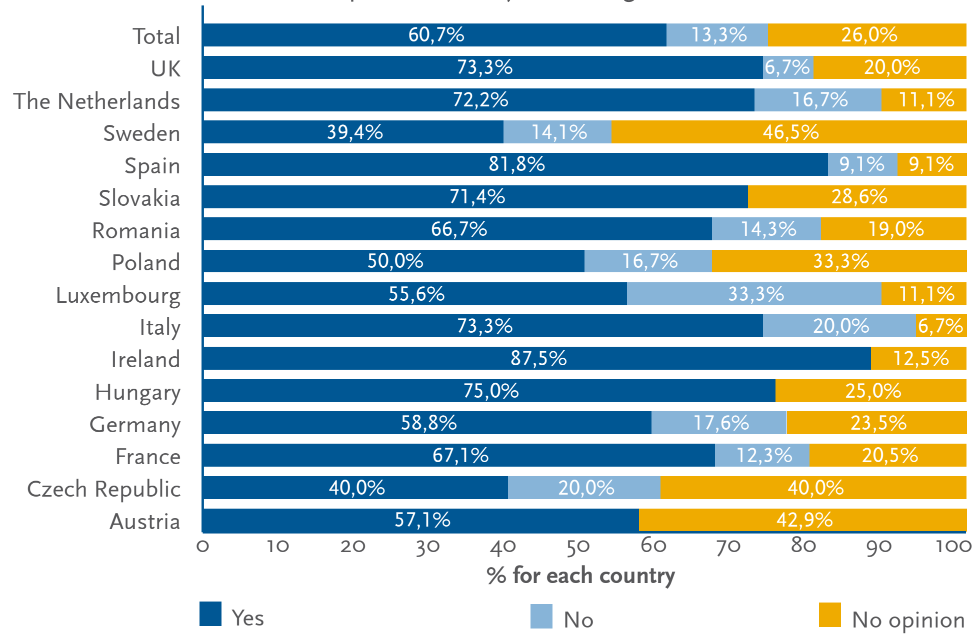
As a matter of simplification, the opinion of stakeholders was sought regarding maximum harmonisation of rules and Notification Forms. There is a clear support for such harmonisation and simplification.

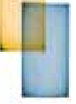


3.8.3.1 Possibility to have a single EU rule imposed for major holdings disclosure



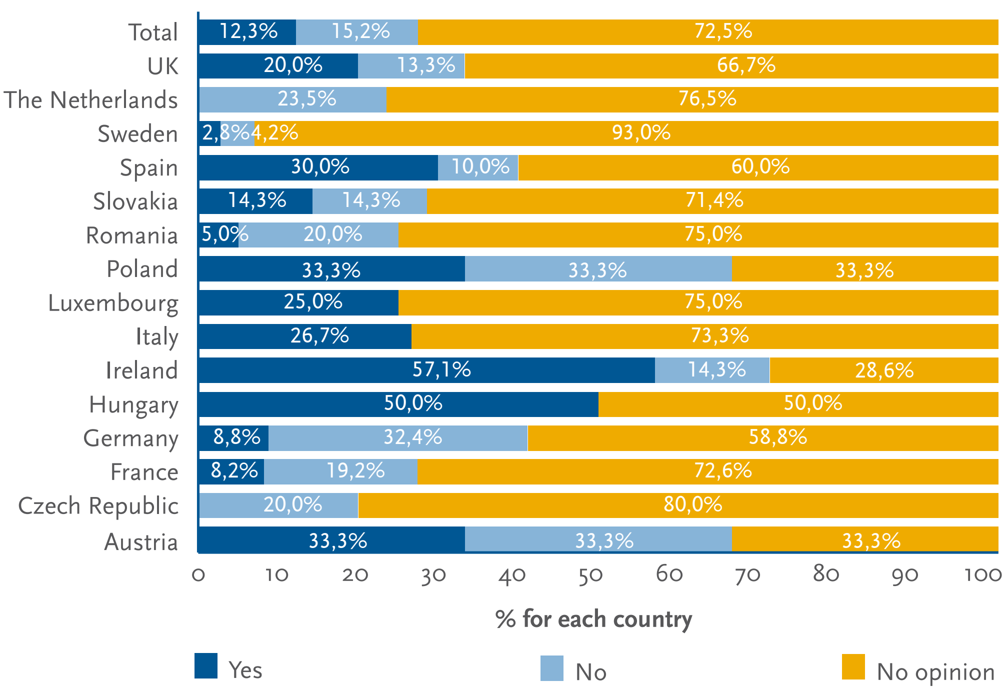
Consistent with the answers to the previous question, a clear majority (60.7%) of all categories of stakeholders but one, favour a single fully harmonised EU rule for the disclosure of major holdings. Only the supervisors are generally opposed to this harmonisation. This call for harmonisation is shared by stakeholders across all the Member States.

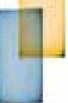




3.8.3.2 Use of Existing Standard Notification Forms

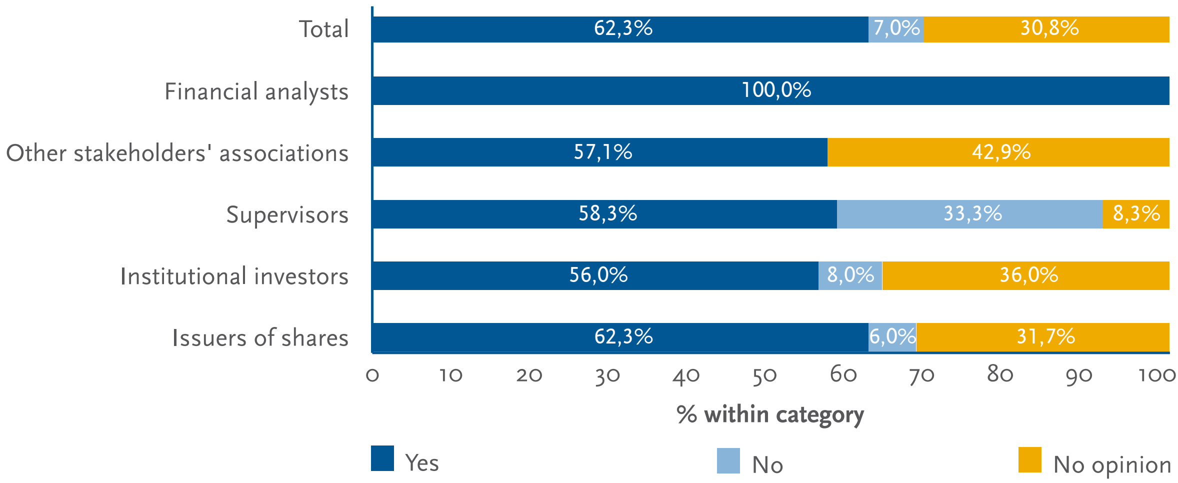
Existing Standard Notification Forms are apparently not widely used or known by Issuers and Institutional Investors; only 12.3% consider that they are widely used. Most supervisors think that these forms are not used. Member States where the Standard Forms seem to be known and used are Ireland, Hungary and, to a lesser extent, Italy, Poland, Spain and Austria.





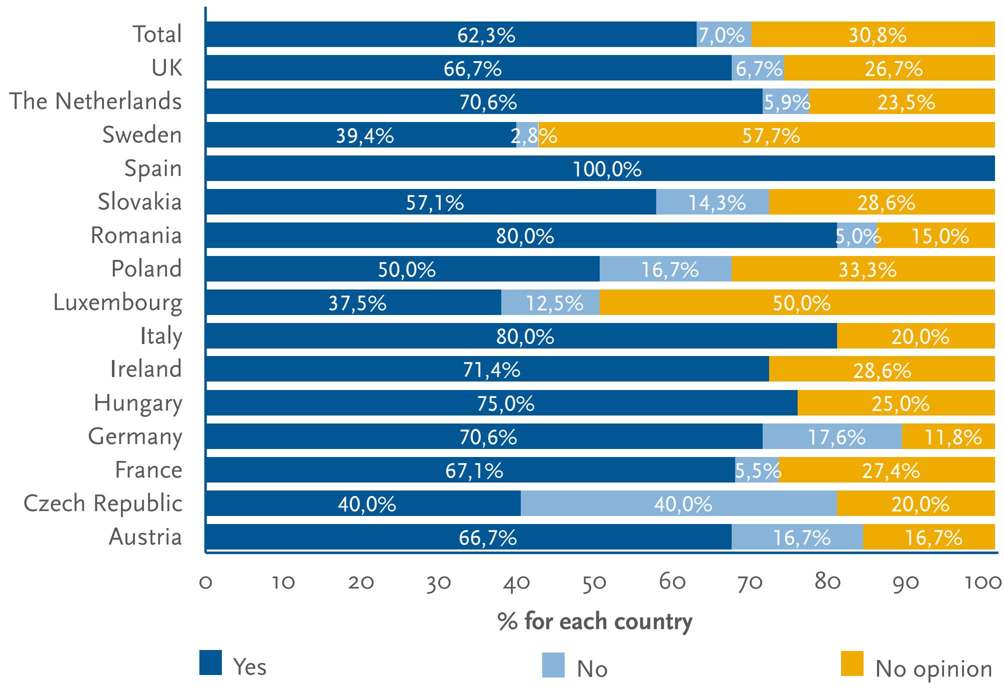
3.8.3.3 Suitability of common electronic Standard Notification Forms

Though not widely used, stakeholders think that a common Standard Notification Form would be appropriate. With some doubts expressed by the Supervisors, a clear majority of stakeholders (62.3%) favour the use of a common electronic Standard Form for the EU to notify crossing of thresholds.



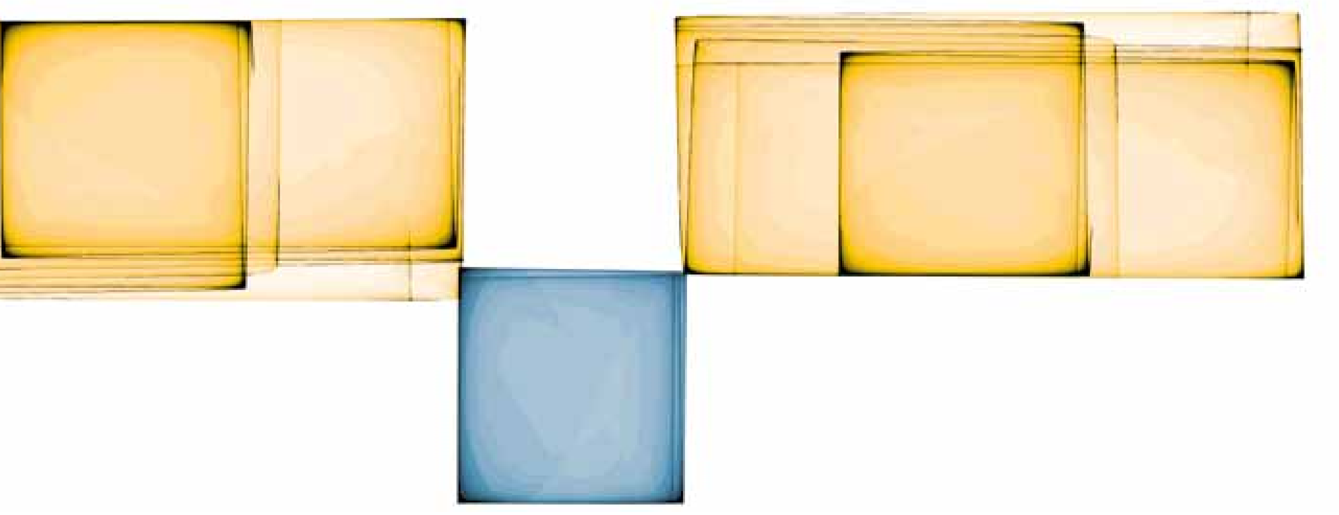
Except in the Czech Republic, where views are split, stakeholders in all the Member States support an electronic Standard Form.

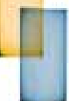
Breakdown by jurisdiction - Would it be appropriate to have a common electronic Standard Form for the European Union to notify the crossing of thresholds?



The idea of a common EU electronic Standard Notification Form to notify thresholds was strongly supported during interviews and many stated that the Form should be fully harmonised and mandatory. It was suggested that this e-Standard Form could be coupled with additional IT facilities. Indeed, if monthly declarations by issuers on the number of shares and voting rights as well as definition of competent authorities per issuers are centralised (or accessible), then the e-Standard Form could correct material calculation of thresholds errors and, once validated, send automatically the notification to the issuer and its relevant competent authority.

4. Dissemination and storage of regulated information





4.1 Key perceptions and implemention issues

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

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

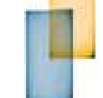
A heavily commented issue is the poor cross-border dissemination of regulated information by SMEs and the low interest shown by analysts and investors in those companies ("Black hole"). 72% of financial information users have no opinion on the impact of the Directive on better access to financial information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

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

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

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

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



In other words, two years after the introduction of the Directive, there would appear to still be no stable and consensual vision on the manner in which stored information may be accessed aon a national and EU level. No real cost benefit analysis taking into account the interests of all stakeholders has been conducted on the issue.

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

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

Possible improvements

As a result the following improvement may be suggested:

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

4.2 Key provisions of the Directive

The objective of the Directive regarding dissemination of financial information is to ensure that this information can be rapidly accessed by investors, on a non-discriminatory basis and at no cost by investors.

Information should be disseminated as publicly as possible throughout Europe and as simultaneously as possible in all countries. The Directive is neutral regarding the media used for effective dissemination but recognises that in addition such information may be published in newspapers. Indeed, currently, several Member States require some kind of paper-based dissemination.

In order for the Regulated Information disclosed by issuers to remain accessible to investors, the Directive requires that at least one mechanism for the central storage of Regulated Information be appointed in each EU Member State. In addition to filing to the regulator, issuers are required to file their Regulated Information to this mechanism. The information should be stored for 5 years. The Directive is neutral as to the nature of this national central mechanism. It can be a commercial entity, the Exchange or the regulator itself. Both scenarios exist in the EU. In addition, the Directive encourages the creation of an EU central storage mechanism that has not yet been established.

4.3 Dissemination of regulated information

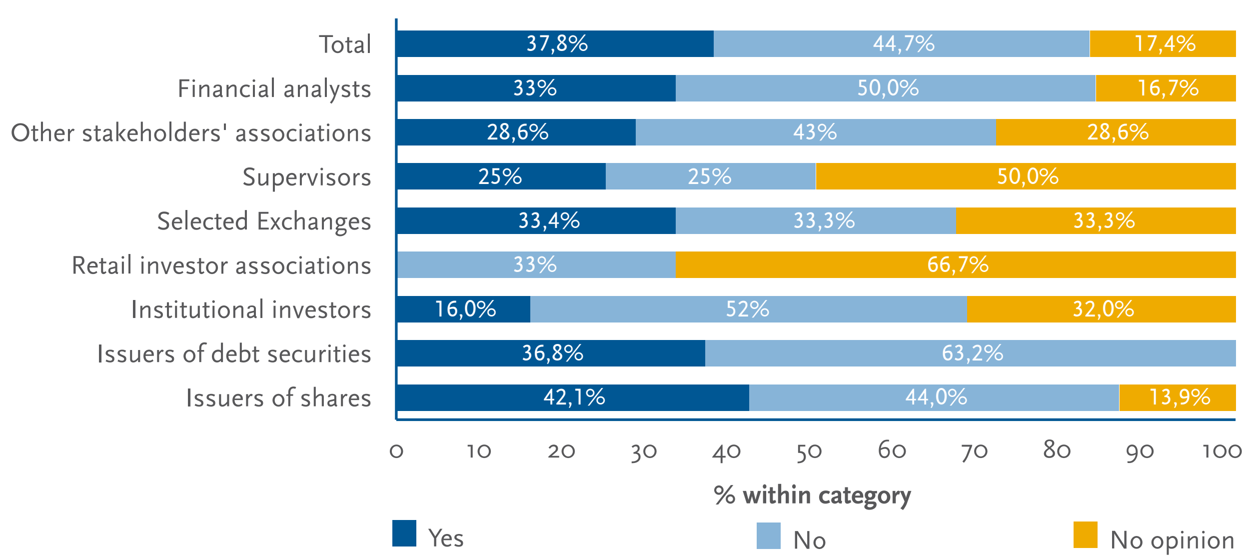
4.3.1 Means of dissemination

Even if practices are very diverse in Member States, the way companies comply with the obligation to disseminate their Regulation Information has not radically changed with the Directive. This view is expressed by stakeholders when asked about the impact of the Directive on dissemination. The way dissemination is carried out is also considered satisfactory by users of Financial Information. The role of Supervisors and/or Exchange in the dissemination of Regulated Information is changing and not stable.

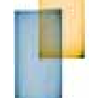
4.3.1.1 Impact of the Directive on the way is published Regulated information published

Views of stakeholders are mixed regarding the impact of the Directive on the way Regulated Information is published but, on balance, 45% say that the Directive has not changed their practices. That said, Exchanges clearly consider that the provisions of the Directive have changed the way information is disseminated. Issuers of debt securities do not signal a significant change.

Within the category of the Issuers of shares, on balance, Small companies and companies listed after 2004 are those who consider that the Directive has changed the way Regulated Information is published.



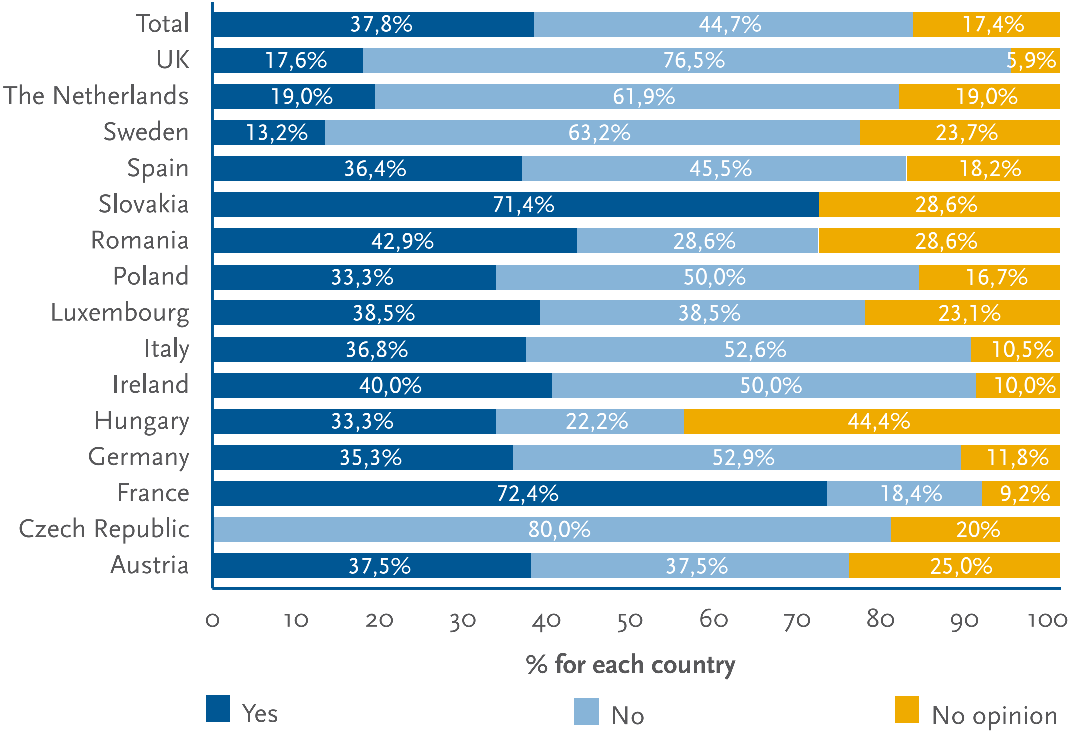
The only issues stressed by issuers during interviews is the national requirement in some Member States to publish (fully or partially) some of the Regulated Information in national newspapers. The merits of this requirement, left at



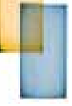
the discretion of Member State by the Directive, are not obvious for issuers. Modern technology being today more efficient to reach investors, the measure is more often perceived as a manner of ensuring revenues to the paper based press. During interviews, as regards the impact of technology developments that could favour the use of other means, SMEs expressed the view that posting of the information on the website should be sufficient to comply with the dissemination obligation of the Directive.

Views of stakeholders in the Member States also show very mixed opinions on the impact of the Directive on the way regulated information is published. It should be highlighted that significant change is felt in France, Slovakia and Romania.

Breakdown by jurisdiction - Has the entry into force of the Transparency Directive resulted in a change in the way the regulated information is published?

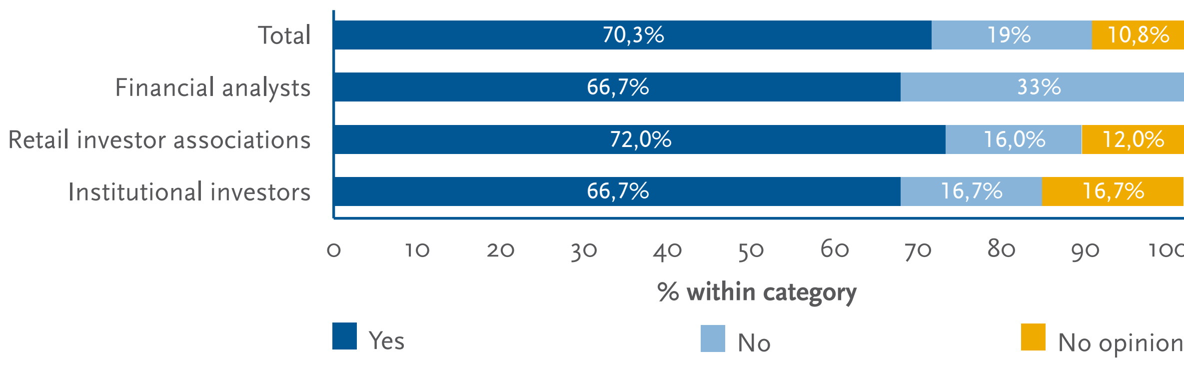


During interviews, a number of issuers suggested that the Internet should be used more widely to communicate with shareholders. For example, they would the support possibility for an issuer to send by e-mail the documentation necessary to hold a General Assembly.



4.3.1.2 Media used by issuers to disseminate financial information

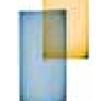
A clear majority (70%) of users of financial information consider that the media used by the issuers to disseminate financial information are satisfactory.

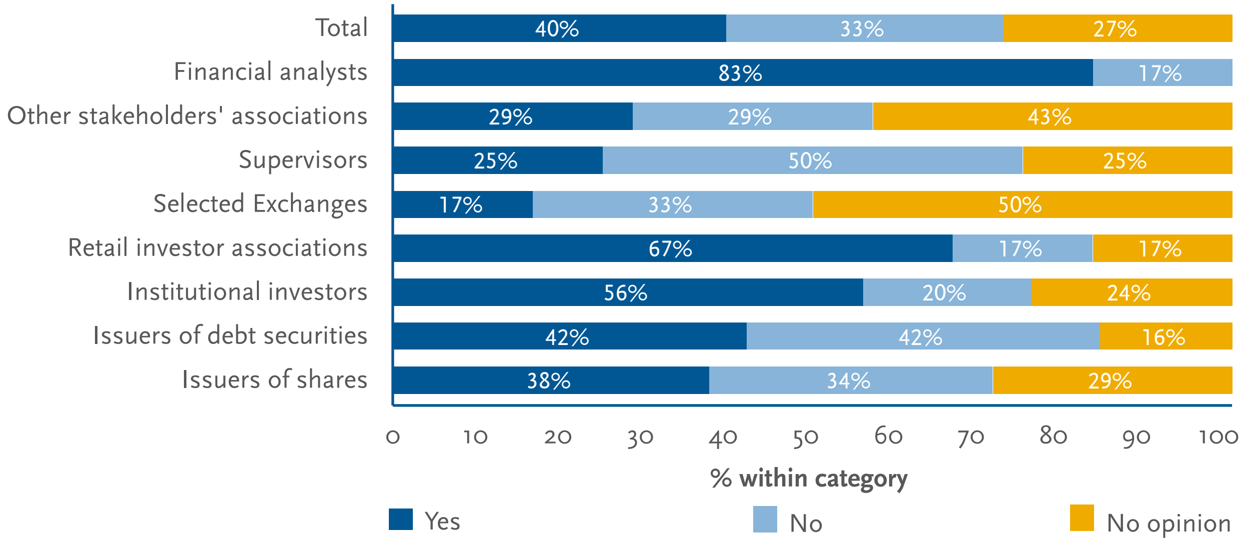


Stakeholders interviewed have even stressed the positive impact of the Directive in making the dissemination of information more professional and standardised.

4.3.1.3 Role of regulators in disseminating regulated information disclosed by issuers

The views of stakeholders on the role that regulators should play in the dissemination of financial information are very mixed (in particular amongst the issuers). On balance, only a small majority of them (40% *versus* 30%) believe that regulators should play a role. Strong supporters of this idea are the users of financial information (Financial Analysts, Retail and Institutional Investors). But a majority of Supervisors and Exchanges are against a role played by Supervisors in the dissemination of regulated information.





Stakeholders in Romania, Italy, Slovakia, Spain, the Netherlands and Hungary support an active role of Supervisors in the dissemination of Regulated Information published by issuers. Clear views to the contrary are expressed by stakeholders in Austria, Czech Republic, Germany, Ireland and Sweden.

Interviews with Supervisors clearly confirmed their reticence to play a role in disseminating Regulated Information: they considered themselves not to be ill equipped to spread information. Exchanges have expressed the same view but they are more prepared to play a role in giving access, or even storing, Regulated Information. However major exchanges have recently sold their specialised subsidiaries offering dissemination storing and “added value” information services (NYSE Euronext and Deutsche Börse). Both categories of stakeholders clearly prefer that the dissemination of Regulated Information be left to market forces.

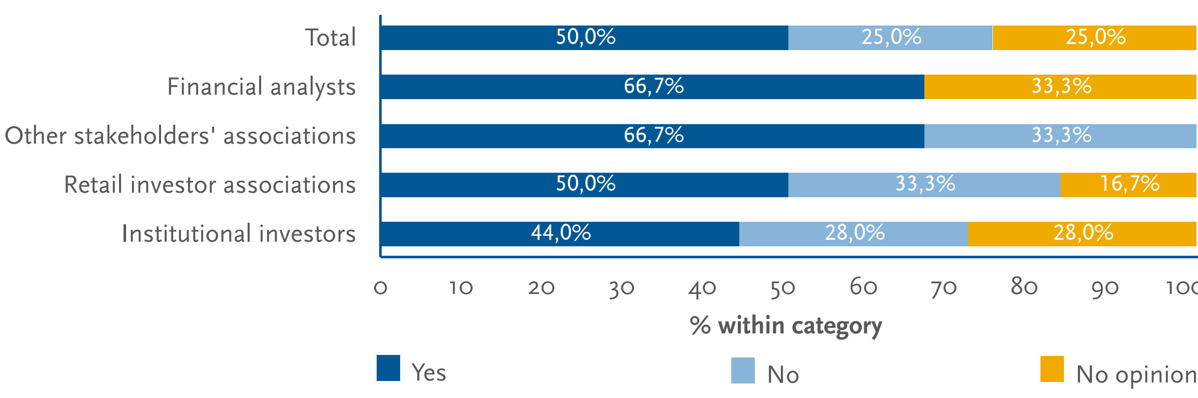
In practice, issuers continue to use data disseminators to ensure a wide dissemination of the regulated information. Some Member States have introduced a formal procedure to approve data disseminators and check their efficiency and integrity: (UK, Germany). Others have put in place electronic systems allowing issuers, with only one “click”, to send regulated information simultaneously to the Supervisor, the Exchange and a data disseminator that will spread it to the press: (Poland, Portugal and Spain). In Portugal and Spain the Supervisor acts as a disseminator. In Poland, the information is also automatically stored. But all in all, for the dissemination of regulated information, the means put in place for issuers to comply with the requirement of the Directive have not changed and have not induced new costs. Having said this, it has been clear in interviews that no enforcement by Supervisors of the obligation to publish on an “EU wide” basis is happening.

4.3.2 Access to information disclosed by issuers

Access to Regulated Information is considered easy and not captured by intermediaries. The Directive itself is considered positive in terms of impact on the quality of the financial research. The lack of progress in terms of cross-border access and increase of cross-border visibility for SMEs is the real weak point.

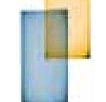
4.3.2.1 Access to financial information by investors

On a positive note, a majority (50%) of users of financial information state consider that the information disclosed by the issuers easily reaches both categories of investors (retail and institutional).

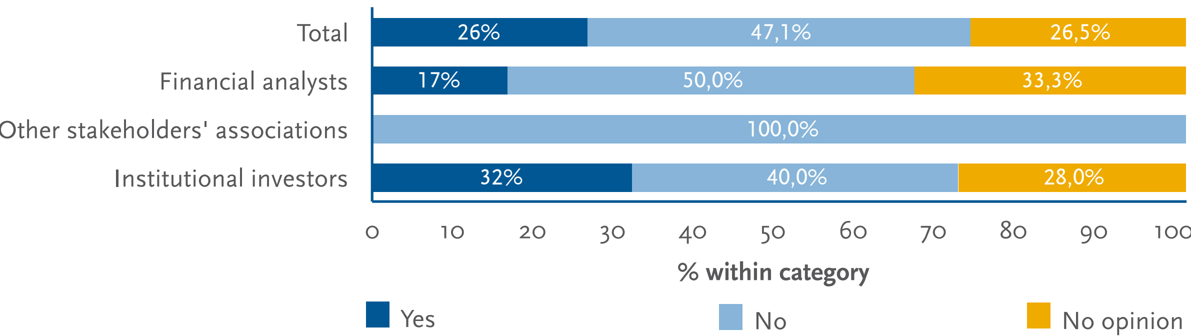


4.3.2.2 Access to financial information by intermediaries

In addition, most users of financial information do not believe that the financial information easily reaches only the intermediaries to their detriment.



Breakdown by category of stakeholders - Do you consider that the information easily reaches only the intermediaries?



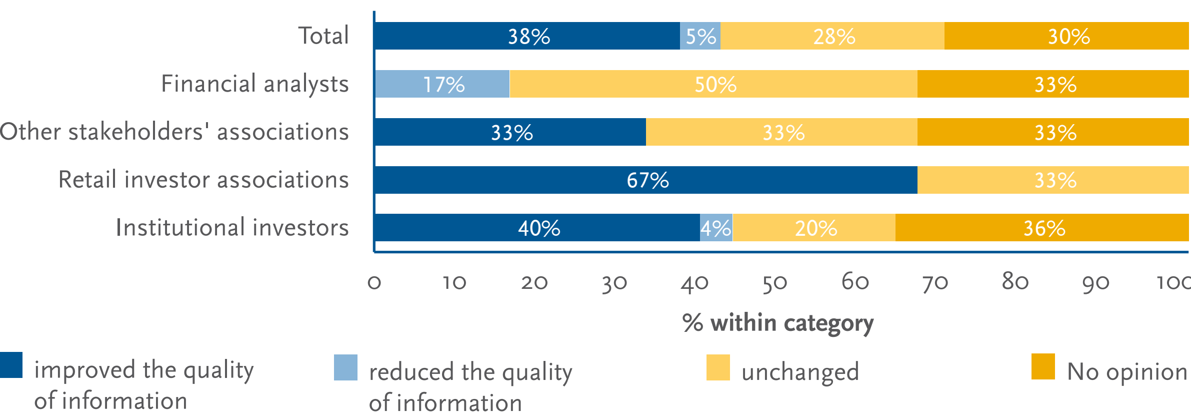
4.3.2.3 Retail investors and the information about the individual performance of a company

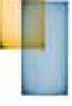
When following the performance of a company, Retail Investors indicate that they both directly search for information and use information published by intermediaries. Only 17% rely exclusively on intermediaries.

4.3.2.4 Impact of the Directive on the quality of financial research

A majority (66%) of users of information (Financial Analysts, Retail and Institutional Investors) believe that the Directive has improved or not changed the quality of information necessary to produce quality financial research. However, some Financial Analysts (17%) are of the opinion that the quality of this research has declined.

Breakdown by category of stakeholders - Regarding the financial information necessary to produce quality financial research, do you believe that the Transparency Directive has:





4.3.2.5 Access to financial information on a cross-border basis of mid and small caps

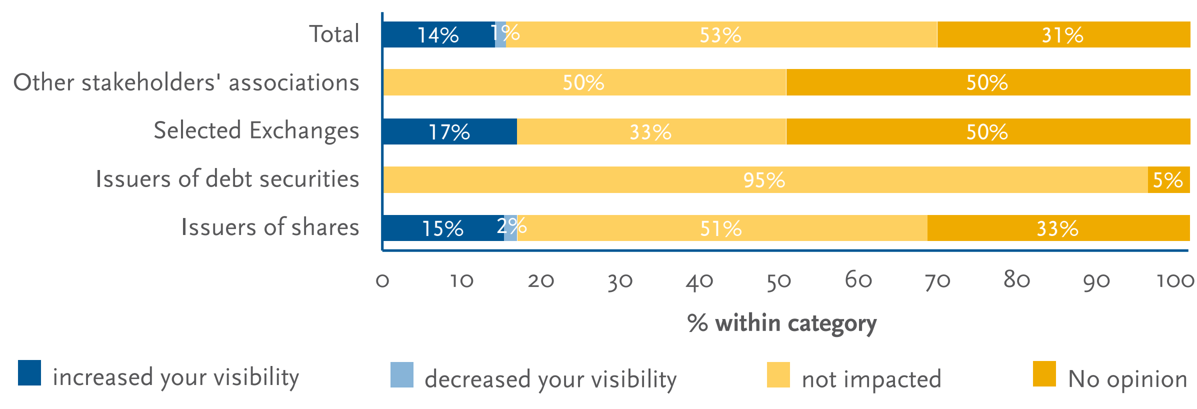
Users of financial information have not expressed a strong opinion on the impact of the Directive on the cross-border access to financial information published by Small and Midcaps. When they expressed an opinion, Institutional Investors believe that the Directive has facilitated access to such information. A positive opinion on cross-border access to financial information published by Small and Midcaps is expressed in particular by stakeholders in Sweden, Ireland, France and the Netherlands.

The issue on which stakeholders commented most was the lack of cross-border visibility of SMEs. During interviews, Top Companies did not believe that the "black hole" exists. The same opinion was given by Small and Midcaps that have a heavy "national based" and very concentrated shareholdership. Having said this, long-standing listed SMEs complained about the lack of interest by foreign investors. Investors and Analysts are considered to concentrate only on Top companies. It is widely held that the solution is neither in the law nor in the rules. Only the market players' behaviour can change the "black hole" problem.

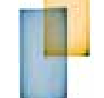
But market players seem to be in a "catch 22" situation: SMEs regret the low level of cross-border interest of Analysts and Investors and therefore are reluctant to spend money to ensure wider dissemination (translation into English in particular). On their side, analysts and investors believe that they do not receive sufficient information from non domestic SMEs, and therefore are reluctant to invest in those companies.

4.3.2.6 Impact of the dissemination provisions of the Directive on the cross-border visibility of listed companies

Generally speaking, issuers of shares have no opinion (33%) or believe that the Directive has not impacted (51%) on their cross-border visibility. Only recently listed companies feel that the directive has increased their visibility.



Member States where stakeholders have particularly felt that their cross-border visibility has improved are Austria, Hungary, Romania and Slovakia. In the Czech Republic, among the stakeholders that believe that the Directive had an impact on their cross-border visibility, all maintain that the impact was negative and that the Directive decreased their visibility.



4.4 Storage of regulated information

The relevance of storing regulated information is confirmed by stakeholders. They also agree with the content and the storage period required by the Directive.

4.4.1 Relevance of the stored information

4.4.1.1 Relevance of the historical information stored

According to the on-line questionnaire investigation, 85% of stakeholders believe that having access to stored historical information disclosed by issuers is useful. This is true for all categories of stakeholders across all Member States.

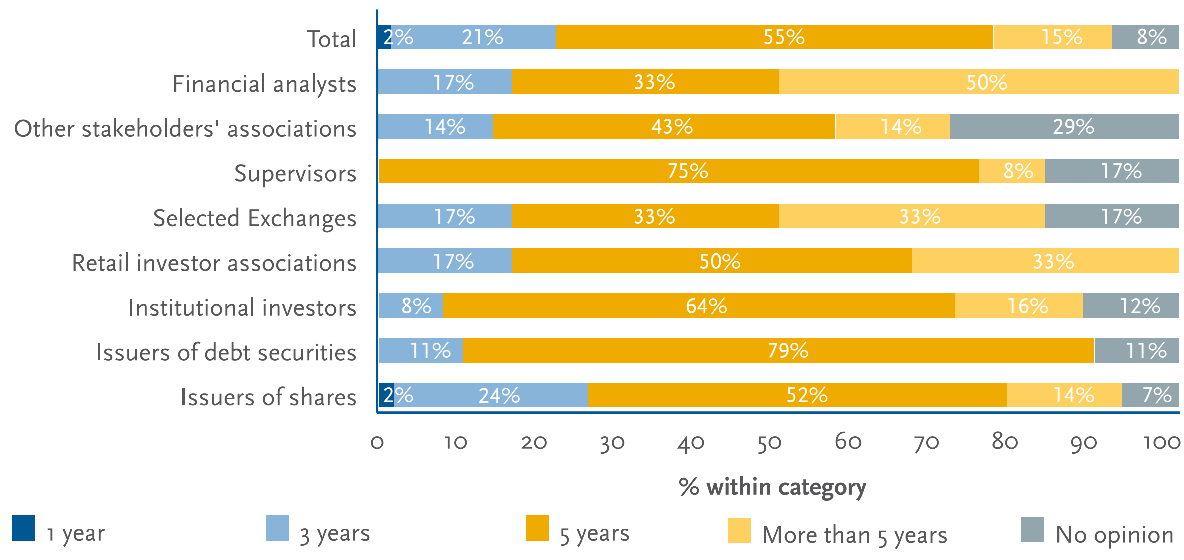
During interviews, the stakeholders in favour of the storage of financial information insisted on the need to ensure continuity and comparability over time. They also mentioned that storage of information is not costly and therefore more information should be stored beyond Regulated Information (By Laws, minutes of General Meeting, Corporate Governance documents, etc.). Stakeholders against a storage requirement hold that the storage of historical financial information is meaningless because they consider that investors are much more interested in prospective information.

4.4.1.2 Content of the historical information stored

A majority of stakeholders (50%) are of the opinion that the information stored should include: annual reports, half-yearly reports, quarterly reports and price sensitive press releases. This means that the provisions of the Directive coincide with the opinion of the majority of the stakeholders.

4.4.1.3 Storage of information period

Here again, the provision of the Directive reflects the general view as a majority of stakeholders (55%) believe that Regulated Information should be stored for 5 years. This opinion is widely expressed in all Member States with the exception of Slovakia, where a shorter period is also supported.

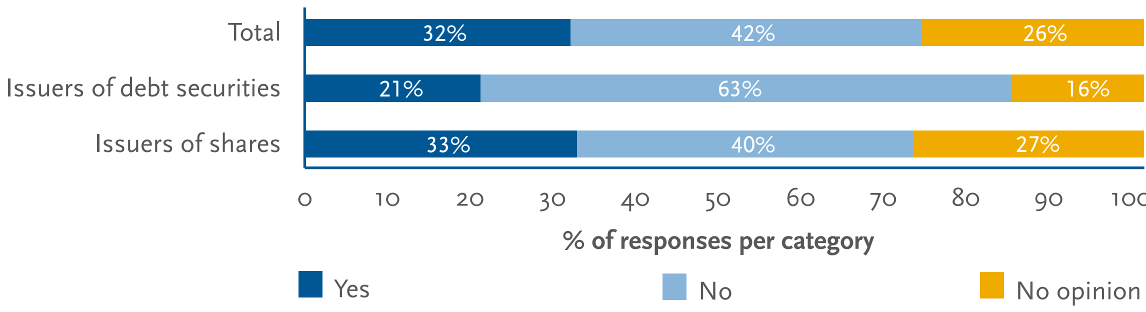


4.4.2 Storage practices

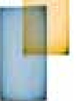
The provisions of the Directive regarding the storage of the Regulated information have not led to a stable storage system in the EU. Stakeholders have mixed views on their impact and no strong opinion on its efficiency at national level.

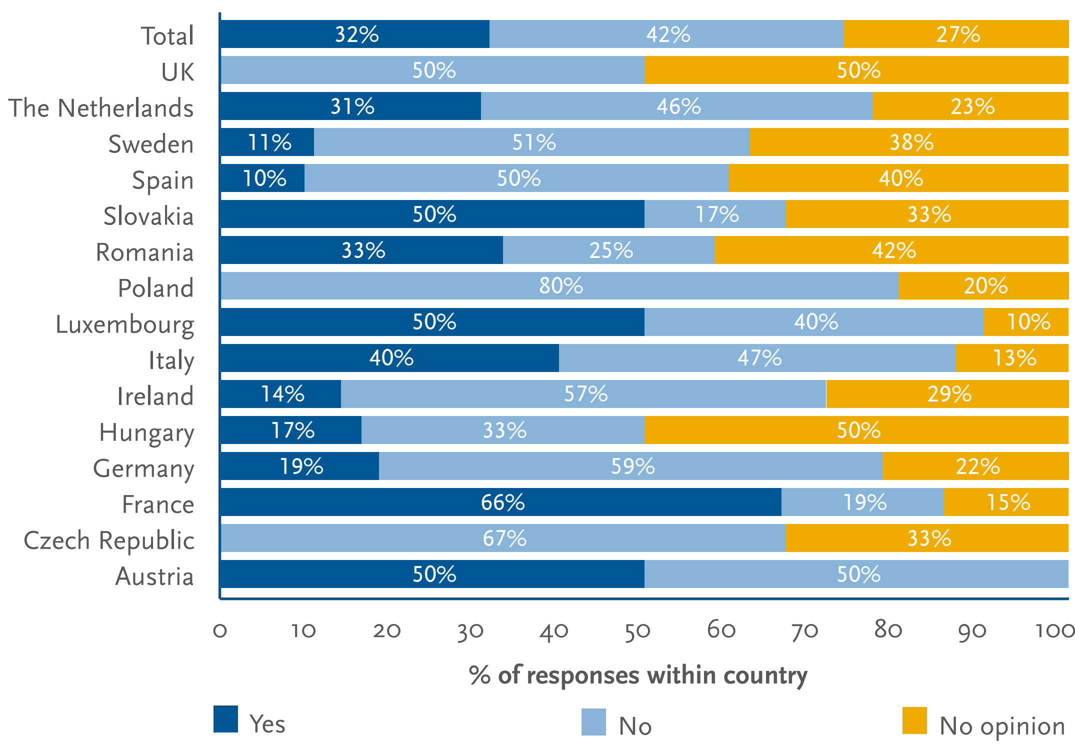
4.4.2.1 Impact of the Directive on the storage of information practice

A relative majority (40%) of issuers believe that the Directive has not changed the way in which they store information. This opinion is more mixed for issuers of shares and in particular Midcaps and small companies.



In the majority of Member States, stakeholders believe that the Directive has not changed their storage practice with the clear exception of France, Luxembourg, Slovakia and Austria.



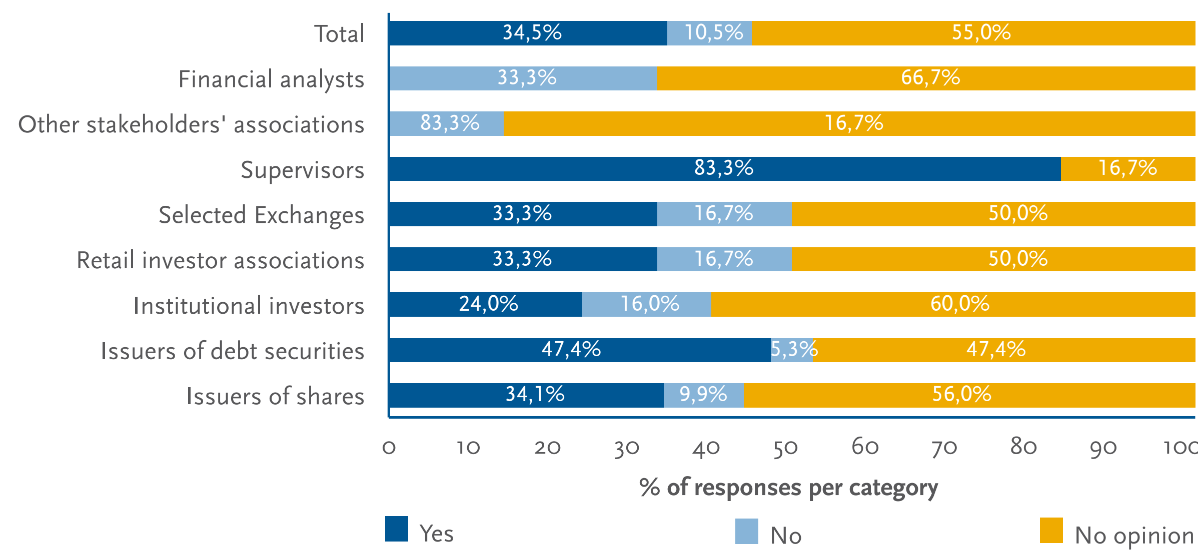


During the interviews, a number of stakeholders favouring a central access point to stored information expressed regrets that Supervisors or Exchange have abandoned their previous storage role.

4.4.2.2 Effectiveness of the system of national independent storage mechanisms

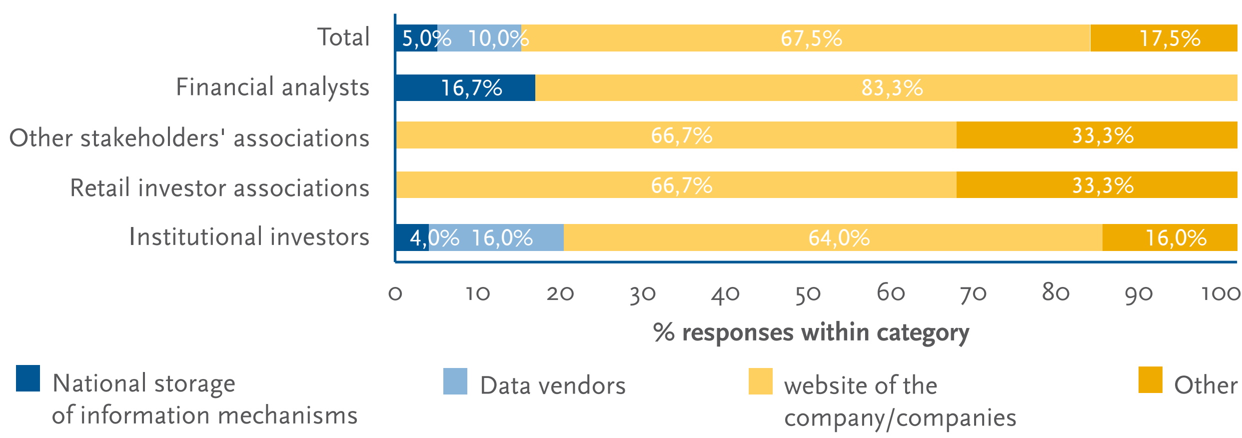
Stakeholders have not expressed a strong opinion on the efficiency of the national independent storage mechanism. However, when they expressed one, this opinion is clearly positive (in particular for Issuers of debt securities and Issuers of shares).

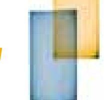
This positive opinion on the efficiency of the national independent mechanisms to store regulated information is expressed in all Member States (to a lesser extent in Germany).



4.4.3 Access to relevant stored information

4.4.3.1 Primary source of information about a specific company



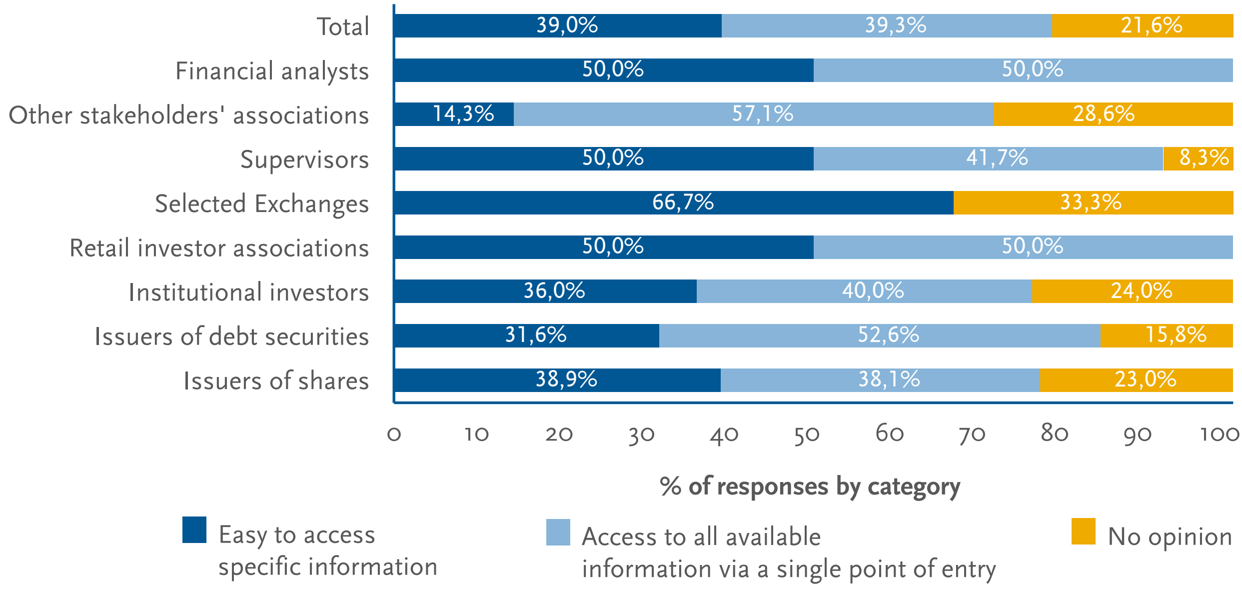


When asked which primary source of information about a specific company they use, 68% of users of financial information indicated the website of companies. When asked to specify what other sources of information are used, users of financial information mention the websites of Exchanges, intermediaries or the Annual Report of the company. It should be noted that only 5% of users of financial information use the national storage mechanism to search for information on a specific company.

4.4.3.2 Kind of access to information for investment decision

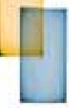
Stakeholders do not express a preference in terms of access to information, probably because their preference is to have multiple access to information. This seems particularly to be the case for users of financial information (Financial Analysts, Retail and Institutional Investors).

Breakdown by category of stakeholders - On an EU basis, what do you believe would be more beneficial to an investment decision?



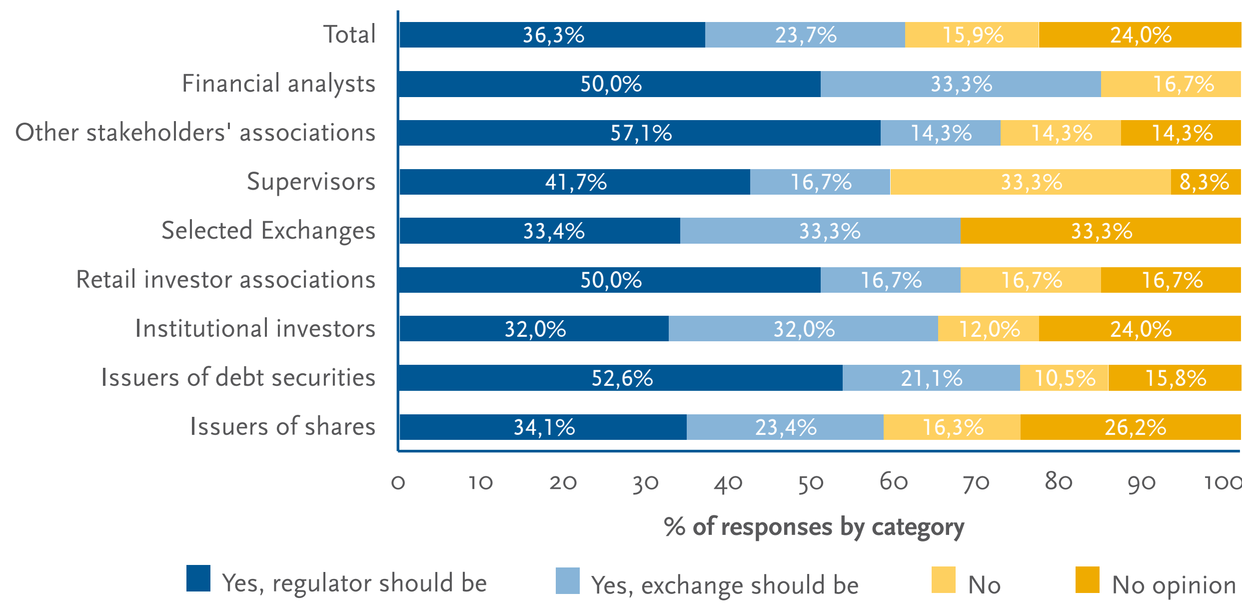
4.4.3.3 Investor trust

Having said this, it should be added that 42% of Retail and Institutional Investors trust the information accessible though an Officially Appointed Mechanism more than the website of an issuer.

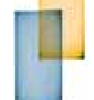


4.4.3.4 The role of regulators or exchanges as a central point of access for stored information

60% of stakeholders believe that Supervisors or Exchanges should be a central access point for stored information but stakeholders have mixed views on whom between the Supervisors or the Exchange should play that role. That said, a preference is expressed in favour of Supervisors acting as a central point of access to stored information (36% against 24%), in particular by the Top and Recently listed companies.

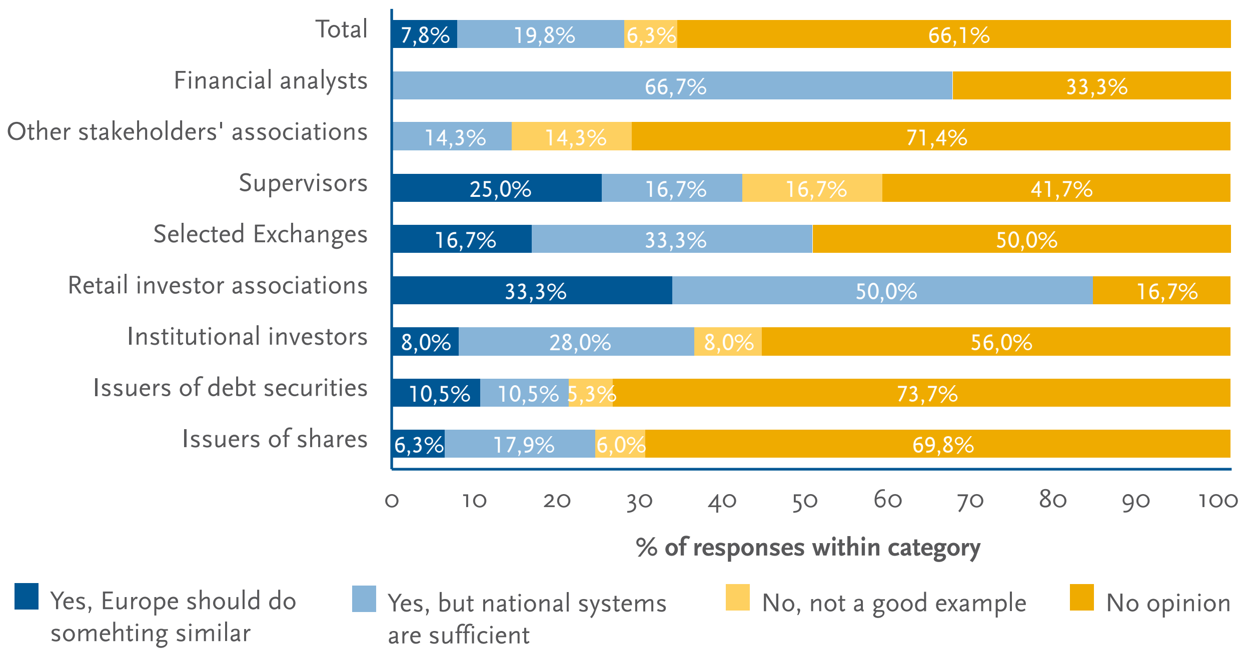


The preference in favour of Supervisors acting as a central point of access to stored information is expressed by stakeholders in Slovakia, Italy, Spain, France and the Netherlands. Views more in favour of Exchanges playing that central role are expressed in Ireland, Luxembourg, Romania and Sweden.

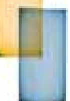


4.4.3.5 The example of the US storage system (EDGAR)

The US storage mechanism (EDGAR) does not seem to be well known in Europe. Users of financial information (Financial Analysts, Retail and Institutional Investors) are more familiar with EDGAR and, when they expressed an opinion, they favour the creation of a similar system in the EU. A majority of Supervisors having expressed an opinion believe that the national storage mechanism is sufficient.

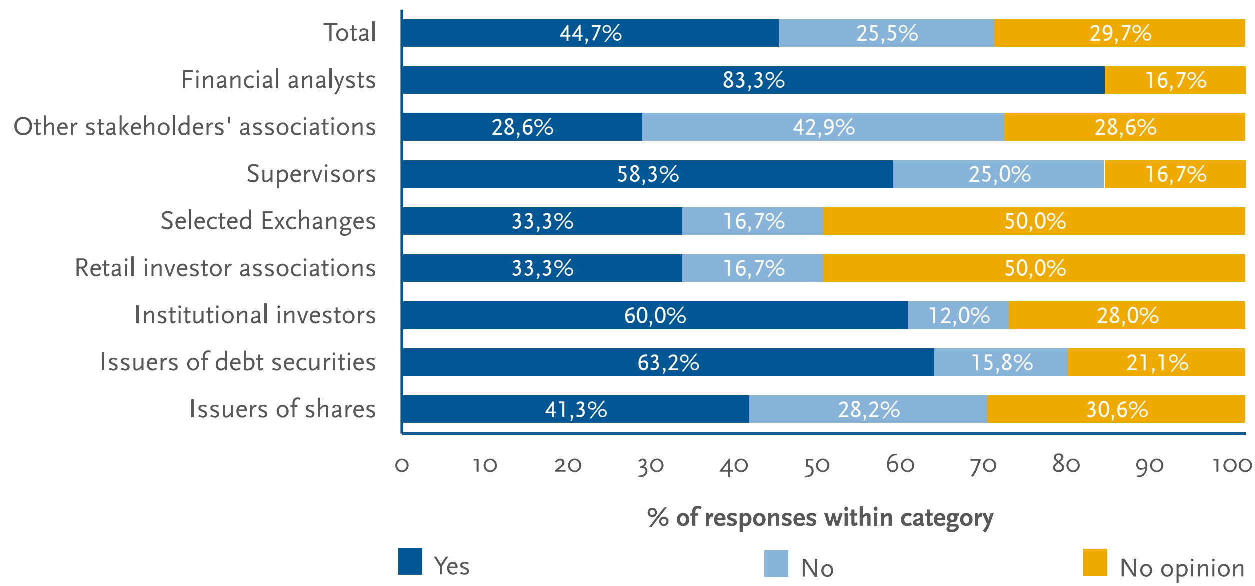


Within Issuers of shares, Top and Recently listed companies are the most supportive of the creation of a system similar to EDGAR in the EU.

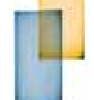


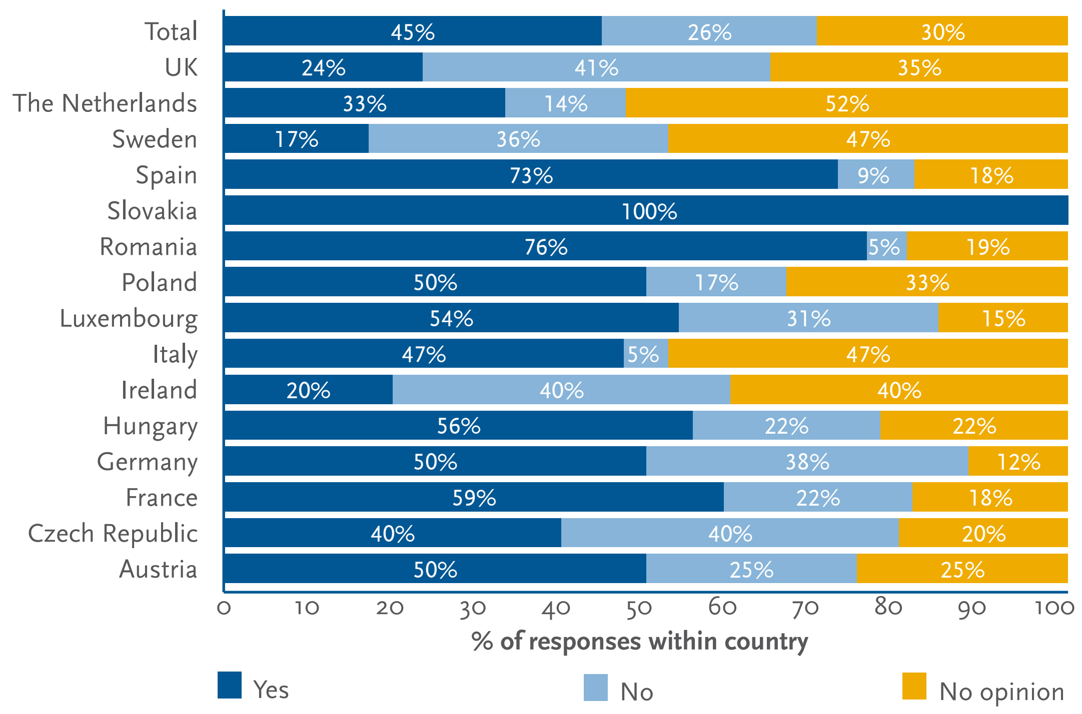
4.4.3.6 Relevance of an EU central storage mechanism

Generally speaking, stakeholders believe that it would be preferable to have a centrally maintained EU system to store regulated information (63% of those who have expressed an opinion). Only industry associations are against it. The most supportive of this idea are the users of financial information (Financial Analysts, Supervisors, Retail and Institutional Investors). A majority of issuers (41%) of shares are in favour of an EU central storage mechanism, in particular recently listed companies (48%).



An EU storage mechanism is particularly supported by stakeholders in Slovakia, Romania, Spain, France, Luxembourg, Poland, Hungary, Germany, Austria and Italy. Views to the contrary are expressed in Ireland, Sweden and the UK.



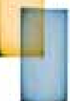


During interviews, stakeholders commented on detail on the relevance of a central storage mechanism. Some even argue against a central system indicating that Retail Investors prefer to access to regulated information through the Internet Home page of listed companies and that Institutional Investors focus more on “added value” data vendors. This being said, Financial Analysts, Supervisors and Issuers favour an official central place for storage that would be a central access point for stored information. Whether this central point should be the regulator or a commercial entity is much debated. An often mentioned point is that the business case of an OAM is not obvious (in some Member States there are no applicants to become an OAM) and even Exchanges hesitate to apply. Exchanges operating on several member States also criticise the lack of harmonisation in the setting up of an OAM.

Finally, whether the central storage mechanism should be at national or at EU level is much discussed and the views are mixed. Even for a central EU access point, the underlying architecture of the system is a matter for debate (Interconnection of national OAM? Centralisation? Central access only?).

Confronted with all these complexities and believing that technological development with the Internet call for different solutions, some stakeholders proposed a simpler and more straightforward idea: imposing minimum standards for issuers to store Regulated Information on their website and inviting the users of financial information to use Internet search facilities (e.g. Google) to access the stored information. It should be noted that the storage of Regulated Information on the website of the issuer is already compulsory in several Member States.

5. Supervision



5.1 Key perceptions and implemention issues

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

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

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

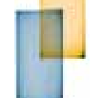
One point highlighted by stakeholders is the lack of transparency by supervisors on the procedure by which to assess the equivalence of third countries transparency regimes and the result of such assessments on an EU-wide basis.

As regards the opportunity to extend the ten year exemption to publish half-yearly reports for bond issuers listed before 2005, stakeholders would appear to be relatively indifferent. An estimate of those corporate issuers availing of the exemption by the time it expires (in 2015) could be counted in the dozens.

Possible improvements

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

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

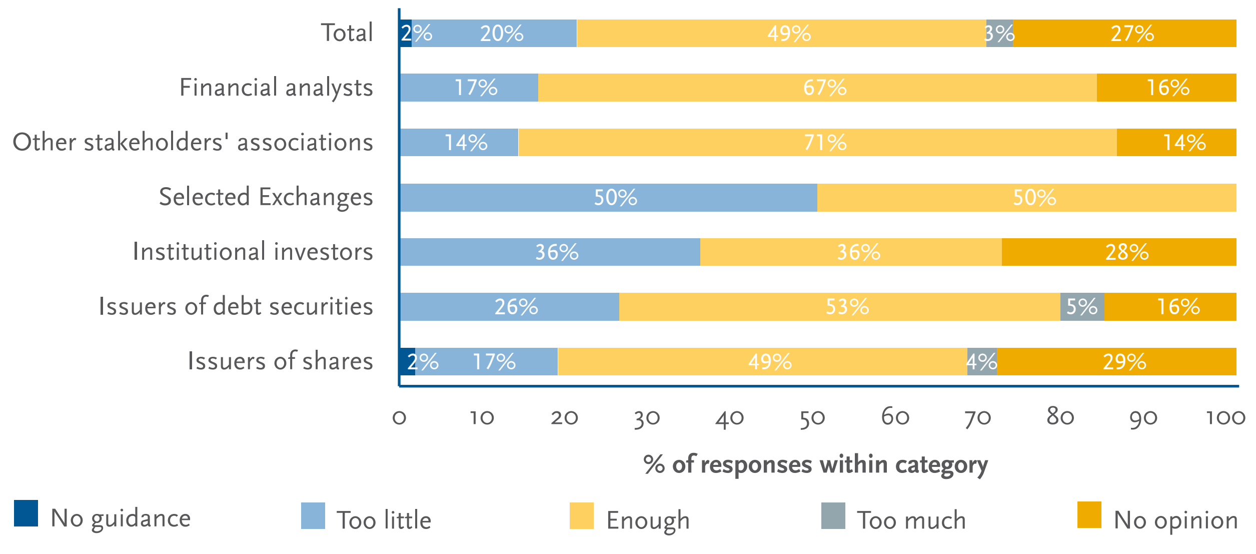


5.2 Stakeholders' perceptions on Regulators and Supervisors Rate

5.2.1 Suitability of guidance to comply with transparency obligations issued by the regulators

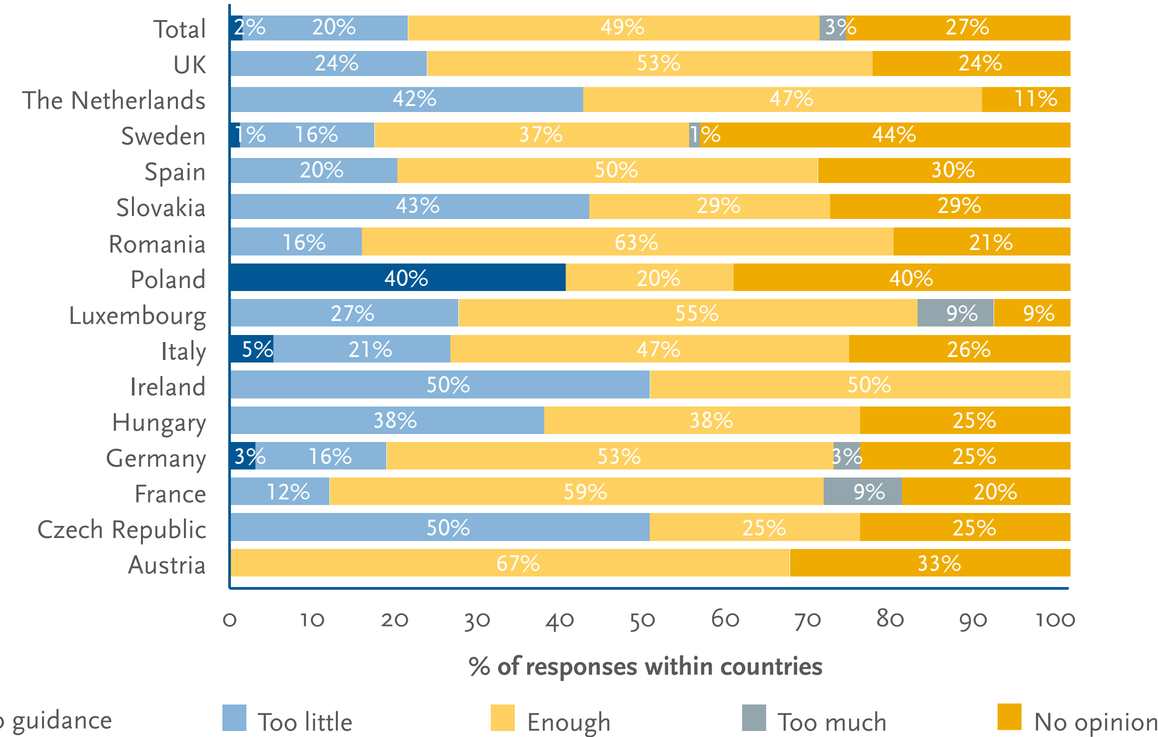
According to the on-line investigation, a relative majority (49%) of stakeholders believe that regulators have issued enough guidance to comply with transparency obligations. This general opinion is shared among all categories of Issuers of shares, in particular by Top companies (60%). Nevertheless, some Institutional Investors and Exchanges believe that Supervisors have issued too little guidance.

Breakdown by category of stakeholders - As regards guidance to comply with transparency obligations, do you consider that regulators have issued:



Member States where Supervisors are considered to have issued too little guidance are Poland (in fact no guidance), the Netherlands, Ireland, Czech Republic, Slovakia and, to a lesser extent, in Hungary.

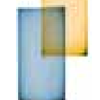
Breakdown by jurisdiction - As regards guidance to comply with transparency obligations, do you consider that regulators have issued:

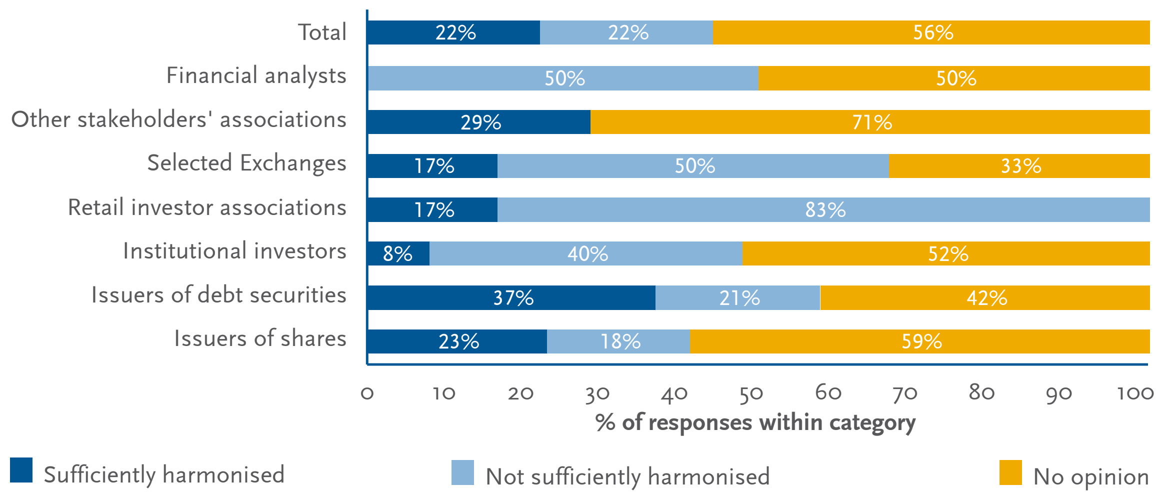


5.2.2 Harmonisation of Supervisors' guidance

Stakeholders have mixed views on the degree of harmonisation needed in the Supervisors' guidance:

- Issuers of shares and debt securities are, on balance, inclined to believe that the Supervisors' guidance is sufficiently harmonised. This can be explained by the fact that issuers continue to deal with one set of rules (the national transposition of the Directive in their Home country).
- Whereas, the users of financial information (Financial Analysts, Institutional and Retail Investors) that have to deal with several regulatory regimes on a cross-border basis, are clearly of the opinion that the Supervisors' guidance is not harmonised enough.

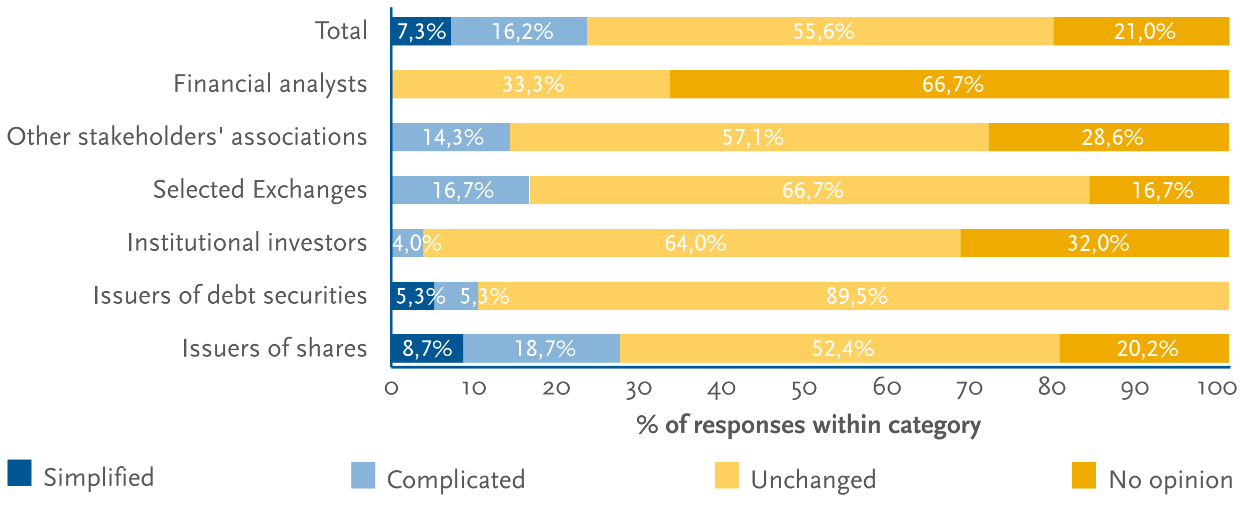




Stakeholders in Romania, Hungary, Italy and Ireland most believe that the Supervisors' guidance is sufficiently harmonised. Those calling for more harmonisation are the stakeholders from the Netherlands, the UK, Spain and Germany.

5.2.3 Impact of the Directive on the relationship with regulators

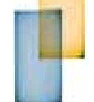
A majority of the stakeholders (55%), in all categories, consider that the Directive has not changed their relationship with regulators. This is also expressed across all Member States, even though some stakeholders from Austria and Hungary would welcome simplification and some others, in France and Slovakia, signal more complicated relationships.

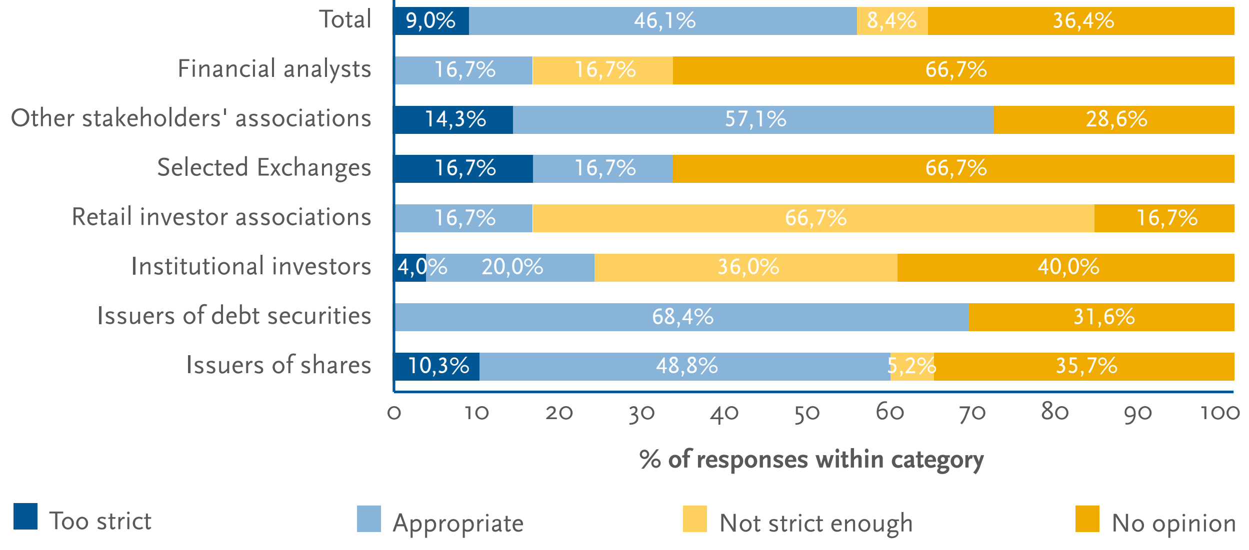


It was sometimes mentioned that the list of non-EU countries considered having equivalent transparency rules should be made more predictable. The implementing measure of the Directive has helped to clarify the criteria to measure such equivalence but Supervisors do not seem to have a harmonised approach. In addition and there is no transparency about which third country regime has been considered equivalent in one or more Member States. The general public has no other alternative than tracking approved prospectus for admission to trading on EU Regulated Markets. To get a consolidated idea on those equivalence decisions across the EU would be of real added value.

5.2.4 Impact of the Directive on the monitoring and sanctioning of the transparency obligations of the Directive

Overall, stakeholders consider that Supervisors have an appropriate monitoring (46%) and sanctioning activity. Views are different for the users of financial information (Financial Analysts, Retail and Institutional Investors), for whom Supervisors are not strict enough.





Within the Issuers of shares category, the suitability of Supervisors in monitoring and sanctioning compliance with transparency obligations is strongly felt by Top companies (64%).

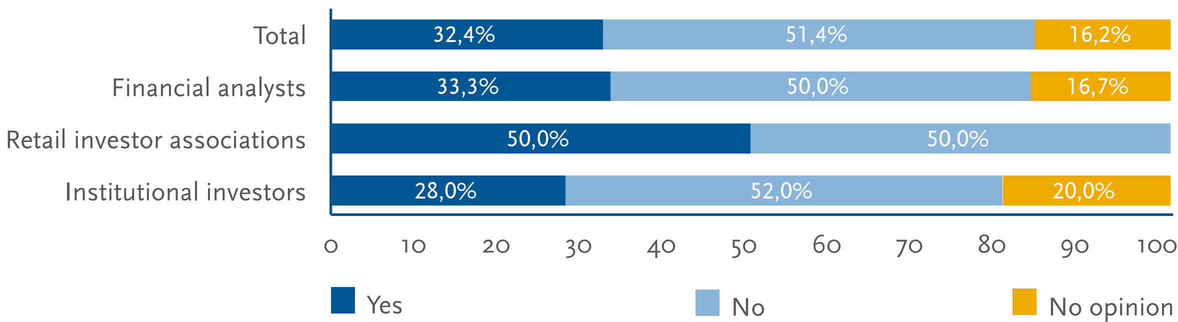
It should be noted that during interviews, stakeholders generally welcomed the fact that the enforcement of the Transparency rule is, with the Directive, the responsibility of the Supervisor and not the Exchange. Even Exchanges welcome this opportunity of being relieved of enforcement costs. In some Member States, this split is not fully achieved.

An additional point made during interviews is that the sanctions for the non declaration of the crossing of a threshold are not dissuasive enough in certain Member States. The sanction is sometimes almost symbolic and therefore leads to a lack of notifications.

In more general terms, there is a plea by several stakeholders interviewed, for a harmonisation of the level of sanctions across the EU. The CESR report (CESR/09-058) on the mapping of supervisory powers, administrative and criminal sanctioning regimes of Member States in relation to the Transparency Directive, provides an exhaustive picture of the diversity of supervisory regimes and of the nature and level of sanctions.

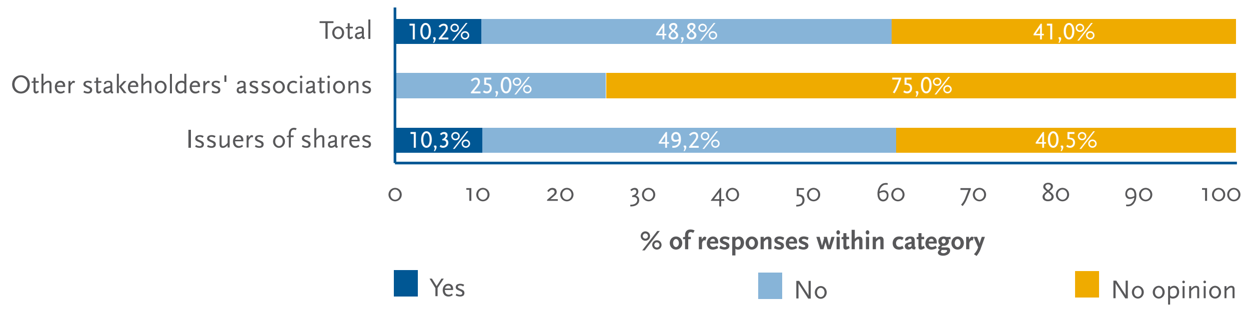
5.2.5 Identification of the supervisor for each issuer in the European Union

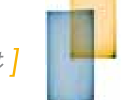
A majority (51%) of users of financial information (Financial Analysts, Retail and Institutional Investors) do not have a clear idea of who the competent Supervisor is for each company in the EU. This is less true for Retail Investors as most of their investment is domestic.



5.2.6 Country of incorporation and the implementation and enforcement of the provision of the Directive

Generally speaking, Issuers of shares do not take into account the manner in which the Directive is implemented and enforced when choosing their country of incorporation. This is less true for the Recently listed companies that have taken the decision recently (26%).





No significant compliance issues have been identified in the course of the legal operational assessment regarding the way in which Supervisors implement the Directive, other than the issues mentioned in the report concerning the use of derivatives.

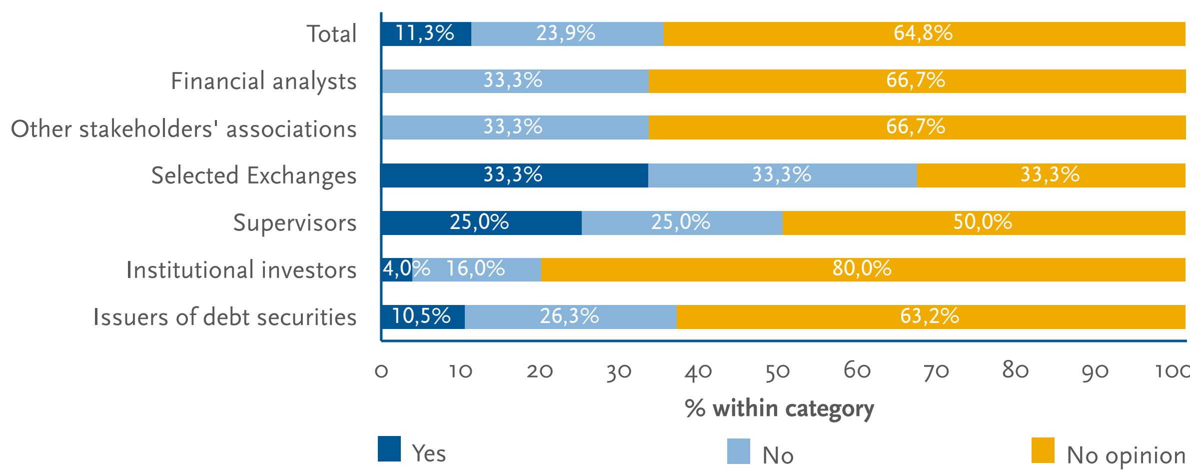
Non compliance may come from a lack of clarity in applicable rules or a lack of experience in applying them, when the directive has only been recently implemented or in smaller markets. For instance, regarding article 17.2, it may be noted that there has been criticism in the Czech Republic because the proposed implementation legislation sets out neither the time-limits nor the manner of publication by issuers on information regarding shareholders meetings, leaving the interpretation up to the issuers, potentially to the detriment of the investors.

5.3 Article 30(4) Exemption for bond issuers

5.3.1 The 10 year exemption to publish half yearly financial statements for bond issuers listed before 2005

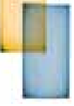
Stakeholders have not expressed a strong opinion on the opportunity to keep the exemption to publish half-yearly reports for bond issuers listed before 2005. When they have expressed an opinion, a small preference is expressed in favour of ending such an exemption. This view is expressed in particular by Financial Analysts, Industry associations, Institutional Investors and even Debt issuers. On the contrary, Exchanges and Supervisors are more in favour of keeping such exemption[21].

Breakdown by category of stakeholders - Do you believe the 10 years exemption to publish half yearly financial statements for bond issuers listed before 2005 should be kept?



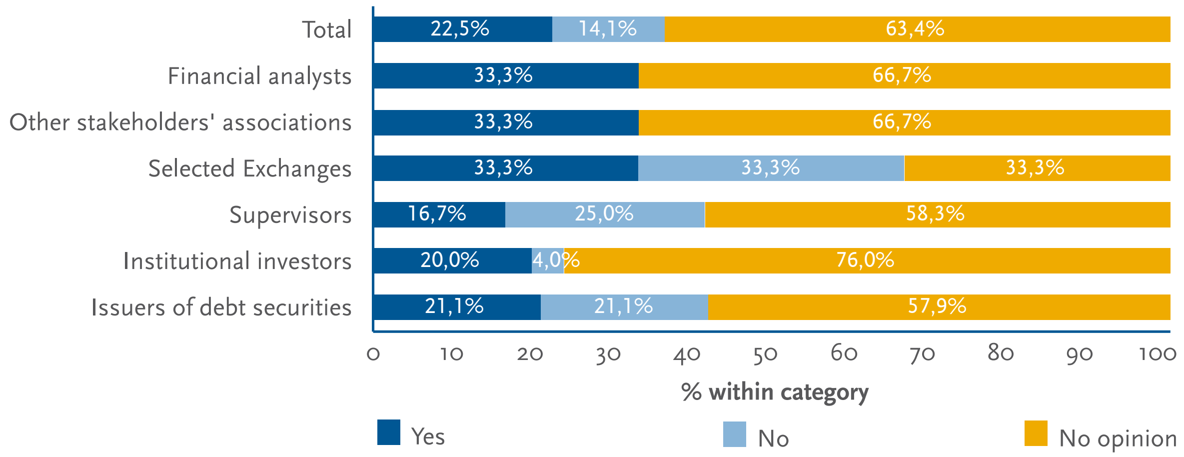
When they have expressed an opinion, in Hungary, Austria, Italy, the UK, Romania, the Netherlands and France, stakeholders favour the deletion of such an exemption. In Luxembourg, Czech Republic, Ireland and Sweden, stakeholders are more in favour of keeping the exemption.

21 It should be mentioned that the percentages of opinion by Supervisors and Exchange have a different meaning (See Methodological Annex)



5.3.2 Different regime and breach in the level playing field

When they have expressed an opinion, a majority of stakeholders hold that the existence of different transparency regimes for debt securities can create a breach in the level playing field. This view is not shared by Exchanges and Supervisors. Debt securities issuers have mixed views on the issue.

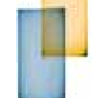


When they have expressed an opinion, stakeholders in Hungary, Italy, Romania, Austria, and France and, to a lesser extent, in the UK, believe that keeping two different transparency regimes for bond issuers creates a breach in the level playing field. This view is not shared by stakeholders in the Czech Republic, Sweden, Ireland and Luxembourg.

From the legal operation assessment done in Member States it can be said that section 30.4 of the Directive provides that *"the home Member State may exempt issuers only in respect of those debt securities which have already been admitted to trading on a regulated market in the Community prior to 1 January 2005 from disclosing half-yearly financial report in accordance with Article 5 for 10 years following 1 January 2005, provided that the home Member State had decided to allow such issuers to benefit from the provisions of Article 27 of Directive 2001/34/EC at the point of admission of those debt securities"*. Recital 13 specifies that the exemption is available *"during a transitional period of ten years, only in respect of those debt securities admitted to trading on a regulated market prior to 1 January 2005 which may be purchased may be purchase by professional investors only. If such an exemption is given by the home Member State, it may not be extended in respect of any debt securities admitted to a regulated market thereafter"*.

This exemption applies only in a limited number of Member States. In those Member States, the request is more to extend the exemption than to terminate it.

For instance, in the United Kingdom, the FSA did not openly consult on the issue of whether the UK should take advantage of the exemption in article 30.4 which suggests that, if it were given the opportunity to extend the exemption, it would.



This approach would be likely to be supported by trade bodies representing the interests of these issuers. ICMA (acting as the International Primary Markets Association prior to the formation of ICMA as it now exists) issued strongly worded guidance in 2003 prior to the implementation of the Transparency Directive which warned that the requirements of the Transparency Directive would, if appropriate exemptions were not given, lead to extensive de-listing of securities and losses to investors if issuers were not in a position to meet the new requirements.

Generally speaking, issuers who had their "Eurobonds" admitted to listing prior to 1st January 2005, did so on the basis of the then existing disclosure regulatory framework.

Issuers who would still have "Eurobonds" outstanding after 1st January 2015, could possibly be categorised in four different types:

- those issuers who comply with Transparency Directive requirements on account of other listings: for this type of issuers the exemption itself may not be particularly relevant and they are therefore likely to be indifferent;
- large unlisted issuers who either prepare IFRS financial reports as a matter of course or under their (unlisted) debt covenants;
- issuers who are a one time or specialised issuer such as financing SPVs for whom the added disclosure rules may involve a substantial cost and effort;
- issuers not falling in either of the two categories but for whom the disclosure obligations would entail a significant expense (eg. SMEs).

Some of those issuers in the latter two categories may consider moving their debt securities to a market which is not a regulated market but some of them may not be able to do so for a variety of reasons. The question is to weigh the impact on the issuers against the benefit to the market.

If possible, the exact number of issuers that could potentially have "Eurobonds" outstanding after 1st January 2015 and have not issued new bonds after 2005 should be verified, if that information could easily be made available from the various regulated markets to determine the actual implications of the issuer. Having in mind that corporate issuers very rarely issue long term bonds (i.e. superior to 10 years). As a result of interviews with Exchanges, an estimate of those issuers availing of the exemption by the time it expires could be counted in a few tens (and few hundreds of SPVs).

As regard the potential risks deriving from the existence of the two tiers transparency regime regarding bonds permitted by the exemption, no major disruption during the initial years of application of the Directive was reported during the interviews.

6. Comparison of the legal framework of the Transparency Directive with similar legislation in non-EU countries

This chapter provides a comparative description of the legal framework regarding transparency in relation to issuers having securities admitted to trading on a regulated market in six non-EU jurisdictions. It also provides an overview of the perception of non-EU market players on specific provisions of the Transparency Directive.

For the purpose of this study, the selected non-EU jurisdictions are China, the United States of America, Hong Kong, India, Japan and Switzerland. These countries have been chosen because of their significant market capitalization, their location in three continents and their different traditions. This study aims at finding out what mechanisms are being used abroad to allow investors to make an informed assessment of an issuer's financial position. The comparison with the requirements imposed in non-EU jurisdictions is an essential step of the global analysis since it allows for seeking alternative solutions to those already existing in the EU. In addition, the collection of non-EU stakeholders' views on the transparency regime applicable in the EU is a valuable source of information to measure the attractiveness of the Single Market.

Regarding the methodology used, a standardised legal questionnaire has been prepared for all jurisdictions focusing on some of the main issues arising in relation with the Transparency Directive. In addition, a standardised on-line questionnaire was sent to two categories of stakeholders in the non-EU countries selected. Individual interviews were conducted with some of the targeted stakeholders. More details are given in the Methodology Annex.

The results of the legal comparative study laid out in this chapter have been obtained thanks to the collaboration of six law firms, each established in one of the relevant countries. We would especially like to thank for their efforts, **HHP Attorneys-At-Law** based in Shanghai, China, **Gallant Y.T. Ho & Co** in Hong Kong, **Dua Associates** in India, **Nagashima Ohno & Tsunematsu** in Tokyo, Japan, **Altenburger & Partner Rechtsanwälte** in Zürich (Switzerland) and **Duane Morris LLP** in the US (New York).

This chapter starts with a description of the perception by non-EU market players of the clarity and suitability of the legal transparency environment created by the Transparency Directive. In addition, the subsequent sections focus on three issues, for which a legal comparative review has been conducted:

- The production of periodic financial information
- The disclosure of material shareholdings and changes to major holdings
- The dissemination and storage of regulated information

Finally, this last section provides an indication on the perceptions of non-EU stakeholders on the EU Supervisors.

Impact of the Directive on the attractiveness of the Single Market

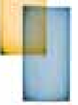
It should be noted from the outset that non-EU stakeholders have not shown a great interest in commenting on the functioning of the EU transparency regime created by the Directive. The rate of "no opinion" from non-EU stakeholders to a number of questions of the online questionnaire is much higher than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

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

Positive points are mainly expressed by institutional investors: 66% of non-EU institutional investors consider that the level of transparency of the ownership of EU listed companies is sufficient and that they have a satisfactory access to financial information stored by EU listed companies. 55% are of the opinion that the compliance with the Directive has not resulted in an increase of burden. Finally, non-EU stakeholders do not consider language as an obstacle to access the EU markets.

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

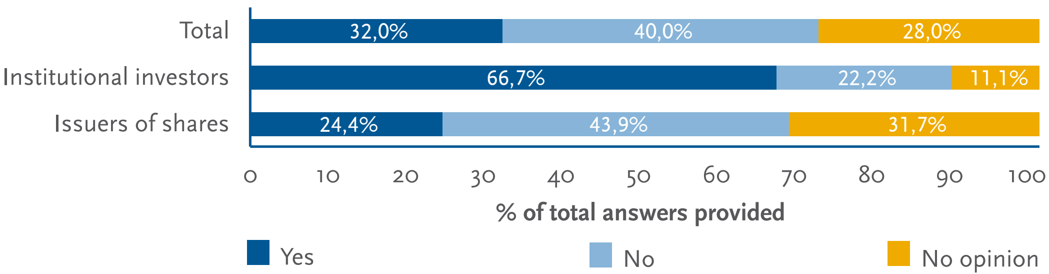
Having said all this, non-EU stakeholders are supportive of measures that would facilitate access to EU markets. 66% of non-EU stakeholders would favour a common electronic form for the notification of major holdings (77% do not know or believe that the current Standard Form is widely used). In addition,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



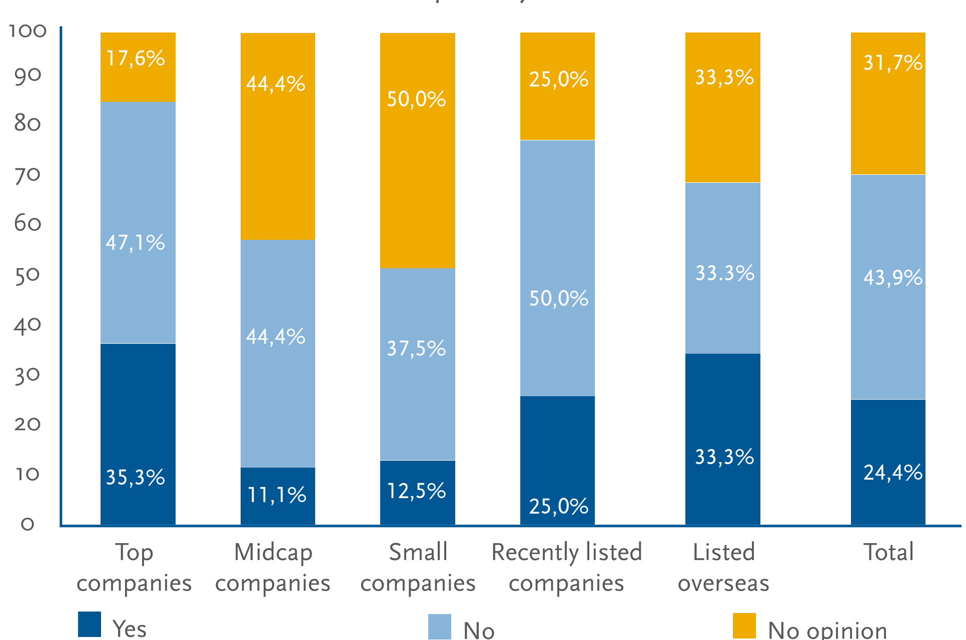
6.1 Clarity and suitability of the Directive for non-EU market players

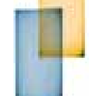
6.1.1 Overall clarity

The overall knowledge and understanding of the obligations imposed by the Directive by non-EU market player is low (32%). Having said that, Third countries' Institutional Investors indicate that they have a rather good level of understanding of the clarity of the provisions of the Directive. On the contrary, non-EU Issuers do not have a clear understanding of the obligations imposed by the Directive.



Non-EU Issuers Listed Overseas and Top companies are more familiar with the provisions of the Directive than Small and Midcaps.



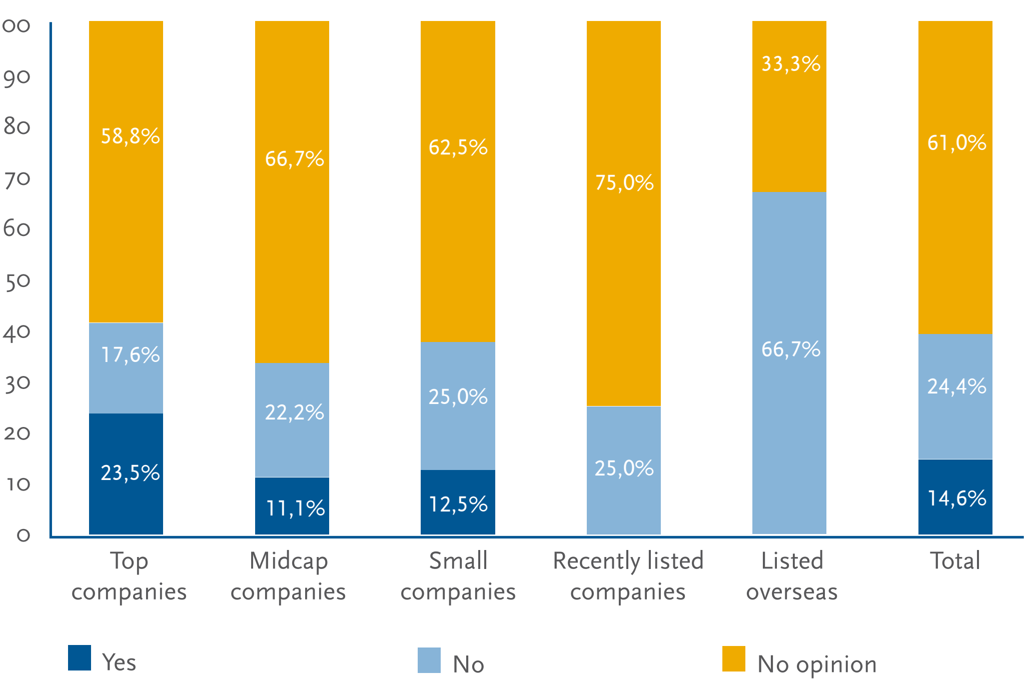


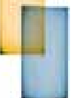
6.1.2 Explanation on the lack of clarity

A majority of non-EU stakeholders have not expressed a strong opinion as regards the source on the lack of clarity of the obligations of the Directive. When they expressed an opinion, they believe that this lack of clarity is due to the Directive legal framework and the national market practices.

6.1.3 Sufficiency of guidance

Only 14.6% of third countries issuers of shares considered that they have sufficient guidance in their country as to the requirements of the Directive. Not surprisingly, the Swiss issuers are the most familiar with the obligations of the Directive.

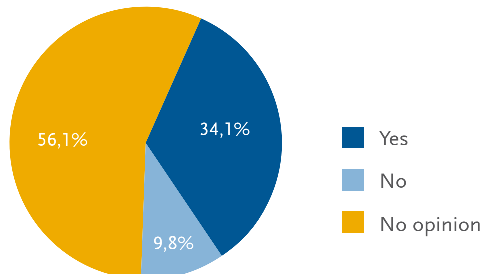




6.1.4 Wish for additional guidance

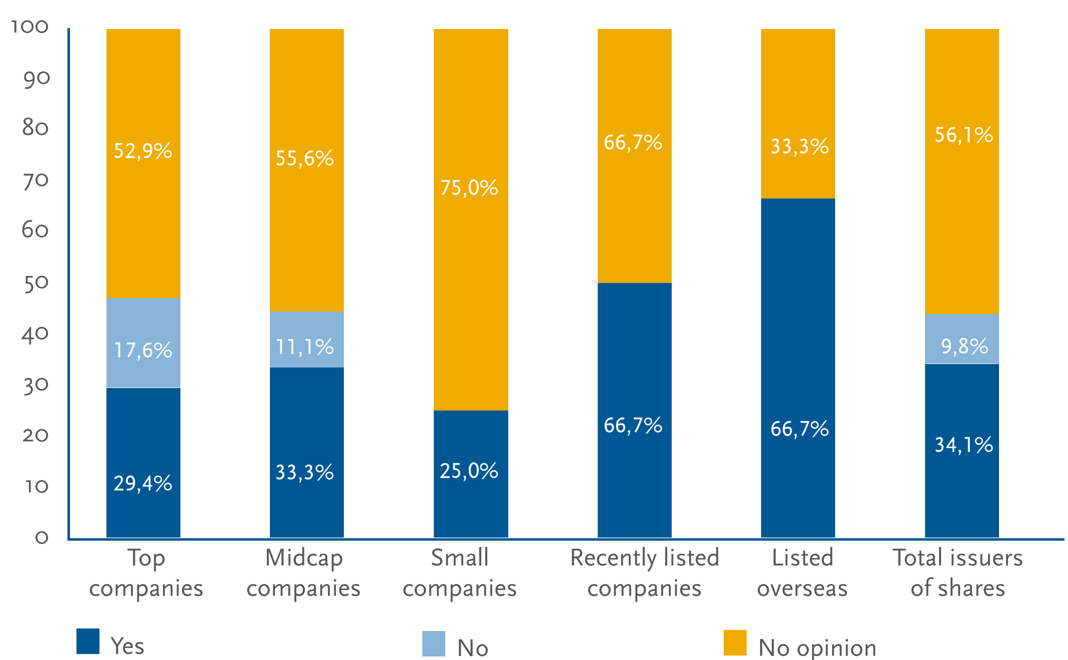
When they have expressed an opinion, non-EU issuers of shares are in favour of additional guidance as to the obligations of the Directive.

Non EU jurisdictions - Are you in favour of additional guidance as to the obligations imposed by the Transparency Directive?

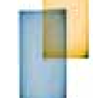


This view is particularly expressed by Recently listed companies and companies Listed overseas.

Issuers of shares - Are you in favour of additional guidance as to the obligations imposed by the Transparency Directive?



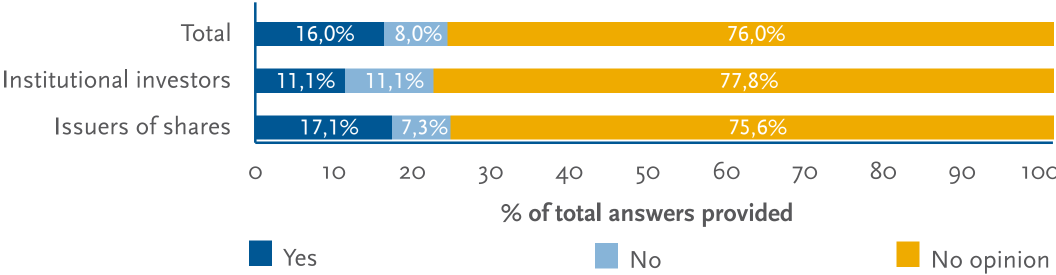
Countries where issuers would welcome additional guidance are the US, Switzerland, China and Hong Kong.



6.1.5 Sufficiency of legal certainty and predictability to non-EU issuers listed in the EU

Non-EU stakeholders have not expressed an opinion on the legal certainty and predictability of the provisions of the Directive applicable to non-EU companies listed in the EU. This predictability is considered very low in Japan.

Breakdown by stakeholder category - Does the Transparency Directive provide sufficient legal certainty and predictability to non-EU issuers listed in the EU?



44% of Non-EU Institutional Investors that have to comply with the notification of thresholds obligations of the Directive have expressed a preference for additional guidance on the obligations of the Directive.

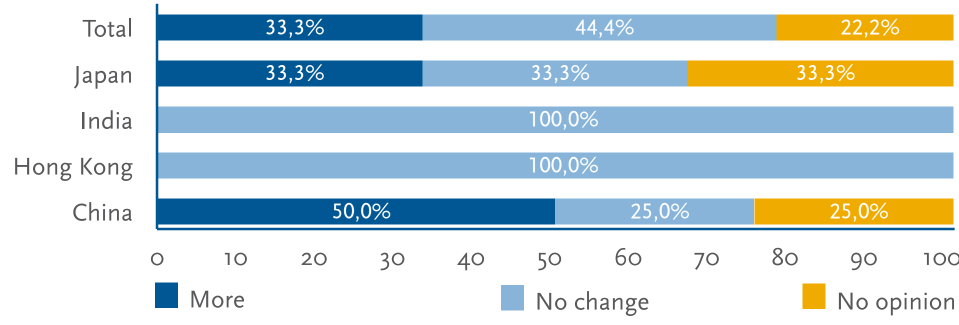
6.1.6 Impact of the Directive on listings in the EU

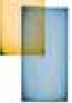
Non-EU stakeholders did not express a clear opinion on the impact of the Directive on the listing attractiveness of the EU. It is considered to have an encouraging effect by Japanese and Chinese Issuers and to have a discouraging effect by Swiss Issuers.

6.1.7 Directive encouraged institutional investors to invest in EU listed companies

Overall, non-EU Institutional Investors consider that the Directive has not changed the way they invest in the EU. Chinese and, in more relative terms, Japanese Institutional Investors are more inclined to believe that the Directive has encouraged them to invest more in the EU.

Breakdown by non EU - jurisdiction - Institutional investors - Has the Transparency Directive encouraged you to invest more or invest less in EU listed companies?

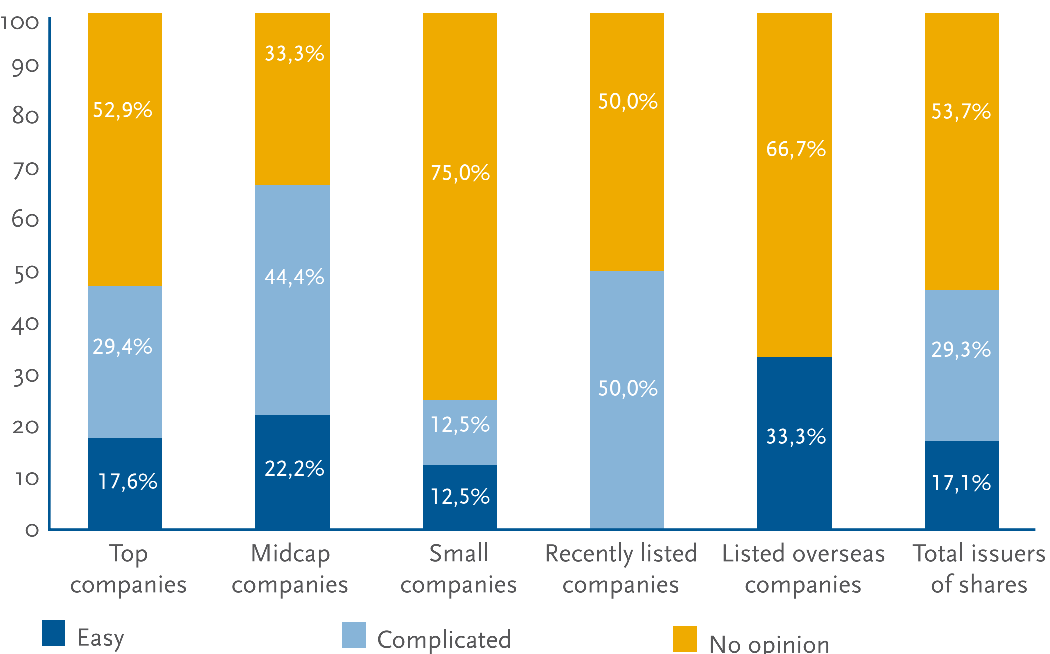




6.1.8 Access to the EU market considered as easy or complicated

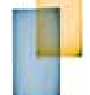
When they expressed an opinion, 63% of non-EU Issuers considers that access to EU markets is complicated; opinions are more frequently voiced by Swiss, Japanese and Chinese companies.

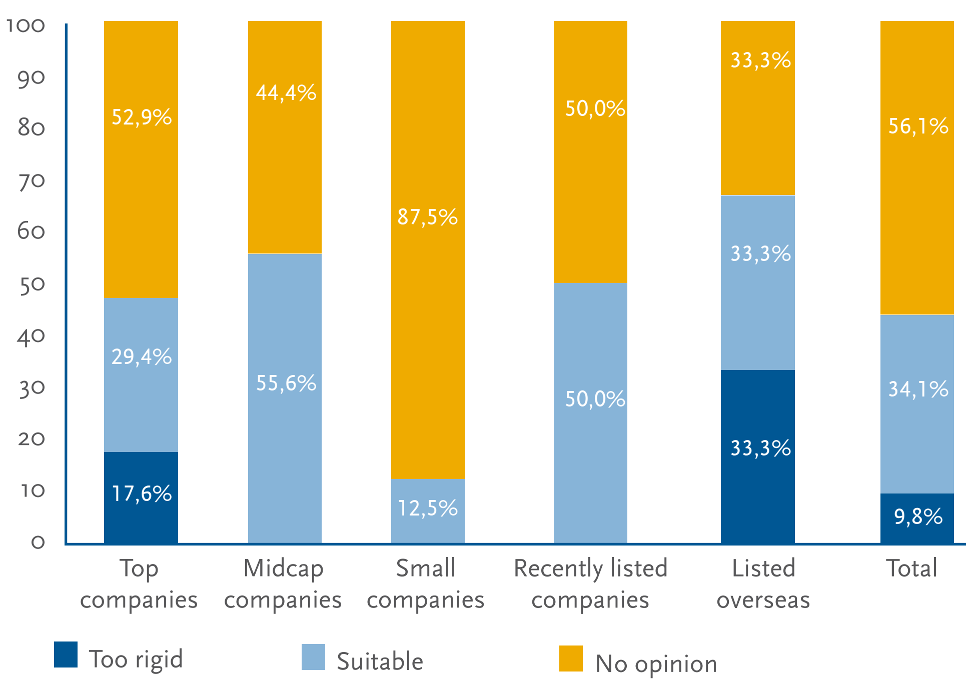
Issuers of shares - Do you consider that access to the EU market is easy or complicated?



6.1.9 Flexibility of the regime applicable to issuers from non EU countries

Despite the responses to the previous question, non-EU Issuers of shares believe that the regime applicable to non-EU Issuers is suitable and flexible (recognition by EU regulators of equivalent requirements).

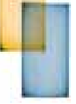




This opinion on the suitability of the regime applicable for non-EU issuers is fully showed by Issuers of shares in China and Switzerland.

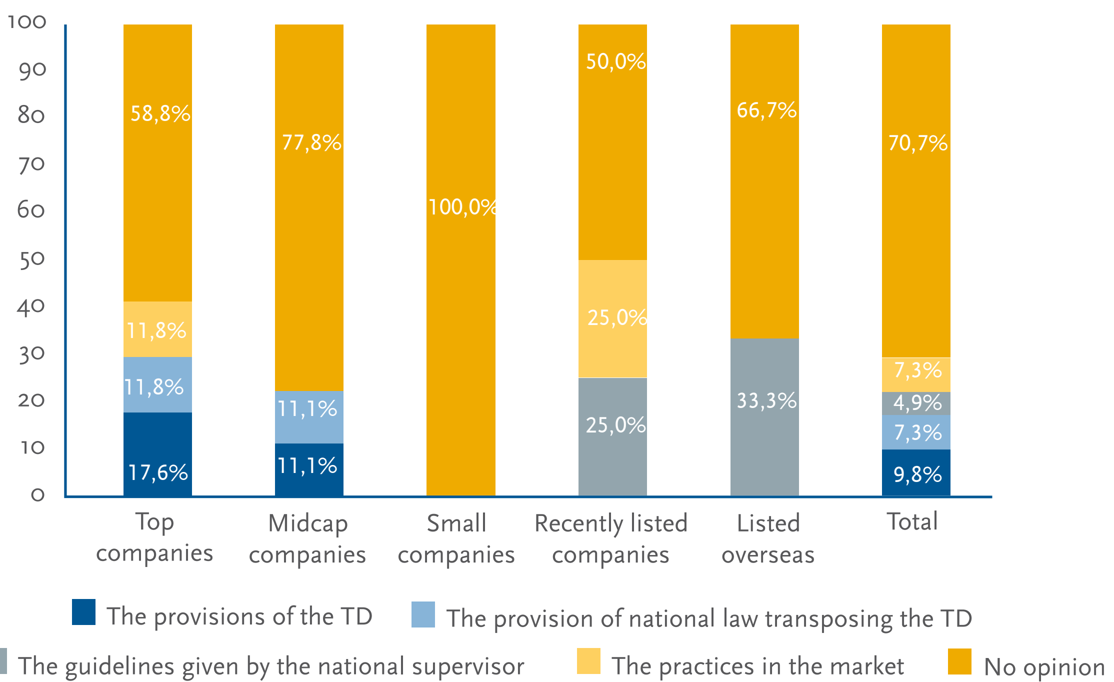
6.1.10 Costs of the obligations of being listed in the EU

No clear opinion on the costs attached to listing in the EU has been expressed by the non-EU Issuers. One can however note that Swiss and Japanese Issuers consider that the cost of being listed in the EU is expensive.



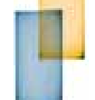
6.1.11 Reasons for considering that being listed in the EU is burdensome

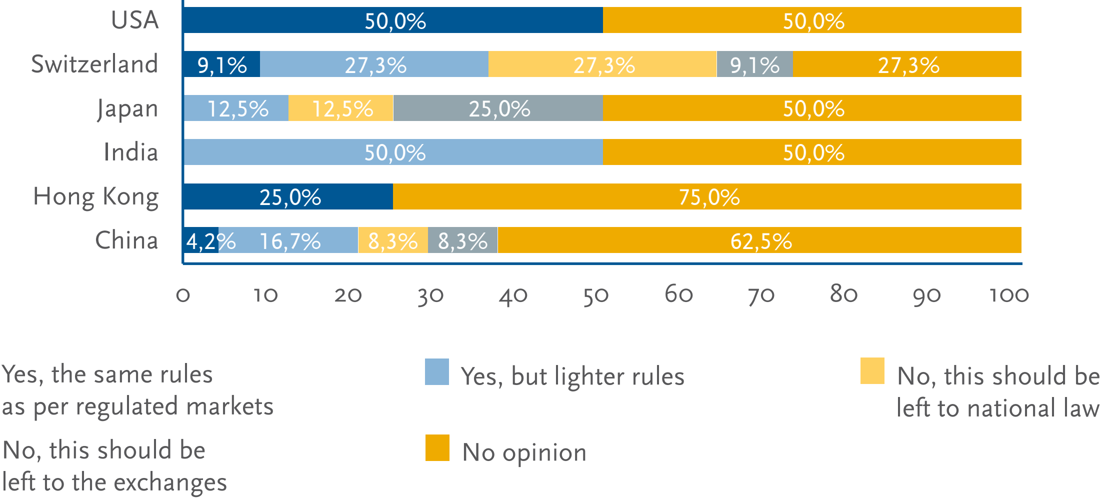
If they believe that a listing in the EU is burdensome, non-EU Issuers do not a clear idea of the reasons but they seem to consider that to a certain extent, responsibilities lie in the Directive itself.



6.1.12 Extension of the harmonised rules to issuers listed on non-regulated / alternative markets

When they expressed an opinion, non-EU Issuers are in favour of lighter rules for EU alternative exchange and flexibility left at national or exchange level. This view is particularly expressed by Small and Recently listed companies.





6.2 The production of periodic financial information

6.2.1 Key findings and main concepts

Harmonisation of the production of periodic and ongoing financial information is one of the key features of the Directive. A comparison with the systems existing in the other jurisdictions under review provides the following main results:

- Yearly, half-yearly and quarterly reports are required in all reviewed jurisdictions for issuers of shares, with the exception of Switzerland regarding quarterly reports. Regarding issuers of debt securities, yearly financial reports are required in all reviewed jurisdictions, half-yearly financial reports are required in China, India and Japan and quarterly reports are required in Hong Kong and the US.
- Some jurisdictions provide for different regimes depending on two criteria: the size of the issuer (for instance, in the US, the time to file the annual and quarterly reports is longer for smaller issuers) and its nationality (for instance, foreign issuers have more time to file annual reports in Japan).
- Access to financial reports follows different patterns. If we look at electronic access, which is the most interesting for investors, we find that the relevant information may be found on the issuer's website, the regulator's website or the stock exchange's website, with an availability period that varies from 5 years to an open-ended duration. Behind apparent diversity, there is a common situation, which is general access to financial statements through the Internet. Provided that effective access is granted (under the supervision of regulators), there seems to be little reason to impose a unified system, which is consistent with the Directive's approach.

- The issue of liability for financial statements shows that the main liability remains in all reviewed jurisdictions with the board of directors. Corporate officers assume a specific liability in China, India and the US. In the Transparency Directive system, the issue of liability is addressed through the obligation for the persons responsible within the issuer to issue a statement regarding the yearly financial statements. Although this may lead to enhanced liability for such responsible persons, it should not be considered a decisive step towards a unified regime in this matter. Liability for false or misleading statements is a complex issue that is distinct from transparency and deserves separate treatment.
- The specific issue of the time period to publish half-yearly financial statements needs to be addressed as the two month rule imposed by the Transparency Directive has generated much criticism. In this respect, it should be noted that the US provides for shorter deadlines (40 calendar days for the standard regime), China is applying the same rule as the directive and Hong Kong, Japan and Switzerland grant a longer period (three months). It should also be noted that, in the US, smaller issuers benefit from a slightly longer period to file (45 days instead of 40 days).

6.2.2 Annual Financial Report

- **Scope of the obligation**

- In all the countries reviewed, the publication of an annual financial report is required from issuers of shares as well as issuers of debt securities. Exemptions for sovereign issuers are provided for in China, India, Japan and the US (for the US government).

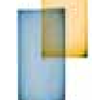
- **Timing of the publication**

- The time periods for such publications are usually four months, with a range from three to six months. In some jurisdictions, the time period is the same for all issuers: 3 months after the end of the financial year for India, and four months for China, Hong Kong and Switzerland. In other jurisdictions, the time period may differ according to the nationality or size of the issuer:
  - in Japan, the time period is three months for domestic issuers and six months for foreign issuers,
  - in the US, the time period is 60 days for the largest issuers, 90 days for the smallest issuers and 75 days for other issuers[22].

- **Availability**

- The availability period of the half-yearly financial report to the public is at least 5 years (in Japan and in Switzerland), up to 10 years (in Hong Kong), or even open-ended (in the US and China). The availability depends on how and where the information is held. The table below summarizes the main cases:

22. A "Large Accelerated Filer" is an issuer with aggregate worldwide market value of common equity held by non-affiliates (i.e., public float) of $700 million or more. An "Accelerated Filer" has a public float of $75 million or more but less than $700 million. A "Smaller Reporting Company" has a public float of less than $75 million.)



ACCESS TO YEARLY FINANCIAL REPORTS						
	China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
At the issuer	Open-ended	7 years		5 years	1 year[23]	Open-ended
On the issuer's website	No	5 years	8 years	No	5 years	Open-ended
On the regulator's website	Open-ended	No	Open-ended	5 years	No	Open-ended
On the stock exchange's website	Open-ended	Past 10 years up to present	5 years (usually)	5 years	Electronic link only	Open-ended
At the company register	No	Open-ended	8 years	No	No	Open-ended

- **Content**

- A management report and audited financial statements must be included in the annual financial report in all jurisdictions. In all the countries reviewed except India, the financial statements and the management report must be submitted together with statements as to their reliability and fairness. The table below provides a summary regarding who is responsible for such a statement (in addition to approval by the board):

LIABILITY FOR FINANCIAL STATEMENTS						
	China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
Chairman	X					
CEO	X		x			X
CFO	X		x			X
Other	X (senior management personnel)			X (internal auditors)		

When reading this table, one should bear the following in mind:

- Regarding China:

- The directors (including the Chairman of the board of directors) and senior management personnel of a listed company shall confirm the periodic reports in writing to the regulator and the stock exchange. The "senior management personnel" includes the manager, deputy manager, financial person in charge, secretary of the board of directors, and other persons stipulated in the Articles of Associations of the company.

23 May be replace by a publication in SHAB (Swiss Official Gazette of Commerce)

- The board of directors is responsible for the approval of periodic reports. The board of supervisors shall be responsible for the review and approval of the periodic reports worked out by the board of directors. It shall issue its review opinions in writing to state whether or not the preparation and review procedures of the board of directors conform to the relevant laws, administrative regulations and the CSRC's provisions, and whether or not the contents of the report can truthfully, accurately and completely reflect the actual information of the listed company.
    - Regarding Japan, it should be noted that the Chairman, CEO and CFO are generally members of the board (and are thus committed to stand behind the financial reports).
- In all jurisdictions, the annual financial report must be audited and the audit report made available to the public in full.

6.2.3 Half-yearly Financial Report

- **Scope of the obligation**

- Regarding issuers of shares, half-yearly financial reports are required in all jurisdictions (provided that in India and the US, there is no specific half-yearly requirement, the half-yearly financials are the second quarterly financial). In the US, foreign issuers are permitted to file a half-yearly report instead of quarterly reports, if it is the law in their home jurisdiction.
- Regarding issuers of debt, half-yearly financial statements are required in China, Japan and the US. In India, regarding issuers of debt securities whose shares are listed, a quarterly reporting is required (and, in this case, there is no specific half-yearly information); when debt is listed by an issuer whose shares are not listed, there is a requirement of half-yearly information.

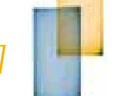
- Exemptions for sovereign issuers have been provided for in China, India, Japan and the US (for the US government).
- In all jurisdictions, a half-yearly report is not required for the second half of the year.

- **Timing of the publication**

- The applicable deadline for the publication of half-yearly financial reports ranges from 40 calendar days (in the US, where it is applicable to most issuers) to three months (in Hong Kong, Japan and Switzerland). China imposes a two month deadline.
- The US provides a special regime for small issuers. However, its impact is limited, as such issuers have 45 days (instead of 40 days) to publish their report.
- With respect to issuers of shares, India imposes a one month deadline for quarterly reports (including in respect of the second quarter).

- **Availability**

- The availability period of the half yearly financial report to the public is at least 3 years (in Japan), up to 10 years (in Hong Kong), or even open-ended (in the US, India and in China). The availability depends on how and where the information is held. The table below summarizes the main cases:



ACCESS TO HALF-YEARLY FINANCIAL REPORTS						
	China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
At the issuer	Open-ended	7 years	Open-ended	3 years	No	Open-ended
On the issuer's website	No	5 years	Open-ended	No	5 years	Open-ended
On the regulator's website	Open-ended	No	Open-ended	3 years	No	Open-ended
On the stock exchange's website	Open-ended	Past 10 years up to present	5 years (usually)	3 years	Electronic link only	Open-ended
At the company register	No	Open-ended	Open-ended	No	No	Open-ended

- **Content**

In the US and India, there is no specific half-yearly financial report, but only a second quarterly financial report. In Hong Kong and Japan, the content of the half-yearly financial report does not substantially differ from that of the yearly financial report. In Switzerland, there is no requirement to include a full financial statement; a condensed set of financial statements is sufficient (although it has to be noted that this issue is not codified, but addressed by doctrine).

- In all the reviewed countries except India, the half-yearly financial report must include an interim management report.
- Indication of the issuer's likely future developments for the remaining six months of the financial year must be provided in China (only when the board forecasts that the company will suffer loss or there is material change in the net profits in the next reporting period), Hong Kong and Switzerland. If not already disclosed, the major related parties' transactions must be provided in China (in the chapter of Major Events in the half-yearly report), Japan and Switzerland.
- In all the reviewed countries except India, the financial statements and the management report shall be made together with statements as to their reliability and fairness. Responsibility for such statements is the same as for the yearly financial statements.
- In none of the reviewed jurisdictions is an audit of the half-yearly financial report required.
- The issue as to whether the half-yearly financial report needs to be reviewed is addressed quite differently in the countries reviewed:
  - In the US, the report must be audited.
  - In India and Japan, such a report must be reviewed.
  - An audit is required in China in two cases, (i) where the issuer intends to distribute profits, increase the registered capital or make up for the losses with the common reserves in the second half year; or (ii)

where the issuer intends to apply for issuing new shares or convertible bonds in the second half year.

- In Hong Kong and Switzerland, no review is required.

- In case of an audit or a review of the half-yearly financial report, the audit report or the review report has to be reproduced in full. In China, if the accounting firm issues a standard audit report on the company, the company does not need to disclose the full text of it, while if a non-standard report is issued, the company should disclose the full audit report to the public.

6.2.4 Quarterly Financial Report

- **Scope of the obligation**

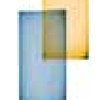
- The publication of quarterly financial reports is required from issuers of shares in all the reviewed countries, except in Switzerland. None of the reviewed countries, except Hong Kong and the US, requires issuers of debt to provide quarterly financial reports. A quarterly report is never required for the 4th quarter of the year.

- **Timing of the publication**

- The applicable deadline for the publication of quarterly financial reports ranges from one month (in China and India) to 45 days (in Hong Kong, Japan and the US). The US provides a special regime for small issuers. However, its impact is limited, as such issuers have 45 days (instead of 40 days) to publish their report.

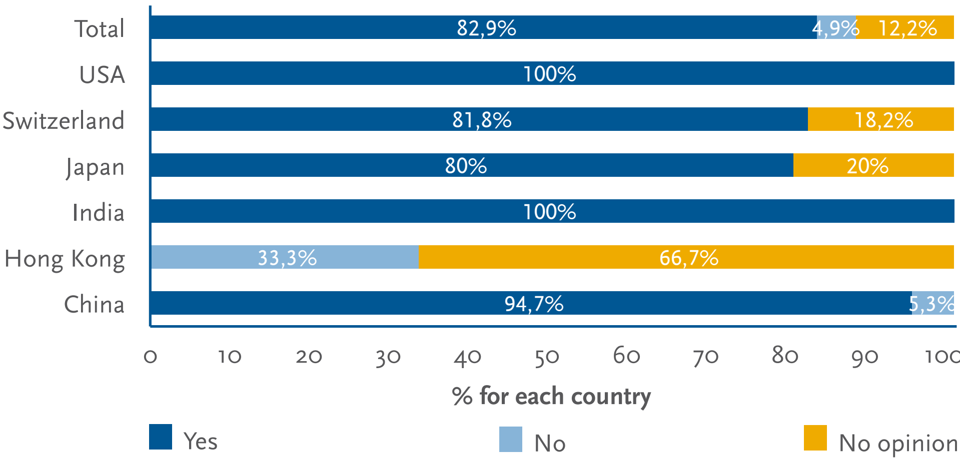
- **Content**

- In all the reviewed countries, financial figures must be included in the quarterly financing report. A narrative description is not enough.



6.2.5 Non EU Stakeholders opinion on the key feature of periodic information

- **Compliance with reporting obligations by issuers**

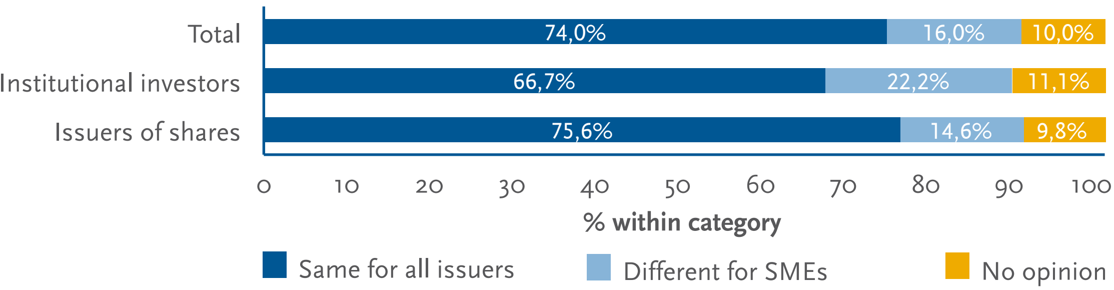


Except for stakeholders in Hong Kong, non-EU Issuers strongly believe that periodic obligations are respected in their respective jurisdictions.

- **Timing characteristics in other non EU jurisdictions**

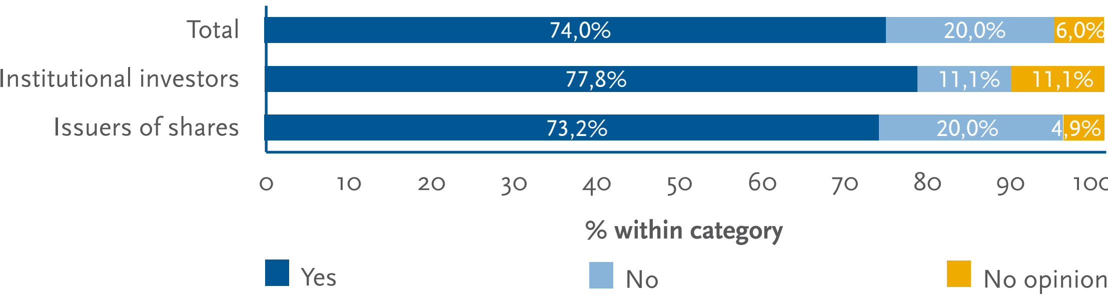
Non-EU stakeholders are of the opinion that the timing for disclosure of periodic financial information should be the same for all listed companies (including SMEs)

Breakdown by stakeholders category - In your jurisdiction, is the timing of disclosure of periodic information (yearly/ half-yearly/ quarterly) the same for all listed companies or is this different for SMEs?



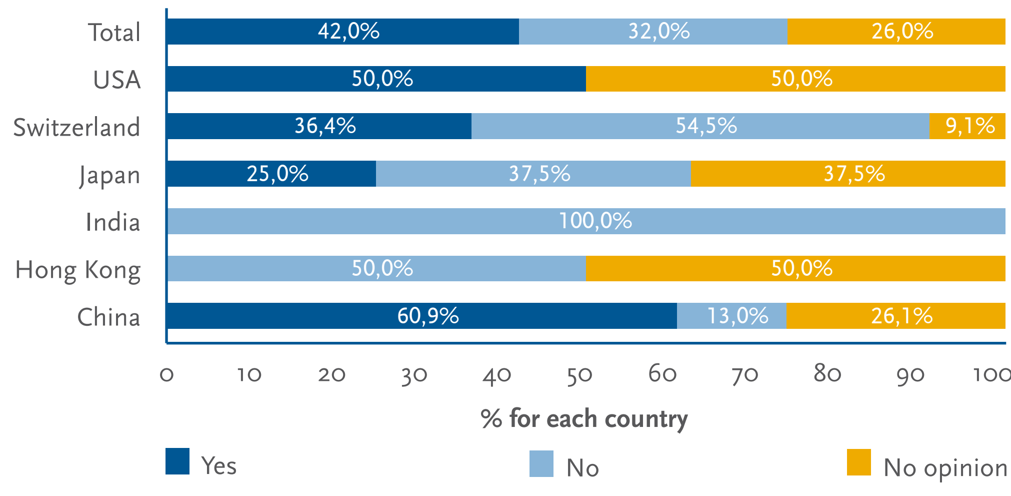
- **Publication of quarterly reports**

Non-EU stakeholders are also clearly of the opinion that the publication of quarterly reports is useful for the transparency and functioning of the market.

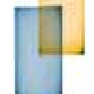


- **Awareness of XBRL**

Non-EU stakeholders are generally (42%) aware of the existence of XBRL[24] except in India, Hong Kong and to a certain extent in Switzerland. They generally see merits in using XBRL to publish accounts.



24 eXtensible Business Reporting Language: one of a family of «XML» languages which is becoming a standard means of communicating information between businesses and on the internet)



6.3 Disclosure of material shareholdings and changes in major holdings

6.3.1 Key findings and main concepts

- In the general context of a financial crisis related in part to insufficient transparency from investors and market players, providing for a fully transparent system seems a critical requirement. In this respect, useful lessons may be drawn from international comparisons on disclosure of material shareholdings.

- The first criterion regarding notification of material shareholdings is the level of applicable thresholds:
    - *The initial threshold is set at 5% in all reviewed jurisdictions, except Switzerland (where it is set at 3%). It should be noted that it is often authorized for companies to impose lower thresholds (for instance in China and Hong Kong), although doing so is not a market practice.*
    - *The following thresholds may be either every 5% (China, India, and Switzerland) or every 1% above 5% (Hong Kong, Japan, US). In the US, notification may even be required for moves smaller than 1%, if it is otherwise significant.*
- The timing of notifications is critical: it varies from two business days (in India), to four trading days (in Switzerland) to 5 business days in Japan. In the US, where the overall system is complex, the deadline varies from 10 days (for the first crossing of the 5% threshold) to one business day (for subsequent standard notifications taking the form of amendments to Schedule 13 D).

- The overall notification system may be of two kinds:
    - *A simple system, similar to the one provided for by the Transparency Directive, which combines thresholds and well defined exemptions; this system may be found in all reviewed jurisdictions except China and the US.*
    - *A more complex (or sophisticated) system that takes into account the relative position of the shareholder or its intent. For instance, in China, notification requirements are increased if the shareholder, although holding a low participation (for instance 10%) is the most important or controlling shareholder. In the US, simplified requirements are also applicable to "passive investors", defined as persons not seeking to acquire or influence control of the issuer.*

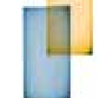
- The content of the information provided in the notification should not be assessed only in light of the list of items to be filled in the standard forms. The following concepts are relevant:
    - *Whether objective or subjective information is required: the Transparency Directive requires only objective information (such as identity of the investor, chain of control, and number of shares) whereas in other jurisdictions (such as China) information about the intent of the investor may also be required[25]. As the underlying interest regarding the intent of the investor is often linked to its position as a long term or short term investor, an interesting approach should be noted: in the US, the sources of funding of the investor for the acquisition must be disclosed, which, in some cases, may provide useful information in this respect (short term active investors are often highly leveraged).*

25 It should be noted that some jurisdictions within the EU (such as Germany and France) also require disclosure of intent when certain thresholds are crossed.

- *Whether the information is only financial or encompasses other items, such as the planned strategy: although this is linked to the previous point, it goes deeper into the issue of the link that should exist between the financial sphere and the real economy. The Transparency Directive remains very traditional in this respect and requires only financial information, whereas other jurisdictions (such as China) require more diverse information from investors.*
- *Whether the information may be "streamlined" (or "optimized") by investors or should be verifiable or even verified: the Transparency Directive system relies on the fact that information given by investors is* ***a priori*** *true and faithful (verifications may only be made ex post), whereas the US system requires the filing of supporting documents (such as contracts) which allow almost simultaneous verification of the accuracy of the statements made by investors. A more heavy system may be found in China where, when investors become significant (holding of more than 20%); the information provided in the notification must be verified by an independent third party.*

- The issue of the types of exemptions granted is significant for the proper functioning of the market that may require that some market players benefit from simplified notification rules. The items to be assessed in this respect are the following:
  - *Simplicity or complexity of the exemption system: the Transparency Directive sets up a (relatively) simple system based on a single set of rules found in the Transparency Directive whereas other jurisdictions (such as the US) rely on complex exemptions based on rules issued by various regulators under many different legal instruments and complex case law interpreting flexible notions.*
  - *The type of investors benefiting from the exemptions, and in particular whether they are registered, regulated and supervised (which is the case for most exemptions).*
  - *The objectivity of the criteria that need to be met in order to benefit from the exemption: for instance, if the exemption is linked to the status of "passive investor" (as is the case in the US) or the undertaking not to vote the relevant shares or otherwise influence the issuer (as in the directive system), the criteria are in part objective and in part subjective. The investor may at any time decide to waive its right to the exemption through a change in attitude (from "passive" to "active" investor in the US, or through the decision to vote the relevant shares in the directive system).*

- The issue of extensions of notification requirements to specific situations may be assessed in light of the following:
  - *The simplicity of the main criteria being used: in the Transparency Directive (as well as in most reviewed jurisdictions), the criteria most often used are related to the ability to influence the issuer and the size of the holding, whereas some jurisdictions (such as the US) use complex notions such as "beneficial ownership" that involve an assessment of both the ability to exercise influence on the issuer and the right to dispose of the shares.*
  - *The nature of the exemptions: whether they are limited to specific types of conduct or if they include "catch all" provisions (such as the Transparency Directive provision relating to third parties acting on behalf of an investor).*
  - *The existence of a general anti-fraud provision, such as exists in the US where it is clearly stated in the law that sophisticated financial instruments may not be used to evade notification requirements.*



- Notification from persons holding financial instruments giving access to shares that have not yet been issued is important to have a full picture of the interests that may be held in an issuer:
  - *The most transparent system (found in Japan and the Switzerland) requires notification when the financial instrument is acquired, whether irrespective the right to obtain newly issued shares is immediately exercisable or not. The rule is similar in Hong Kong, where it is specified that notification is only required if the number of underlying shares may be determined.*
  - *Another system requires notification when the holder has the right to acquire beneficial ownership within a certain period of time. In the US, notification is required if the acquisition of beneficial ownership may take place within 60 days.*
  - *In the least transparent system, no notification is required: this is the case in India and in the Transparency Directive.*

- Notifications of financial instruments giving access to shares already issued in general follow the same rules as above. However, the Transparency Directive contains an obligation to disclose these instruments. Two questions may arise (which exist also for instruments giving access to shares not yet issued):
  - *Whether, when the exercise of the financial instrument is subject to a condition outside of the control of the holder, satisfaction of this condition should be a pre-condition to the obligation to notify: in the US, this is the case, whereas the reverse is true in Hong Kong, Japan and Switzerland.*
  - *Whether the instruments should be aggregated with shares for disclosure purposes.*

- Notification of stock lending (or similar temporary transfer) transactions is a sensitive subject as it is related to an extensive practice financial markets (in contexts that may not lead to interesting information for the markets) and a potential for abuse in the form of so-called “empty voting” (vote without the corresponding economic exposure). The relevant issues include:
  - *The rules pursuant to which the borrower needs to notify: generally speaking, notification is required if the voting right is transferred (which is the case when the ownership of the share is transferred as a result of the loan, or if it is provided through contractual provisions).*
  - *The cases when the lender needs to notify, which are usually difficult to determine and not well defined.*
  - *The existence of specific lending systems or rules which, if followed, may give rise to some notification exemptions, as in Switzerland (when loans go through standardized platforms and are used in connection with liquidity management) or in Hong Kong when “Approved Lender Agents” are used.*

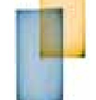
- Notification of cash-settled derivatives has become a subject of discussion when they have been used as a way to build up stakes in issuers without the need to proceed to notifications. The situation in the reviewed jurisdictions is currently as follows:
  - *China and India do not require specific disclosure, which is mostly due to the lack of general regulation regarding cash-settled derivatives*
  - *Japan does not require disclosure.*
  - *The US, which traditionally did not require disclosure, is now in an intermediate position, as a court ruled that cash-settled derivatives could not be used to avoid notification requirements.*
  - *Hong Kong and Switzerland require notification.*

6.3.2 Thresholds

In case of acquisition or disposals of major holdings, notifications are required upon crossing thresholds in all the reviewed countries. They are computed on the basis of both increases and decreases of shares and voting rights, except in Switzerland where only voting rights are taken into account. Countries that require the highest levels of transparency are Hong Kong, Japan and the US, which all require disclosure when thresholds of 5%, 6%, 7%, etc. are crossed. Switzerland has a more typically "European-style" system. India's system is made more complex by the fact that there are several cases when mandatory takeovers may be triggered: when the 15% threshold is crossed, when there is an increase of 5% between 15% and 55% and when any share is acquired between 55% and 75%. Although China appears to have lower transparency requirements, it should be noted that its system is actually interesting for its sophistication, as shall be further described below. The following table summarizes the applicable thresholds:

APPLICABLE THRESHOLDS (ARTICLE 9.1)						
	China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
Thresholds	5% between 5% and 30% : increase or decrease of 5% (30% mandatory offer)	5% or more + every 1% Short position of more than 1%.	5%, 10%, 14% between 14% and 54%: increase by 2% or 5% above 54%: any acquisition	5% or more + every 1%	3%, 5%, 10%, 15%, 20%, 25%, 33,33%, 50%, 66,66%	5% or more + every 1%

- The shares whose voting rights are suspended shall not be included in the calculation of total voting rights in China, India, Hong Kong and the US (where the applicable mechanism differs from that of the Directive) unlike in Japan and Switzerland, which follow the same principle as the Directive.
- China and Hong Kong may allow issuers to impose (in their articles of association for example) the notification of lower thresholds than those required by law, although it does not seem to be market practice to do so. In India and Japan, it is not clear whether such clauses are enforceable. In Switzerland and in the US, such clauses would not be valid.



- Notifications in the US follow a very specific regime which is worth describing at the outset:
  - Notifications in the US

1) Initial Reporting

Principle: A person (or a group of persons) that acquires beneficial ownership of more than 5% of a class of voting equity securities must report such acquisition to (i) the SEC), (ii) any stock exchange on which the securities are listed, and (iii) the issuer.

Notion of beneficial ownership: A person is deemed to be a beneficial owner of any equity security if such person or group has or shares:

(i) *voting power* (including the power to vote, or to direct the voting of, the security) or

(ii) *investment power* (including the power to dispose, or to direct the disposition of, the security).

In addition, a person is deemed the beneficial owner of any equity security underlying other equity-linked instruments if:

(a) such instruments were acquired with the purpose or effect of changing or influencing control of the issuer or

(b) their holder has the right to acquire the underlying equity security *within 60 days* through the exercise or conversion of such instruments; provided that the exercise or conversion of the equity-linked instruments is not subject to a material contingency outside the control of the holder of the instruments.

Reporting requirement: Any person acquiring beneficial ownership of more than 5% must report it by filing a form with the SEC under cover of **Schedule 13D,** with the exception of certain specified categories of investors who may instead file a simpler form under cover of **Schedule 13G**.

Regarding Schedule 13D

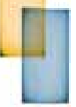
Timing: within *10 calendar days* after the 5% threshold is crossed.

Content: (i) the identity of the acquirer, including its management, directors and controlling entities; (ii)· *the source and amount of funds* used to acquire the securities; (iii) the *purpose of the acquisition,* including any plans or proposals of the acquirer for future purchases or sales of issuer's stock or for any changes in the issuer's management or board of directors or any major corporate transaction affecting control of the issuer; (iv)· the amount and percentage of the issuer's securities held by the acquirer and details about transactions in such securities during the 60 days prior to filing of the Schedule 13D; and (v) *any arrangements to which the acquirer is a party relating to the issuer's securities* (including debt securities and securities not registered under the Exchange Act).

Regarding Schedule 13G

Schedules 13G apply to two categories of persons:

Qualified Institutional Investors. These are specified types of *US institutional investors* (such as a US bank or a registered investment company) that have acquired the securities *in the ordinary course of business, without the purpose or effect of changing or influencing control of the issuer,* and not in connection with or as participants in any transaction having such effect;



Passive Investors. These are any persons *not seeking to acquire or influence control of the issuer* who own *less than 20%* of a registered class of the issuer's securities.

Timing:

45 days from the end of the calendar year in which the acquisition occurred for Qualified Institutional Investors;

10 days from the acquisition for Passive Investors.

Content : (i) the identity of the holder; (ii) the basis for its eligibility to use Schedule 13G; (iii) the amount and percentage of the issuer's securities that it holds; and (iv)· the identity of the persons on whose behalf it owns the securities.

2) Amendments to previous filings

Amendments to Schedule 13D

Timing: *promptly* (i.e., no later than the next business day), upon the occurrence of any material change in the information included in a previously filed Schedule 13D, including the acquisition or disposition by such reporting person of 1% or more of the relevant class of equity securities.

Threshold: each 1%

Amendments to previous filings Schedule 13G

Timing:

Principle: *within 45 days of the end of the calendar year,* if, as of December 31 of such calendar year, there are any changes to the information included in their previously filed Schedule 13G.

Exception: if such an investor crosses the 10% threshold during any calendar year, or thereafter if it increases, or decreases, its ownership percentage by more than 5%, it must amend its Schedule 13G filing as follows:

- Qualified Institutional Investor: *within 10 days of the end of the month* in which such change in its ownership percentage has occurred;

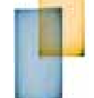
Passive Investor: *promptly.*

3) Computation methods

Numerator:

all the outstanding equity securities of the same class that are directly held by the reporting person; plus

any equity securities of the same class that the reporting person is deemed to beneficially own that may be acquired upon exercise or conversion of equity-linked instruments, irrespective of whether such equity securities are outstanding or not.



Denominator:

all the outstanding equity securities of the same class other than treasury shares; plus

any equity securities of the same class that the reporting person is deemed to own beneficially that may be acquired upon exercise or conversion of equity-linked instruments, if such equity securities are not outstanding.

- **Exemptions**

- Except for China, all countries have laid down an exemption for *custodians,* which is subject to the condition that the exercise of the voting rights attached to the shares is made under the instructions given by the shareholders. In Japan, there is no similar safe harbour, but the exemption is a matter of interpretation. In the US, the exemption would not be available if beneficial ownership has been transferred to the custodian, which is not normally the case.

- The exemption applicable to *market makers* is applicable as follows:

  - In Switzerland (pursuant to rules governing the exemption of banks and securities dealers), the exemption is applicable to equity securities and financial instruments which they hold in their trading book, provided the associated proportion of voting rights amounts to less than 5% and there is no intention to exercise the voting rights conferred by these holdings or to influence the management of the issuer in any other way.

  - In the US, less stringent reporting obligations are applicable to market makers, who would generally report holdings of more than 5% as of the end of each calendar year on a Schedule 13G filed within 45 days after such calendar year ends. They should not intervene in the management of the issuer.

  - No such exemption is provided in China, where there are no established market makers, and in Hong Kong, India and Japan.

- The same applies with respect to the exemption for *credit institutions* acting for their own account:

  - In Switzerland, the voting rights held in the trading book of a bank or a broker shall be excluded from the calculation of the voting rights required by the notification of the acquisition or disposal of major holdings. The exemption is subject to the bank or the broker being prohibited from exercising the voting rights and is limited to 5% of the voting rights. In the US, to the extent that the bank or broker-dealer is the beneficial owner of the shares, the exemption would not be applicable.

  - In Japan, a special rule is applicable to banks and certain other institutions to the effect that such institutions may choose to file a report on holdings twice a month, unless the shareholding ratio exceeds 10%.

  - In China, under the current PRC legal framework, commercial banks are not allowed to purchase stocks

for the purpose of trading. Since the voting rights held in the trading book of a broker are treated as that held by a regular investor, such voting rights are included in calculating voting rights required by the notification of the acquisition or disposal of major holdings.

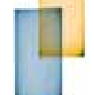
- In Hong Kong and India, no exemption is available.
- In the US, to the extent the bank may benefit from a QIB regime, its reporting requirements could be limited to schedules 13G, which are filed on a yearly basis.

Extensions

(i) Extensions applicable to relationships between shareholders or between shareholders and third parties

Notification requirements may be extended to various persons in the case of acting in concert, share loans (or other similar transactions), use of shares as collateral, acquisitions by a controlled company, depository agreements and use of voting proxies. In each case, the assessment of the precise context and nature of the contractual relationships is key to the correct application of the rules. Subject to this caveat, the following main principles may be stated:

- *Acting in concert* is taken into account in all the reviewed countries.
- Generally, notification is required from the beneficiary of a *share loan,* in case of a stock lending or a similar temporary transfer agreement, to the extent that ownership of the shares is transferred to the borrower. However, the following principles should be noted:
  - In China, regulations require the borrower to declare the transaction.
  - In India, the Securities Lending Scheme, 1997 provides that the beneficial interest continues to remain with the lender and all the corporate benefits accrue to the lender only. However if the borrower is entitled to vote, it should notify the transaction.
  - In Japan, if the borrower holds the title to the shares (which would be the standard case), it should declare the transaction. The lender would also have to notify it.
  - In Switzerland, securities lending and transactions with repurchase obligations must be declared, unless they are processed through standardized trading platforms for the purposes of liquidity management. The lender is exempt from notification requirements.
  - In the US, notification is required if the transferee acquires voting or disposition rights with respect to the shares.
  - The “Approved Lender Agent” (“ALA”) scheme, set up in Hong Kong, is also worth mentioning:



The ALA scheme in Hong Kong

In Hong Kong, regarding stock lending, if certain conditions are satisfied, there will be (i) an exemption for substantial shareholders (other than substantial shareholders who are directors), (ii) simplified disclosure regime for ALA and their holding companies and (iii) a disregard of the interests of regulated persons (corporations licensed to deal in securities, and overseas brokers in recognized places) in shares borrowed and lent.

a) Substantial shareholders

Regarding substantial shareholders who lend through an ALA, on condition that the shares are held by the ALA (i) as agent for the substantial shareholder, (ii) for lending only and for no other purpose and (iii) are lent using only a specified form of agreement, they are exempt from making disclosure of changes in the nature of their interests that result from :

(a) the transfer of the shares to the ALA and the return of the shares by the ALA; and

(b) the lending of the shares by the ALA and the return of the shares to the ALA (SBL Rules, S.3)

b) ALA

A corporation approved by the Commission as an ALA will be exempted from the disclosure requirement when it lends shares from its "lending pool" or when shares are returned to their lending pool. If an ALA is interested in more than 5% of the shares of a issuer it will be a substantial shareholder and will have to disclose changes in the percentage level of its "lending pool" of shares in that issuer but the amount of information required to be included in their notification has been simplified.

Lending pool :

(i) shares that the ALA holds an agent for a third party which he is authorised to lend under a lending agreement that meets the requirements of the SBL Rules; and

(ii) shares that have been lent by the ALA only if the right of the ALA to require the return of the shares has not been extinguished.

c) Regulated persons

The regulated persons borrow and lend the shares within 5 business days after the shares on which the interest in the shares is acquired. Such interests in shares are to be disregarded. When the shares are returned to the regulated person it may either return the shares to the ultimate lender or it can lend the shares to another borrower provided it is done with 5 business days.

The regulated persons are corporations licensed to deal in securities, and overseas brokers in recognized places e.g. France.

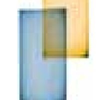
- The case of the *collateral* holder is diversely addressed and heavily dependent on the precise terms of the collateral agreement. Notification would typically be required when there is a transfer of ownership or voting rights (which may not be the standard practice in several jurisdictions).
- In China, India, Switzerland, and the US, the notification is required from a person for shares held by an *undertaking controlled* by such person. In Japan, such notification will be required only if both entities

are deemed "joint holders" agreeing to jointly acquire or transfer the shares or to jointly exercise voting rights or other rights (which will be typically the case). In Hong Kong, such notification will be required if the controlling entity is entitled to exercise any right conferred by the holding of the shares or control the exercise of any such right.

- Depositors with discretionary voting rights would typically be required to notify in all reviewed jurisdictions.
- The notification is required from a *proxy holder* where such person can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders. In Japan, if the proxy holder has the intention to control business affairs of the issuer, this is enough to trigger the notification requirement (irrespective of voting discretion). In Switzerland, no notification is required if the proxy holder may only vote in accordance with instructions of the board of directors (as the vote is thus not discretionary for the proxy holder).

(ii) Extensions applicable to shares not yet issued

- In all the reviewed countries except India, the notification is required also from persons holding financial instruments giving access to shares which have not yet been issued.
- Aggregation with shares shall take place in all jurisdictions studied. It may be made at the level of the numerator only (such as in Hong Kong) or at both the numerator and the denominator (such as in the US).
- In China, holding 20%, 30%, 40% etc. of convertibles bonds needs to be notified, irrespective of the number of shares that may be obtained through conversion.
- The time when the notification should be made follows different patterns:
  - The most transparent system states that notification may be required when the financial instrument is acquired, irrespective of the fact that the right to obtain newly issued shares is immediately exercisable or not. This is the case in Hong Kong, Japan and Switzerland.
  - Another system requires notification to be made when the holder has the right to acquire beneficial ownership within a certain period of time. In the US, notification is required if the acquisition of beneficial ownership may take place within 60 days.
  - In a third system, disclosure is only required within the exercise period. This is the case in China.



The table below summarizes the situation in the various countries under review:

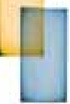
WHEN SHALL THE NOTIFICATION OF MAJOR HOLDINGS BE ALSO REQUIRED FROM PERSONS HOLDING FINANCIAL INSTRUMENTS GIVING ACCESS TO SHARES WHICH HAVE NOT YET BEEN ISSUED (SUCH AS CONVERTIBLES)? (ARTICLE 10)					
China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
When the holder qualifies for the exercising conditions or within the exercise period.	If the number of underlying shares through such convertibles can be determined at the date when one first acquires an interest in those underlying shares.	NA	Upon acquisition	Upon acquisition	When the holder has the right to acquire beneficial ownership within 60 days. Thus, if a convertible security is convertible at any time, or otherwise within 60 days, the holder would be deemed to already beneficially own the underlying securities.

Content of the notification for the crossing of a threshold

- The following table compares the information requirements to be provided when the crossing of a threshold must be notified in the various jurisdictions with the information requirements of the Directive:

CONTENT OF THE NOTIFICATION REQUIRED FURTHER TO THE CROSSING OF THRESHOLDS						
Directive	**China**	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
Voting rights held	X	[number of shares]	X	X	X	X
Percentage of capital held	X	X	X	X	X	X
Description of chain of control	X	X			X	X
Date of the transaction	X	X	X	X	X	X
Identity of the shareholder	X	X	X	X	X	X

- In most jurisdictions, additional information may be required. For instance, in the US, the following items always need to be disclosed: source and amount of funds used to acquire the shares, purpose of the transaction, contracts, arrangements, and understandings or relationships with respect to securities of the issuer. Additional information is also required when the interest acquired is such that a mandatory takeover has been launched (for instance, in India, when the 15% threshold is crossed).
- In other systems, additional information may be required depending on the exact situation of the issuer or the type of transaction. Factors that are taken into account include the percentage held by the investor, its activity (active or passive investor), its situation (largest or controlling shareholder) or the size of the transaction.



- A table summarizing this is presented below:

ENHANCED NOTIFICATION REQUIREMENTS (OTHER THAN IN CONNECTION WITH MANDATORY TAKEOVERS)						
Answer / Local Rule	**China**	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
Thresholds	20%	NA	NA	Large sale (holder selling more than half of its highest holding within a 60 days period, and reduction of more than 5%)	NA	20% or holder's intent is no longer passive2
Disclosure of additional information	See below.			Name of purchaser		Schedule 13D (instead of Schedule 13G)

- The Chinese system, which is sophisticated, is presented in the box below:

The Chinese notification system

The Chinese notification system is worth mentioning for the following reasons:

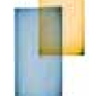
- it provides for different requirements depending on the actual situation of the investor acquiring an interest in the issuer;
- it provides in certain cases for an independent verification of the content of the notification;
- it requires detailed information on a number of topics.

1) Different requirements for different situations

If an investor and its concerted parties are not the largest shareholder or actual controller of a listed company, and they together hold shares more than 5% but less than 20% of the issued shares of a listed company, they shall file a standard report on the change of equities. If the aforesaid investor and concerted parties (holding more than 5% but less than 20% of the shares) are the largest shareholder or actual controller of a listed company, they shall file a detailed report.

If the shares held by an investor and its concerted parties reach or exceed 20% but do not exceed 30% of the issued shares of a listed company, they shall also file a detailed report on the change of equities. If such investors are the largest shareholders or actual controllers of such listed company, they shall in addition provide independent third party verification.

The triggering event of the notification is an increase or decrease of 5% in the number of shares or voting rights within the two bands.



The system may thus be summarized as follows:

	Percentage above 5% and below 20%	Percentage at least 20% but below 30%
Investor is not largest nor controlling shareholder	Standard notification	Detailed notification
Investor is largest or controlling shareholder	Detailed notification	Detailed notification with independent third party verification

2) Independent third party verification

In the above-mentioned case, the investor needs to hire a financial consultant to issue verification opinions concerning the contents disclosed in the aforesaid report on the change of equities.

However, if the aforesaid investor and concerted parties promise to waive their right to vote the relevant shares for at least 3 years, they are exempted from hiring such financial consultant.

3) Information to be provided

The information to be provided includes, *inter alia,* the following:

- Regarding standard notifications:

- Purposes for shareholding, whether the investor and concerted parties intend to continuously increase their equities in the listed company within the next 12 months.
- Brief information on the purchase and sale of the shares of the said company through the securities transactions at the stock exchange within the preceding 6 months of the change of equities.

- Regarding detailed notifications:

- The controlling shareholders and actual controllers of the investor and concerted parties, as well as the structure chart on their equity control relationship;
- The prices, necessary capital, sources of capital or other payment arrangements for acquiring relevant shares;
- Whether there is any intra-industry competition or potential intra-industry competition between the business engaged in by the investor, concerted parties, or their controlling shareholders or actual controllers and the business of the listed company; whether there is any continuous related transaction; whether corresponding arrangements have been made so as to avoid the intra-industry competition between the investor, concerted parties or their related parties and the listed company and to keep the independence of the listed company if there is intra-industry competition or potential intra-industry competition;
- Following plans for adjusting the assets, businesses, personnel, organizational structure or articles of association of the listed company in the future 12 months;
- Important transactions between the investor or concerted parties and the listed company in the preceding 24 months.

Notification procedure

- Except in Switzerland, where a standard form is only recommended, in all the other reviewed countries, investors are bound to use a standard form in order to fulfil their notification obligation.
- In all countries under review, the notification must be made to the issuer. Other addressees differ in the various countries, as described below:

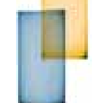
NOTIFICATION PROCESS						
	China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**Us**
Investor to addressees	Regulator, Exchange	Regulator, Exchange	Regulator, Exchange	Regulator, Exchange	Exchange	Regulator, Exchange
Addressee to public	Issuer to public	Exchange to public	Exchange to public	NA	Issuer to public	NA
Comment				Electronic filing (EDINET)	Within 2 trading days (*via* electronic platform)	Electronic filing (EDGAR / IDEA)

- It should be noted that electronic filing with the regulator and/or the exchange makes it possible to provide simultaneous disclosure to the public (such as in Japan and the US).
- Deadlines for notification range from short periods (two working days in India, three working days in China and Hong Kong) to long ones by current standards (10 calendar days in the US).
- The following table summarizes the applicable deadlines:

DEADLINE FOR NOTIFICATION (ARTICLE 12.2)						
	China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
Deadline	3 trading days	3 business days	2 working days	5 business days	4 trading days	Initial: 10 calendar days Amendments: 1 trading day

Segregation

- For the purposes of the notification of the acquisition or disposal of major holdings, the parent company of a management company shall be authorized not to aggregate the voting rights it holds with those managed by the management company in all countries except China. In each case, this exemption is subject to the fact that the management company manages the voting rights independently from its parent company.
- In all countries, there is a similar regime for investment firms.



Call options and derivatives

(i) Call options

- Holders of financial instruments entitled to acquire shares, such as European style or US style call options, may be subject to different types of notification, depending on the level of transparency that is sought:
  - Notification may be made upon acquisition or grant of the call option, in which case transparency is maximum: acquisition of a European-style or US-style call option, whether subject to further conditions or not, triggers an immediate notification requirement. This is the rule in Hong Kong, Japan and Switzerland.
  - Notification may be required only when the call option is exercisable. In this case, acquisition of a US-style call option needs to be notified immediately (provided its exercise is not subject to specific requirements) while European-style call options need to be notified only at the opening of the exercise period. No country uses this system. However, the US uses a similar rule, whereby notification is required when the holder has the right to acquire beneficial ownership within 60 days.
  - Notification may also be required only when the call option is actually exercised, in which case the transparency is lowest, as no information is provided on the actual holding of the option itself. China and India follow this rule.
- The following table summarizes applicable rules:

NOTIFICATION REQUIREMENTS REGARDING CALL OPTIONS					
China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
Exercise date	Acquisition date	Exercise date	Acquisition date	Acquisition date	When the holder has the right to acquire beneficial ownership within 60 days. If exercise of the option is subject to a condition, when the condition is met.

(ii) Derivatives

- The holders of financial instruments having a similar economic effect to shares (i.e. “long” financial instruments) may be required to disclose their position:
  - only in the case of physically-settled financial instruments, on the theory that if no shares may be delivered, there is no reason to disclose the transaction
  - also with respect to cash settled financial instruments (such as cash settled contracts for difference or cash settled equity swaps), on the basis that such instruments may (and have been in effect) be used to build up stakes in companies
- The following table summarizes the applicable rules in the various jurisdictions:

DISCLOSURE OF "LONG" FINANCIAL INSTRUMENTS					
China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
NA	Physically-settled and cash-settled	NA	Physically-settled only	Physically-settled and cash-settled	Physically-settled only (in general) but case law prohibits use of cash-settled derivatives to evade notification provision.

- The number of shares that may be delivered needs to be assessed when notification is filed. There is no guidance in Japan on this issue. In Hong Kong, notification is required when the number of shares may be computed, in which case the face amount is to be used.
- It should be noted that notification regarding derivatives is not always subject to explicit written rules. For instance, in Japan and the US, the issue is mostly a matter of interpretation.
- In the US, the use of cash settled derivatives to evade notification provisions is prohibited (see TCI / CSX case), on the basis of SEC rule 13d-3b (providing that "any person who, directly or indirectly, creates or uses a trust, proxy, power of attorney, pooling arrangement or any other contract, arrangement, or device with the purpose of effect of divesting such person of beneficial ownership of a security or preventing the vesting of such beneficial ownership as part of a plan or scheme to evade the reporting requirements of section 13(d) or (g) of the Act shall be deemed for purposes of such sections to be the beneficial owner of such security").

Disclosure of transactions made by the issuer on its own shares

- Issuers acquiring or disposing of their own shares are required to make public such transactions in all the reviewed countries.
- Regarding acquisition of own shares, disclosure is typically required both at the time when the decision to launch a buy-back program is taken and when the program is implemented. In the US, disclosures relating to open market repurchases are considered insufficient. The timing of the disclosure may depend on the way in which the buy-back program is implemented. For instance, in China, in case of acquisition by tender offer, the issuer shall disclose the transaction details every day. In case of acquisition by centralized trading at competing price, the issuer shall disclose the transaction details in the first three trading days of each month and make a public announcement when acquiring every 1% of its total shares.
- Generally, the timing of the disclosure for acquisition of own shares is the following:

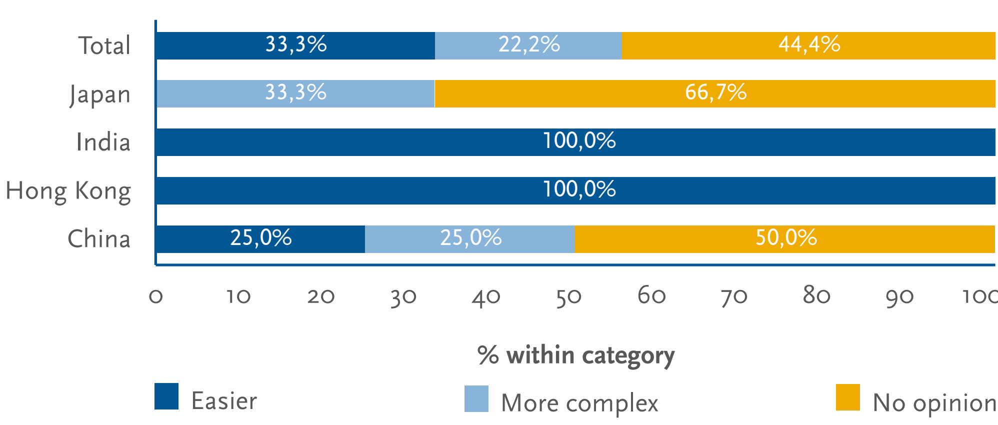
DISCLOSURE OF ACQUISITION OF OWN SHARES					
China	**Hong Kong**	**India**	**Japan**	**Switzerland**	**US**
Daily or monthly (see above)	Daily	Every fortnight	Monthly	Within 4 trading days	Upon crossing threshold

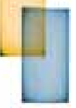
- In all countries, disclosure needs to be made irrespective of the number of shares that are acquired, except in China (where a 1% threshold applies when acquisition is made by centralized trading at competing price), Switzerland (where notifications are made when 3%, 5% and 10% threshold are crossed) and the US (where disclosure is required when the 5% threshold is crossed).
- In all jurisdictions, the issuer is required to disclose to the public the total number of voting rights and capital (or number of shares). The currency of disclosure is the following:

DISCLOSURE BY THE ISSUER OF THE TOTAL NUMBER OF VOTING RIGHTS AND CAPITAL						
	China	Hong Kong	India	Japan	Switzerland	US
Periodic information	Annual, Half-yearly and Quarterly Report	Monthly basis	Quarterly	Annual, Semi-Annual and Quarterly reports	Annual and Semi-annual financials	Annual and Quarterly financials

Evolution of cross-border declaration of thresholds

On balance, when they expressed an opinion, non-EU Institutional Investors consider that the Directive has made cross-border declaration of thresholds easier.





6.3.3 Perception by non-EU stakeholder on the obligation to notify major holdings

Level of transparency provided by Transparency Directive rules on thresholds

In accordance with the responses to the previous question, a majority (66.7%) of non-EU Institutional Investors believe that the Directive provides an appropriate level of transparency of the EU listed companies.

Obligations of the directive considered as an unreasonable increased burden

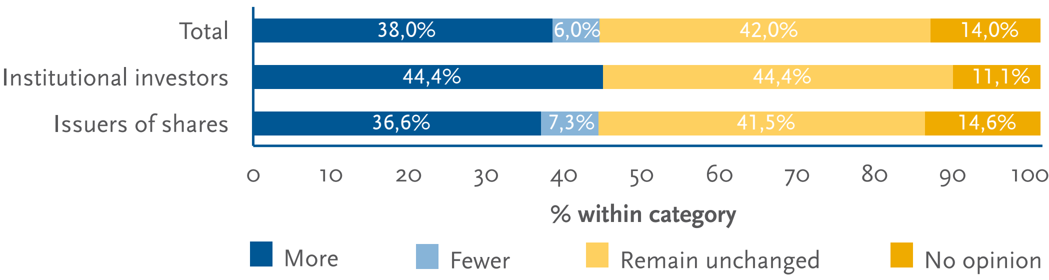
In general, non-EU Institutional Investors do not think that the obligations of the Directive regarding notification of thresholds have resulted in an unreasonable increase of burden.

Additional cost for investors resulting from insufficient harmonisation

55.6% of non-EU Institutional Investors believe that the lack of EU harmonisation regarding the declaration of major holdings represents an additional cost to them.

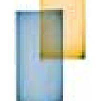
Need for disclosure of more or fewer situations

On balance, non-EU stakeholders are rather of the view that the number of situations disclosed regarding thresholds should remain unchanged in the EU.

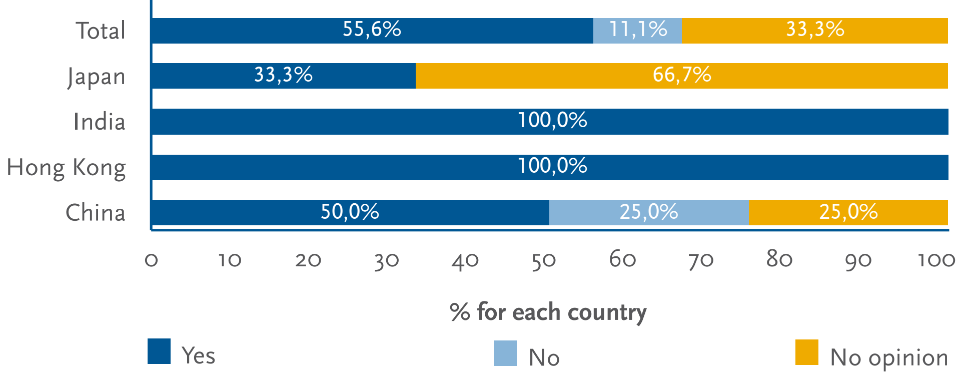


Transparency Directive and capture of the financial products implying transfer of ownership and voting rights

A majority (55.6%) of non-EU Institutional Investors are of the opinion that the Directive properly captures the category of financial products implying transfer of ownership and voting rights.



Institutional investors - Does the Transparency Directive capture properly the category of financial products implying transfer of ownership and voting rights?



Declaration of borrowed voting rights

Non-EU Institutional Investors are in favour of the inclusion of borrowed voting rights in the calculation of thresholds. One third of them think that this is only necessary at the time of the General Assembly.

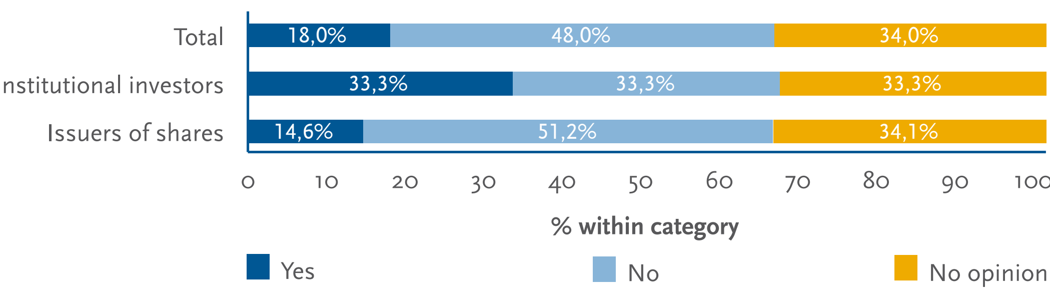
Declaration of voting rights held on behalf of a third party

A clear majority (77.8%) of non-EU Institutional Investors consider that voting rights held on behalf of a third party by virtue of an agreement should be declared.

Development of "empty voting" in non-EU jurisdictions

Generally, non-EU stakeholders feel that the practice of "empty voting" (voting without the economic pressure usually attached to shares) has developed in their jurisdictions. This view is more mixed for Institutional Investors.

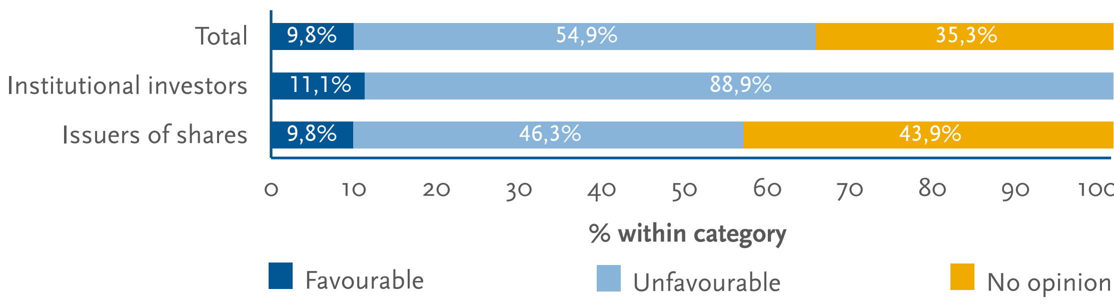
Breakdown by stakeholders category - Has the practice of "empty voting" (borrowing of voting rights for the time of the General Assemby) developed in your jurisdiction?



Stakeholders in Switzerland and, to a lesser extent, in Hong Kong believe that “empty voting” is becoming more prevalent.

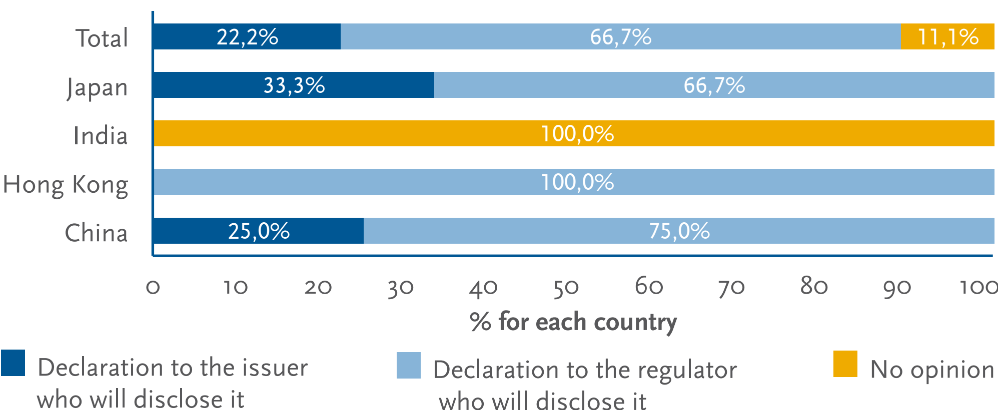
Perception of “empty voting” practice

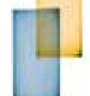
“Empty voting” practices are clearly perceived by non-EU stakeholders as at odds with the transparency of the market.



Method of disclosure of the crossing of thresholds

Generally speaking, non-EU Institutional Investors have a clear preference (66.7%) for declaration of crossing threshold made to the regulator who is then in charge of disclosing it.



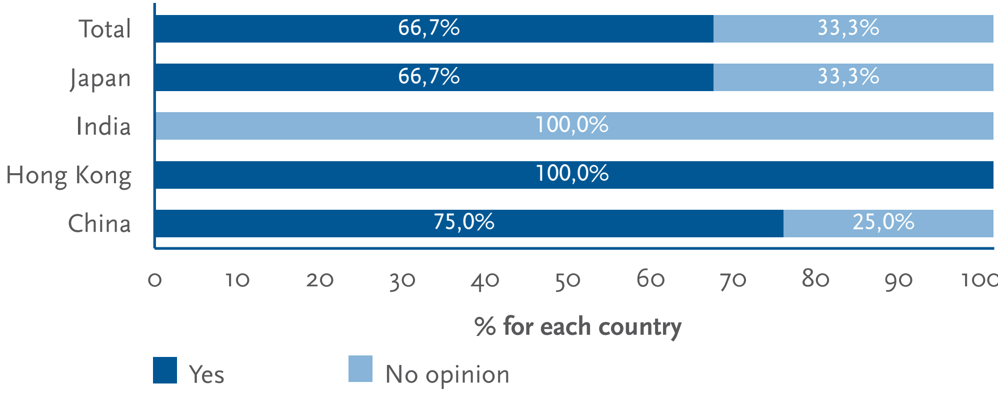


Use of Standard Form for Notification of thresholds

The EU Standard Form for threshold notification does not seem to be known by non-EU Institutional Investors (except, to some extent, in China). Only 22% of them believe that the standard form is widely used.

Suitability of common electronic Standard Form

Non-EU Institutional Investors are clearly in favour of a common EU electronic Standard Form to notify the crossing of thresholds (66.7%).



6.4 Dissemination and Storage of Regulated Information

6.4.1 Key findings and main concepts

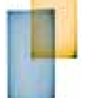
- Comparison of the various legal systems regarding dissemination and storage of regulated information is made complex as a result of the fact that there is no unified concept of "regulated information" in the various jurisdictions. Rules may thus vary according to the type of information considered.
- In addition, storage rules are often linked, from a practical standpoint, to dissemination obligations, in particular when dissemination is undertaken electronically.
- There is widespread use of electronic dissemination of information. However, there is no general rule applied in most jurisdictions. On the contrary, it seems that practical solutions have been implemented as and when needed.

Dissemination of regulated information

- In some cases (Japan and the US), the regulated information must be disclosed to the regulator who then discloses it to the market. Such indirect disclosure is only a relative concept since electronic filing with the regulator results instantaneously in disclosure to the public. China, Hong Kong and India expressly require a simultaneous disclosure to the market and to the regulator.
- Issuers are never allowed to charge investors any costs related to the disclosure of regulated information.
- Electronic dissemination is compulsory in all cases, except in Switzerland. Paper-based publication (in newspapers) is compulsory in China, India and Switzerland. In India, the publication is required in at least one English daily newspaper circulating in the whole or substantially the whole of India and in one daily newspaper published in the language of the region where the registered office of the company is situated.

Storage of regulated information

- The issue as to whether a compulsory system of central storage of regulated information is required is addressed differently in the reviewed countries. In all jurisdictions, durations of storage may differ according to the type of required storage (for instance, with the issuer, the regulator or a regulator designated entity) and the type of document. The following paragraphs should be read in conjunction with the tables called "Access to yearly financial reports" and "Access to half-yearly financial reports" (see sections 6.2.2 and 6.2.3 above).
- In China, all the disclosed regulated information should be registered at the stock exchange and reported to the local counterparts of CSRC. The investors may search for the information on the website of the stock exchange, designated newspapers. Issuers must provide access to the documents on the premises of the companies and on websites designated by CSRC for public review indefinitely.
- In Hong Kong, any document published on the issuer's website pursuant to the listing rules of the exchange remains available on the issuer's website on a continuous basis for at least 5 years from the date of first publication.
- In India, all companies having securities listed on a recognised stock exchange, must file regulated information with EDIFAR in addition to the physical filing with the said exchanges or any other platform as may be mandated by the securities and exchange board of India (SEBI) from time to time (EDIFAR has been launched by SEBI in collaboration with the National Informatics Centre). In addition, on January 1, 2007, National Stock Exchange, Mumbai (NSE) and Bombay Stock Exchange, Mumbai (BSE) jointly launched a common portal for filing and dissemination of information, which is jointly owned, managed and maintained by these two exchanges. Since its launch, the portal has become a single source to view information filed by companies listed with NSE and / or BSE. A listed company would be required to file its submissions through this portal irrespective of the stock exchange(s) on which it is listed and the information so filed can be viewed at this portal.
- In Japan, disclosed information is physically made accessible at the head office of the issuer and is available via the EDINET system (accessible through the internet). The duration of availability depends on the type of documents.



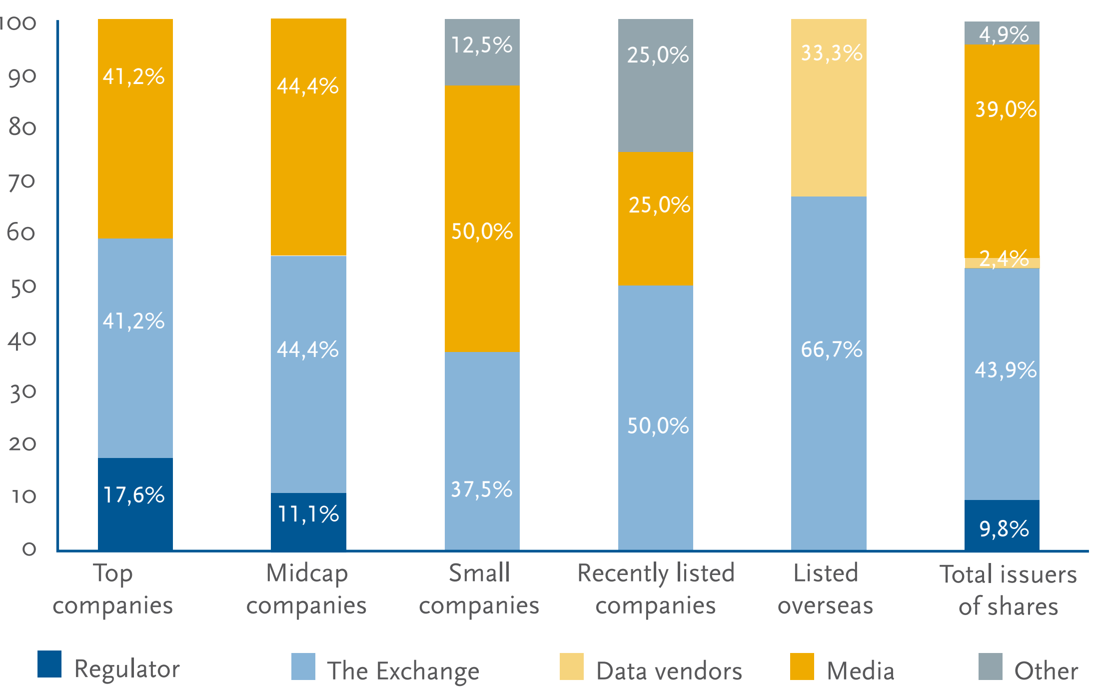
- In Switzerland, the SIX Swiss Exchange provides a central storage system. The information is available to the public for one or two years.
- In the US, all financial information filed with the SEC remains available via the SEC's website on EDGAR (the SEC storage system) for an undefinite period.

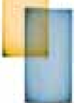
6.4.2 Disclosure of Financial information by non-EU Stakeholders

Channel of disclosure of financial information

In general, non-EU Issuers of shares disclose their financial information through the Exchange (in particular in Japan, Hong Kong and China) and the media. In the US, disclosure is made through the regulator.

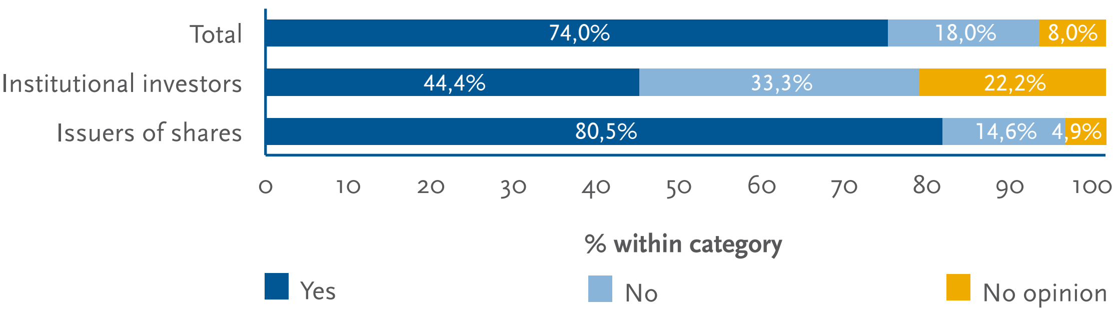
Issuers of shares - Through which channel do you disclose your financial information?





The impact technology changes on disclosure practices

A clear majority (74%) of non-EU stakeholders consider that technology has led them to change their disclosure practices, in particular with an increased use of data vendors and the Internet.



6.4.3 Storage of Financial information

Usefulness of stored historical information

As a preliminary remark to analyse the storage of information in non-EU countries, it should be highlighted that all non-EU Institutional Investors who expressed an opinion consider having access to stored historical information to be useful.

Content of stored historical information

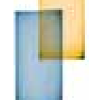
A relative majority of non-EU Institutional Investors stated that the financial information stored should include annual reports, half-yearly or/and quarterly reports and price sensitive press releases. However, some of them do not think that the storage of price sensitive press release is necessary.

Storage period of regulated information

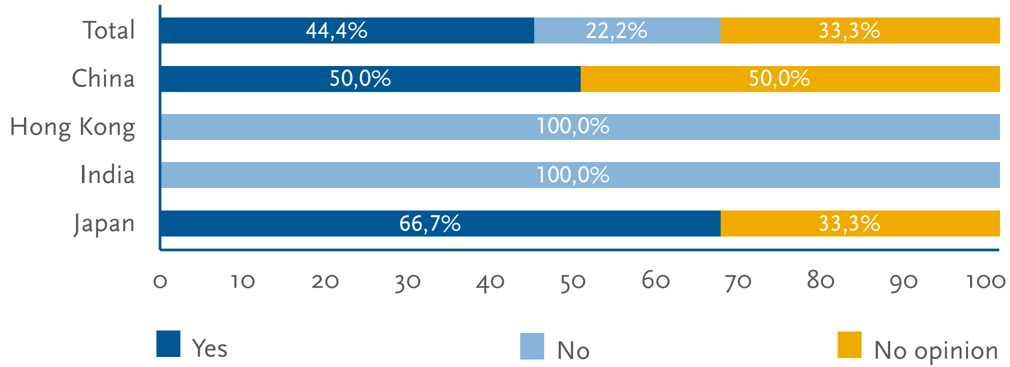
Concerning the period during which financial information should be stored, Non-EU stakeholders strongly believe that financial information should be stored for at least 5 years as required by the Transparency Directives.

Access to financial information stored by EU listed companies

As regards the transparency of listed companies in the EU, a majority (66%) of non-EU Institutional Investors that have expressed an opinion believe that they have satisfactory access to the financial information stored by the EU listed companies in which they invest.



Institutional investors - Do you consider to have satisfactory access to financial information stored by the EU listed companies in which you invest?



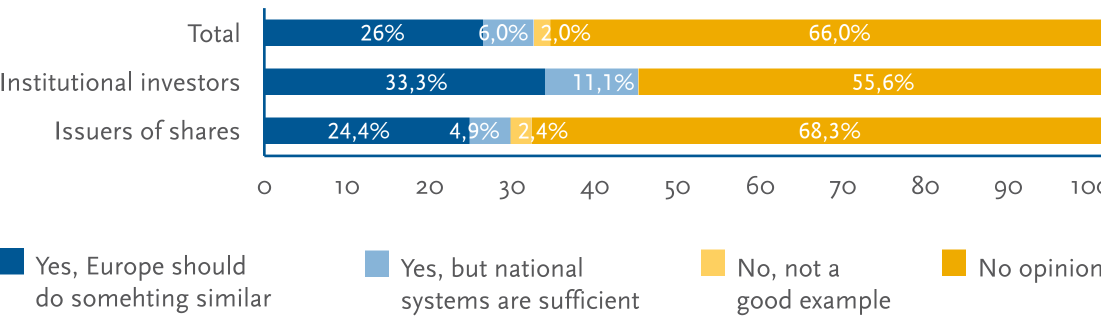
Efficiency of national independent storage mechanisms

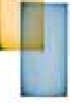
A majority of non-EU Institutional Investors (78%) think that the officially appointed mechanisms established by the Directive at national level to store Regulated information are efficient.

Efficiency of the US storage system (EDGAR)

A limited number of non-EU stakeholders are familiar with the US storage system (EDGAR). When they know it, they consider that Europe should do something similar. This view is strongly supported by Top, Recently listed and Overseas listed companies.

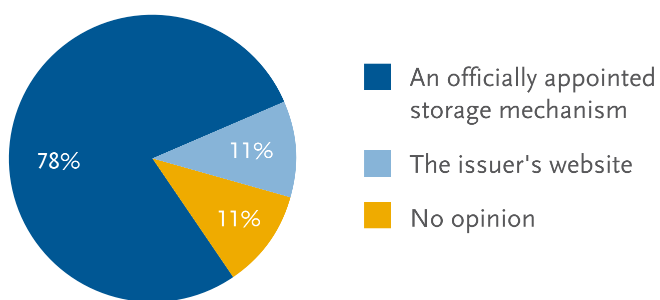
Breakdown by stakeholders category - Do you believe that the US storage system (EDGAR) is a good example of storage mechanism?





Investor trust

That said, a strong majority (78%) of non-EU Institutional Investors trust officially appointed mechanisms more than issuers' website for the storage of information.



Relevance of centrally maintained EU regulatory information system to facilitate cross-market searches for information

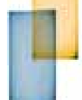
That said, a strong majority (89%) of non-EU Institutional Investors favours a centrally maintained EU regulatory information system to facilitate cross-border market searches of information.

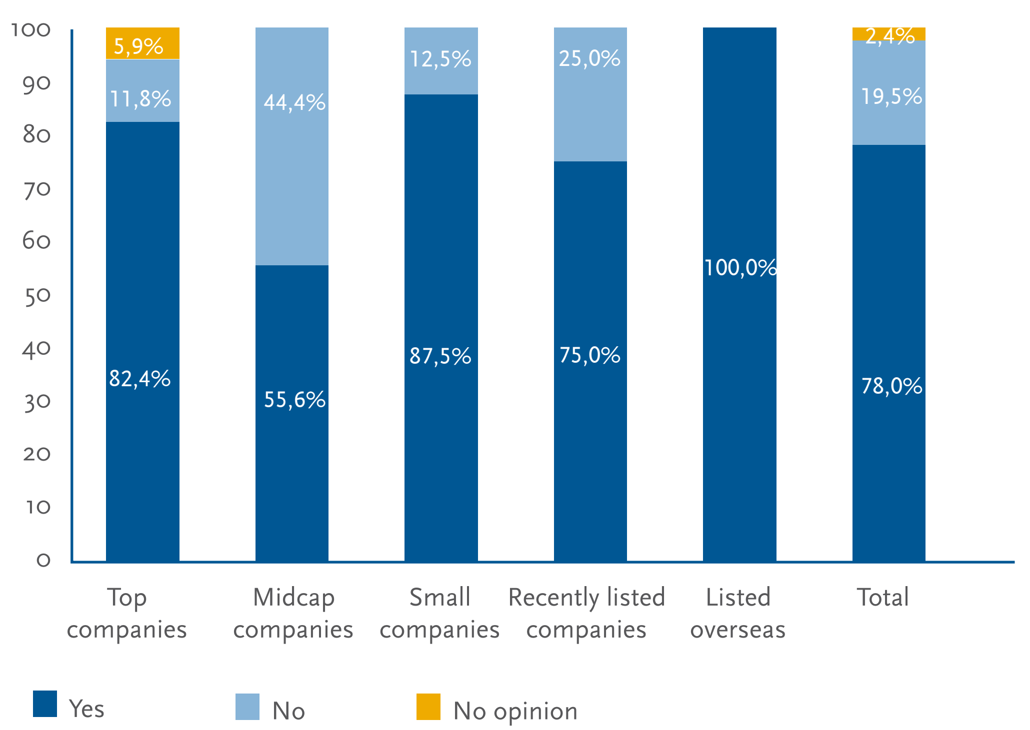
Have technological changes modified storage practices?

A clear majority (79%) of non-EU issuers indicates that technology changes have modified their storage practices and in particular lead them to use the Internet and their Home page more extensively to store financial information.

Do you store your disclosed financial information within a separate section of your website?

A strong majority (78%) of non-EU issuers of shares store their financial information on a specific section of their website. This is done by all categories of share issuers but to a lesser extent by Midcaps.



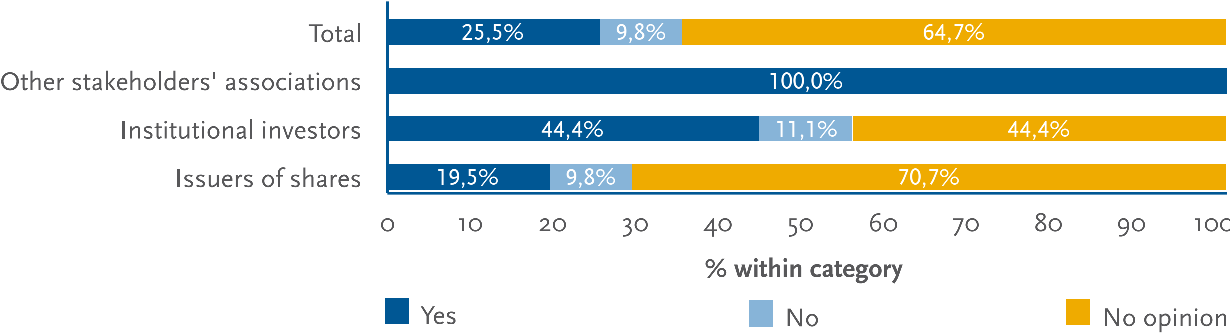


6.5 EU environment: Supervision and use of language

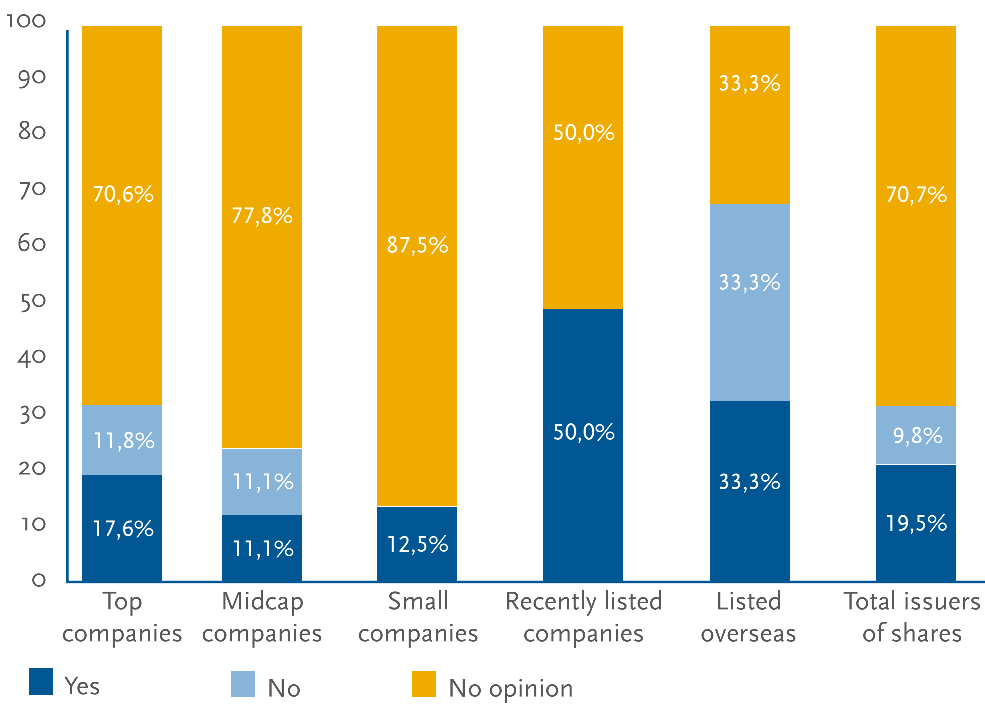
6.5.1 The efforts of EU regulators to facilitate access of non-EU issuers

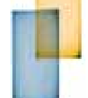
Through the on-line questionnaire Non-EU stakeholders have not expressed a strong opinion on whether EU regulators facilitate listing of non-EU companies in the EU or not. However, when they expressed an opinion, 71% think that EU regulators facilitate access to non-EU companies' listings. This opinion is expressed by recently listed and Overseas listed companies. A different opinion is expressed by stakeholders in Switzerland for whom EU regulators do not favour listings in the EU.

Breakdown by stakeholders category - Do you believe that the behaviour of EU regulators facilitates access of non-EU issuers to the EU?



Issuers of shares - Do you believe that the behaviour of EU regulators facilitates access of non-EU issuers to the EU?

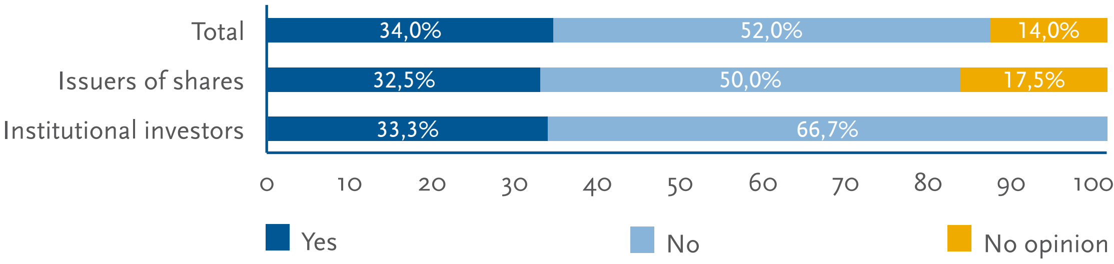




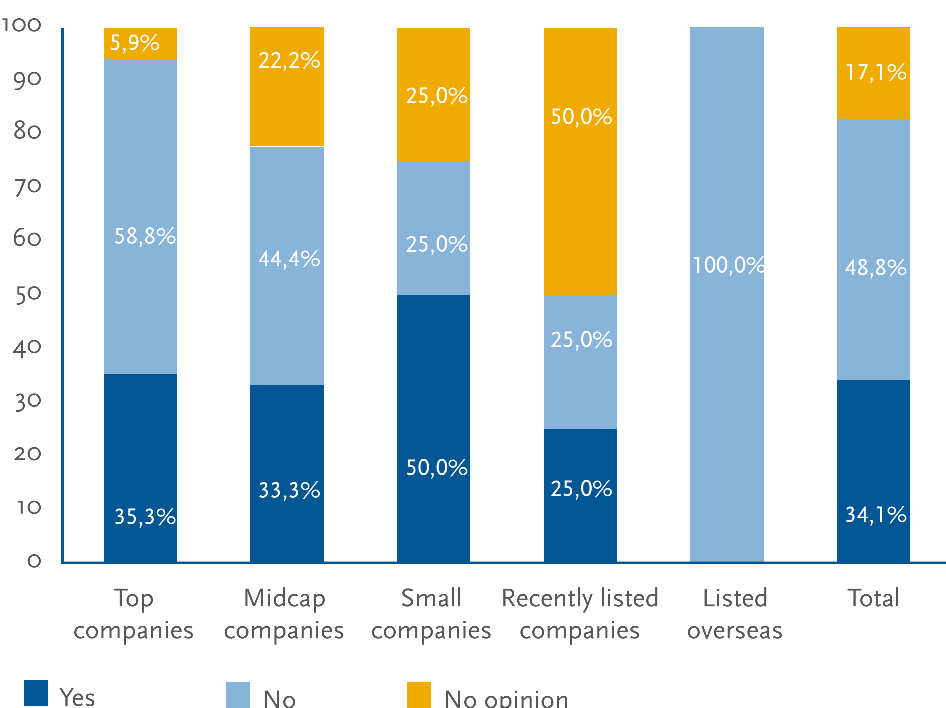
6.5.2 Language and listing in the EU

Generally speaking, non-EU stakeholders consider that language is not an obstacle for being listed in the EU, but this view is not shared by Small companies and by stakeholders in Japan.

Breakdown per stakeholders categories - Do you consider that the language is an obstacle for being listed in the EU?

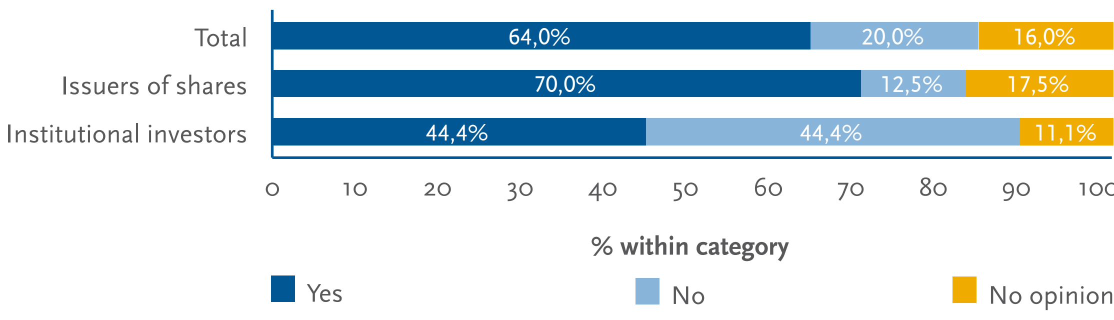


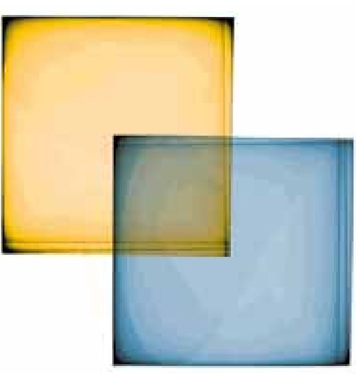
Issuers of shares - Do you consider that the language is an obstacle for being listed in the EU?



6.5.3 Use of one single language in the EU

To ease access to the Single Market, a large majority (64%) of non-EU stakeholders, and in particular issuers of shares (70%), are of the opinion that one language should be accepted across the EU by EU regulators.





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