Chapter 4

Cash-Settled Derivatives as a Takeover Instrument and the Reform of the EU Transparency Directive

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Since the first major reported case in 2003, in New Zealand, where an investor was able to acquire a significant participation in an issuer by using cash-settled derivatives (CSDs),[1] the use of this type of financial instrument as a powerful takeover instrument has been widespread in Europe. However, this type of financial instrument has not been included in the calculation of crossing of thresholds according to the European Union (EU) Transparency Directive of 2004.[2] This lack of inclusion defeats one of the main purposes of the regulation which is to put a potential target as well as the market on notice that an investor might prepare a hostile takeover or might be planning to take control of a company even without launching a bid. Therefore, the potential target can be taken by surprise and might not be able to

1. *Ithaca (Custodians) Ltd. v. Perry Corp.*, [2003]. For a presentation of this case, see G. Ferrarini, 'Equity Derivatives and Transparency. When Should Substance Prevail?', in *Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. August 2010*, eds. S. Grundmann, B. Haar & H. Merkt et al. (Walter de Gruyter, 2010), 1803.
2. Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EG, *OJ* L 390 of 31 December 2004, 38

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have enough time to react to a sudden hostile bid. Cash-settled derivatives have also been used to build large economic interests in listed companies, even without any intention to launch a bid, affecting the transparency of the market. This situation constitutes the biggest current loophole in European financial regulation.

A cash-settled derivative is a financial contract between an investor and a bank which provides an investor with an economic exposure to an underlying stock. If the stock rises, the investor receives at the date of termination of the contract the difference between the price of the stock when the contract was entered into and the price of the stock at the end of the contract, as well as any dividend paid by the company. In exchange, the investor has to pay a fee and an interest for the contract and compensate the bank in the case the stock has fallen below the price at the beginning of the contract. CSDs take many forms: options, equity swaps, contracts for difference (CfDs), etc. CfDs, which have developed since the 1990s,[3] have been widely used in the United Kingdom (UK) for their ability to allow investors to go short, to avoid stamp duty and to protect their anonymity.[4]

The crossing of threshold is regulated at the European level since a 1988 directive which required disclosure of threshold in voting rights of listed European companies of 10%, 20% (or 25%), 1/3 (or 25%), 50% and 2/3 (or 75%).[5] The 1988 directive already covered derivatives instruments but only those who gave a right to an investor to acquire, on his own initiative alone, under a formal agreement, voting rights.[6] Therefore, all CSDs were excluded from the calculation of the threshold. The Transparency Directive of 2004 has not modified this approach.[7] Article 13 of the directive provides that:

> The notification requirements laid down in Article 9 [the obligation to disclose crossing of threshold in shares] shall also apply to a natural person or legal entity who holds, directly or indirectly, financial instruments that result in an entitlement to acquire, on such 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.

The reason for this exclusion is that the Transparency Directive is only concerned with influence on listed issuers through voting rights and not with economic exposure. However, because the Transparency Directive is a minimum harmonisation

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3. On the history of contracts for difference, see <www.contracts-for-difference.com>.
4. A 2007 study by the FSA showed that around 30% of equity trades in the UK were made through CfDs. FSA, 'Disclosure of Contracts for Difference', Consultation Paper 07/20, November 2007, 4.
5. Council Directive 88/627/EEC of 12 December 1988 on the information to be published when a major holding in a listed company is acquired or disposed of.
6. Article 7 of the Directive 88/627/EEC of 12 December 1988.
7. Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC (Articles 9–16). On the Transparency Directive, see N. Moloney, *EC Securities Regulation*, 2nd ed. (Oxford: Oxford University Press, 2008), at 170 et seq.

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directive for the Home Member States, these latter have always been free to include CSDs into their calculation of thresholds.[8]

At the time of the drafting of both directives, the European Commission and the Member States had not anticipated the use of CSDs as a facilitator of takeovers (section 1). However, in recent years, they have been used for the purpose of quietly building a large stake in order to influence later the company or to prepare a hostile bid. This has triggered a reaction by some Member States which has helped reduce the problem in these countries but has also, at the same time, increased the complexity of the legal landscape in Europe (section 2). In addition, some countries have not modified their legislation and have left the loophole intact. Therefore, a reform of the Transparency Directive to include CSDs seems both preferable and probable (section 3).

1. THE USE OF CASH-SETTLED DERIVATIVES IN THE CONTEXT OF HOSTILE TAKEOVERS

The detention of CSDs can be equivalent to holding shares (section 1.1) and have been used in order to facilitate takeovers (section 1.2).

1.1. Cash-Settled Derivatives Can Be Equivalent to Holding Shares

Cash-settled derivatives are a very efficient way to prepare a takeover because they are traditionally not taken into account for the purpose of crossing of thresholds, although they can be equivalent to holding shares. In a hostile takeover, surprise is a key element of success because, the faster the acquisition, the less time the target has to organise a successful defence. In addition, a hostile takeover has more chances to be successful if the bidder already owns a significant percentage of the capital of the target.

Although it seems that CSDs are not equivalent for the investor to holding the shares, the reality can be quite different. The reason is that banks do not want to face the risk that the price of the share increases and they have to pay the difference. Therefore, in order to hedge their risk, they usually purchase the underlying shares relating to the CSDs. At the end of the contract, the banks will normally sell their shares in the market in order to pay to the investor the difference with the price at the beginning of the contract. Even if the bank does not do so, it will not keep the shares once the contract terminates since it usually has no use of the shares. This is especially the case if the CSDs relate to a large number of shares, unless the bank is interested in keeping an exposure to this company which is usually not the case. Then, nothing prevents the investor from purchasing the shares that the bank is selling in the open market. Alternatively, the investor and the bank can decide

8. Article 3(2) of the Transparency Directive.

before the end of the contract to modify it in order that the contract will not be settled in cash but will be settled physically by delivery of the underlying shares.

Therefore, if the bank holds the shares in order to hedge its risk, the investor is during the life of the CSD a quasi-shareholder, except that subject to the contractual agreement, he usually does not control the voting rights attached to the shares held by the bank.

By using CSDs, the investor can easily avoid having to disclose his participation if they are not taken into account in calculation of the notification threshold. As to the bank, it is obliged to disclose the holding of the shares used for hedging in the listed company, but this requirement can also easily be circumvented by using several banks which each holds less than 5% of the shares. If a bank holds more than 5% of the shares and discloses it, the listed company might be put on notice that the bank is not acting for itself and that an investor is the economic beneficiary since banks are usually not interested in holding large participations in a listed company. If the bank is close to a potential bidder known to the company, it might even easily guess the name of the investor. Therefore, investors who want to remain undetected use several banks in order that their economic interest cannot be guessed by the listed company until the moment when it acquires the shares itself and discloses the crossing of thresholds.

1.2. The Use of Cash-Settled Derivatives in Different Countries

CSDs have been used as share equivalent in the context of hostile takeovers or of an attempt to gain control (1.2.1). They have also been used outside the context of a takeover in order to build or keep a large or significant participation in a listed company (1.2.2).

1.2.1. The Use of CSDs in the Context of a Takeover or an Attempt to Gain Control

There are several examples of use of CSDs by a potential bidder. European countries which have seen such situations are, for instance, Switzerland, Germany, and France.

In the case of Switzerland, many companies between 2005 and 2007 have been targeted by hostile bidders or investors attempting to gain control by building stakes through CSDs. According to regulations applicable at the time, the initial threshold for holding of shares was set at 5%, and physically settled options needed not to be added to a shareholding as long as they did not exceed themselves 5% of the voting rights.[9] Therefore, an investor could hold 4.99% in shares and

9. Article 20 of the Federal Act on Stock Exchanges and Securities Trading (*Loi fédérale sur les bourses de valeurs mobilières*) of 24 March 1995. The special exemption for options had been adopted in 1997 at the request of the Swiss stock exchange and listed companies.

4.99% in options without having to make a disclosure. CSDs were not included in the calculation of thresholds.

A first case took place in 2005, when an Austrian company (Victory Industriebeteiligung AG) and a Russian oligarch, Viktor Vekselberg (acting through a company called Renova), disclosed a 42% stake in a Swiss company called Unaxis which they had secretly acquired through cash-settled call options. The acquirer bought in May 2005 the 21% participation of the controlling family, ousted the management, renamed the company OC Oerlikon, and holds currently approximately 57% of the company. Following an inquiry by the Swiss Federal Banking Commission (*Commission fédérale des banques*), the Swiss Finance Department (*Département fédéral des finances*) issued in December 2009 a CHF 40 million fine on the acquirers for not having disclosed that they were acting as a group. This amount was the highest ever imposed by the Swiss Finance Department for such facts. However, the Swiss highest criminal court (*Tribunal pénal fédéral*) overruled the decision in September 2010 for lack of evidence that the defendants were acting as a group.[10]

Under the supervision of its new management, OC Oerlikon built a large stake in Saurer, another Swiss high technology company, and disclosed in September 2006 that they held approximately 21% through cash-settled options, and another 24% which had been previously held by a hedge fund.[11] It announced at the same time a tender offer on Saurer.

Another case is where the same two Austrian investors and Russian oligarch disclosed suddenly a 31% stake in another Swiss company called Sulzer, which they had secretly acquired between December 2006 and April 2007 by using mainly cash-settled call options.[12]

In Germany also, CSDs were not included in the calculation of thresholds. Under German law, the initial threshold for notification requirements at the time lay at 3% for shares[13] and at 5% for physically settled financial instruments.[14] This gave rise to two important cases.[15]

In the first case, a German industrial group, Schaeffler, acquired 2.97% of the shares with voting rights of a listed company called Continental, and also held financial instruments which entitled it to acquire a further 4.95% of the shares. It also concluded contracts for difference with different banks, providing it with another 28% of the shares. Therefore, Schaeffler held around 36% as a whole.

10. Bundesstrafgericht, Entscheid vom 21. September 2010 und vom 20. Oktober 2010 Strafkammer, Geschäftsnummer, SK.2010.4
11. Swiss Takeover Board, 'Empfehlung II', 31 October 2006, 'Öffentliches Kaufangebot der OC Oerlikon Corporation AG, Pfäffikon, mit Sitz in Freienbach, für alle sich im Publikum befindenden Namenaktien der Saurer AG, Arbon – Angebotsprospekt'.
12. The participation in Sulzer, when disclosed in April 2007, was composed of approximately 18% of shares and 14% of options.
13. Article 21 Wertpapierhandelsgesetz (WpHG).
14. Article 25 WpHG.
15. For a general presentation of the situation in Germany and the Schaeffler case, see T. Baums & M. Sauter, 'Anschleichen an Übernahmeziele mit Hilfe von Aktienderivaten', *ZHR* 173 (2009): 454; D. Zetsche, 'Hidden Ownership in Europe: BAFIN's Decision in Schaeffler Continental', *EBOR* 10 (2009).

Then, in July 2008, Schaeffler acquired shares from the banks and launched a hostile takeover on the company. The takeover by Schaeffler was successful, but because of the crisis, Shaeffler has suffered heavy losses on his investment. The German financial regulator, the BaFin (*Bundesanstalt für Finanzdienstleistungsaufsicht*) estimated that CfDs were not to be included in the calculation of the notification threshold because they do not give an investor any influence on the voting rights.[16]

In the second case, the car maker Porsche had planned to take control of Volkswagen and had disclosed by October 2008 a participation in shares of 42.6%. However, Porsche had acquired an additional economic exposure of almost 30% through cash-settled options which was suddenly disclosed on 26 October 2008, possibly because of a request by the financial regulator. The stake had remained undisclosed because Porsche had used six investment banks, each owning options to buy 4.99% of Volkswagen capital, therefore staying below the 5% threshold. At the time of this disclosure, many hedge funds had been shorting Volkswagen shares to an extent of 13% of the capital because Volskwagen seemed overvalued compared to the other carmakers. The disclosure of the 72.6% stake in Volkswagen, and the fact that 20% of the shares were held by the region of Lower Saxony and were not available for sale, meant that the free float was limited to around 6%. This forced the short sellers to repurchase shares on the market at any price and shortly sent the price of Volkswagen up to EUR 1,000, making it the world's biggest company by market value for one day. The losses suffered by hedge funds might have amounted to several billion euros. This might be the greatest short squeeze in history.

France was faced with two similar cases despite having a very ancient and developed regulation on crossing of notification thresholds.[17] According to French law, shares and physically settled derivatives have to be pooled together in order to determine whether a threshold has been crossed.[18] The first threshold is set at 5%. CSDs do not have to be taken into account and not even disclosed. However, financial instruments giving access to non-issued capital (e.g., convertible bonds which give a right to acquire shares not yet issued) have to be disclosed once a threshold is crossed.

In the first case, a listed company, Wendel, started to build from December 2006 a large economic exposure to another listed company, Saint-Gobain, whom it

16. See BaFin press release of 21 August 2008: 'No breach of reporting requirements identified in Continental AG takeover procedure', available at <www.bafin.de>. Supporting this analysis, see T. Baums & M. Sauter, 'Anschleichen an Übernahmeziele mit Hilfe von Aktienderivaten', *ZHR* 173 (2009): 454, 467; H. Fleischer & K.U. Schmolke, 'Kapitalmarktrechtliche Beteiligungtransparenz nach §§ 21 ff. WpHG und ''Hidden Ownership''', *ZIP* 29, No. 33 (2008): 1501–1511, at 1506.
17. On the French regime, see P.-H. Conac, *Les franchissements de seuils* (Répertoire Dalloz Sociétés, 2011).
18. Article L. 233-7 Commercial code. Physically settled derivatives have been included in France in the calculation of thresholds since 1985 (Law n°85-705 of 12 July 1985 regarding participation held in companies with shares, JORF of 13 July 1985, 7918).

was contemplating to take control. However, a friendly approach had been rebuffed by the management of Saint-Gobain.[19]

Wendel entered into agreements on total return swaps with four different banks giving it a large economic exposure to the share of Saint-Gobain. In September 2007, the agreements on the total return swaps ended and the banks sold the shares they held as a hedge on the market while Wendel at the same time was buying an approximately equivalent number of shares on the open market. After the sales were completed, Wendel had acquired approximately 17.6% of the capital of Saint-Gobain and this was subsequently disclosed. Wendel has not launched a takeover on Saint-Gobain and has suffered losses because of the fall in the price of Saint-Gobain after the crisis.

In a more recent case, the French luxury group LVMH disclosed in October 2010 having acquired 17.1% of the other French luxury group Hermès through cash-settled equity swaps which were physically settled after an amendment to the contract. Hermes is a controlled company and therefore a hostile takeover is not possible for LVMH.

1.2.2. The Use of CSDs outside the Context of a Takeover

In Italy, disclosure has to be made by any person who holds more than 2% of the voting rights or 2% in derivatives.[20] Therefore, there are two separate thresholds. Physically settled derivatives are taken into account in order to determine whether a threshold has been crossed but not cash-settled derivatives. As for the calculation of the threshold for a mandatory bid, only shares that give the right to vote in shareholders' meetings on resolutions concerning the appointment, removal or liability of directors or members of the supervisory board are taken into account.[21]

There have been several cases in Italy but the most important one involved the Agnelli family and Fiat. Fiat is controlled by the Agnelli family through a chain of companies which include Ifil. Ifil owned approximately 30% of Fiat's ordinary shares at the time of the transaction. In April 2005, the Agnelli family, acquired through another controlled company, Exor, 8% of Fiat by using cash-settled equity swaps with Merril Lynch. The acquisition of the cash-settled equity swaps was made in order for the Agnelli family not to be diluted to 22% of the capital because of the reimbursement in shares of a large loan contracted in 2002. Merril Lynch publicly notified its shareholding in Fiat after crossing the 2% threshold provided for by the Italian rules on substantial shareholdings, but did not make further disclosures for crossing the 5% threshold, as this was accomplished through

19. See Decision of the Commission of the AMF regarding Wendel SA, M. Jean-Bernard Lafonta and Deutsche Bank Paris, 13 December 2010. The decision (in French only) is available at <www.amf-france.org>, section on 'sanctions', subsection 'Enforcement Committee Decisions'.
20. Article 120, Legislative Decree 24 February 1998 n°58 Consolidated Law on Finance ('Law 58/98') and the Regulation implementing Law 58/98 adopted by CONSOB by resolution n°11971 of 14 May 1999.
21. Article 105, Para. 2, Law 58/98.

cash-settled equity swaps with other dealers. In the summer of 2005, Exor negotiated with Merril Lynch to change the equity swaps from 'cash-settled' to 'physically settled', which allowed the transaction to be unwound by attributing the shares to Exor. Exor subsequently transferred the shares to Ifil. As a result, Ifil kept its 30% participation in Fiat.[22]

Finally, in Switzerland again, a UK hedge fund, Laxey, disclosed in April 2007 a 23% stake in a Swiss real estate company called Implenia which it had started to accumulate in December 2006. The participation had been acquired by Laxey holding directly 4.41% of the shares and the rest through cash-settled options with different banks.

These cases are European cases. However, the issue is not only European. Similar cases took place outside Europe. Two examples are particularly important. In New Zealand, an activist hedge fund, acquired around 16% of a company using cash-settled derivatives. In this case, the Wellington Court of appeal, reversing a decision by the Auckland court, found no duty to disclose.[23] In the United States, an activist hedge fund acquired around 10% of a company. In a 2008 decision, Judge Kaplan of the Southern District of New York (S.D.N.Y.) found that there was a duty to disclose because the CSDs made the investor the beneficial owners of the shares.[24]

2. THE INCLUSION OF CSDS IN EUROPEAN STATES LEGISLATION

Regulatory authorities or Parliaments in Switzerland and in Member States have reacted in different ways regarding the taking into account of CSDs for crossing of notification thresholds. Some countries have included CSDs in the calculation of thresholds or are in the process of doing so (2.1) while others have not, but their regulators have adopted alternative approaches (2.2).

2.1. Countries Which Have Included CSDs in the Calculation of Thresholds

First, some countries have decided to take into account CSDs for crossing of thresholds. This is the case for instance of Switzerland, the United Kingdom and recently Germany.

22. See Comunicato CONSOB, 7 February 2006, on *Notiziario settimanale della CONSOB*, n. 7 of the 13 February 2006.
23. *Ithaca (Custodians) Ltd. v. Perry Corp.*, [2003].
24. *CSX Corporation v. The Children's Investment Fund Management (UK) LLP*, et al., S.D.N.Y. 08 Civ. 2764 (11 June 2008). For a presentation of this case, see G. Ferrarini, 'Equity Derivatives and Transparency. When Should Substance Prevail?', in *Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. August 2010*, eds. S. Grundmann, B. Haar & H. Merkt et al. (Walter de Gruyter, 2010), 1803. The Second Circuit refused to address the swap issue because it was too divided. *CSX Corporation v. The Children's Investment Fund Management (UK) LLP*, 2011 WL 2750913 (2d Cir. 18 July 2011).

In Switzerland, the issue was first dealt by financial regulators, the Swiss Takeover Board (*Commission des OPA*)[25] and the Swiss Federal Banking Commission (*Commission fédérale des banques* or SFBC),[26] who adopted a very broad reading of the concept of 'indirect acquisition' which is used by Article 20 of the Stock Exchange and Securities Trading Act (SESTA). Both regulators held that holding of CSDs was equivalent to an 'indirect acquisition' of the shares. The Swiss Federal Banking Commission then modified its regulation with effect in July 2007, and again in December 2007, so that CSDs had to be taken into account for the calculation of thresholds and that the exemption to declare options (physically or cash-settled) held below 5% was eliminated.[27] The Parliament also modified the Stock Exchange and Securities Trading Act in June 2007.[28] It added new thresholds of 3%, 15% and 25% of the voting rights and modified Article 20 of SESTA to include 'rights related to shares' in order to cover CSDs. To prevent circumvention in the specific case of takeovers, the Parliament added a specific provision stating that transactions with financial instruments that make it economically possible to acquire equity in a company with regard to a tender offer are considered to be an indirect acquisition of shares.[29]

Therefore, in Switzerland, physically and cash-settled derivatives have to be added to shares to determine whether a threshold has been crossed. This is the first basket. In addition, a separate disclosure applies if a threshold is crossed by shares only. This is a second basket. Holding of short equity derivatives (physical and cash-settled) have also to be disclosed separately. This is the third basket. Finally, if a threshold is crossed in one of the three baskets, all the stakes in all the three baskets have to be disclosed.

The United Kingdom is an even more significant example, because of the role of London as a major financial centre in Europe, of a jurisdiction which has decided to include CSDs in the calculation of thresholds. Despite the lack of high profile problems in the UK, the Financial Services Authority (FSA) published a consultation in 2007 as to whether to include CSDs in the crossing of thresholds regime.[30] In 2009, after an extensive consultation, the FSA extended the regime to require

25. Swiss Takeover Board, 'Empfehlung II', 31 October 2006, 'Öffentliches Kaufangebot der OC Oerlikon Corporation AG, Pfäffikon, mit Sitz in Freienbach, für alle sich im Publikum befindenden Namenaktien der Saurer AG, Arbon – Angebotsprospekt', Part 3, 14 et seq.
26. Decision of the SFBC confirmed by the Swiss Federal Administrative Court of 18 December 2008, B- 2775/2008 and B-635/ 2008, confirmed by a decision of the Swiss Supreme Court of 11 March 2010, 2C_77/2009, 2C_78/2009.
27. Currently Article 15 of the Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading of 25 October 2008 ('Ordonnance de l'Autorité fédérale de surveillance des marchés financiers sur les bourses valeurs mobilières', *OBVM-FINMA*).
28. Modification of 22 June 2007 of SESTA.
29. Article 20 2*bis* of SESTA: 'Especially transactions involving financial instruments which economically enable the acquisition of equity securities in view of a public takeover offer shall constitute an indirect acquisition' ('*Par acquisition indirecte, on entend notamment les opérations portant sur des instruments financiers qui offrent la possibilité économique d'acquérir des titres en vue d'une offre publique d'acquisition*').
30. FSA, 'Disclosure of Contracts for Difference, Consultation Paper 07/20', November 2007.

notification of financial instruments which have a 'similar economic effect' to the 'qualifying financial instruments' which were already covered.[31]

The UK regime presents certain specificities. First, the regime applies on a delta-adjusted basis.[32] This implies that the investor does not have to disclose all the shares which he can potentially access through the CSDs, but only the number of shares the bank needs to hold in order to hedge its position, which is a lower number.[33] The difficulty with this approach is that the investor may need to recalculate the delta-adjusted holding on a daily basis as the delta changes over time. Second, the duty to disclose also applies to exchange-traded CfDs[34] and, contrary to France for instance, convertibles which give a legal right to acquire shares not yet issued.[35] Third, in order to avoid circumvention through market innovation, the regime is principles-based and does not define the instruments within its scope. Finally, the regime provides an exemption for client-servicing business.[36]

Germany also included CSDs in the calculation of thresholds. First, in 2008, the Risk Limitation Act (*Risikobegrenzungsgesetz*)[37] laid down that shares and physically settled derivatives should be counted together. Then, under strong pressure from the public and listed issuers,[38] the Ministry of Finance introduced in May 2010 a bill to take into account CSDs which was promulgated on 7 April 2011.[39] The threshold for CSDs is at 5% and includes in the calculation physically settled derivatives and shares.

The new provision establishes a duty to notify for persons directly or indirectly holding financial instruments or other instruments that 'enable' them to acquire shares already issued and with voting rights attached to them. According to the Act, an instrument 'enables' an investor to acquire shares if the other party to the instrument can avoid or lower the risks resulting from its contractual obligations by buying shares.[40] It is irrelevant, if the other party actually does acquire shares or refrains from hedging.

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31. FSA Handbook, 'Disclosure and Transparency Rules (DTR)', DTR 5.3.1 (1)(b)(ii).
32. DTR 5.8.2.
33. According to the FSA (Disclosure of Contracts for Difference – Questions & Answers: Version 3, Point 24), '*A Contract for Differences (CfD), for example, would have a delta of one, as it perfectly mirrors the change in the underlying share price. Delta is a useful and relevant measure, as it is representative of the number of shares the person writing the derivative would need to hold to perfectly hedge its exposure under the derivative. This represents the long economic interest on the performance of the shares to which the holder of the instrument may be taken to have*'.
34. Disclosure of Contracts for Difference – Questions & Answers: Version 3, Point 5.
35. Disclosure of Contracts for Difference – Questions & Answers: Version 3, Point 15.
36. DTR 5.3.1 (2).
37. BGBI. I 2008, 1666. On the reform see H. Fleischer, 'Mitteilungspflichten für Inhaber wesentlicher Beteiligungen (§ 27a WpHG)', *Die Aktiengesellschaft* (*AG*) (2008): 873.
38. European Securities Markets Expert Group (ESME), 'Views on the issue of transparency of holdings of Cash-Settled derivatives', November 2009, 6.
39. Act on strengthening investor protection and improving the functionality of capital markets ('Gesetz zur Stärkung des Anlegerschutzes und Verbesserung der Funktionsfähigkeit des Kapitalmarkts' Ans FuG, BGB1, I, 2011, 538 et seq.).
40. Article 25a § 1 sentence 2 WpHG.

2.2. Countries Which Have Not Included CSDs in the Calculation of Thresholds but Have Adopted Alternative Approaches

Second, regulators in other countries have excluded cash-settled derivatives from crossing of thresholds but have sometimes issued sanctions by adopting a different approach. This is the case, for instance, in Italy and France.

In Italy, in the case of Exor and Fiat, the securities regulator, the CONSOB (*Commissione Nazionale per le Società e la Borsa*) considered that Exor did not have a duty to disclose the holding of CSDs because it considered that they were not covered by the law.[41] However, in February 2007, the CONSOB issued a EUR 16 million administrative fine to Ifil and some of its directors for a false statement made in August 2005, in response to a specific request from CONSOB who had noticed a volatility in the price of Fiat shares.[42] The statement indicated that Ifil intended to keep control of Fiat but had not enacted or studied any initiative as to the conversion of the loan into shares of Fiat ('*intrapresa né studiata alcuna iniziativa in relazione alla scadenza del prestito convertendo*') whereas at the same time, it was negotiating with the bank the swap's unwinding and the purchase of the hedge shares.[43] Ifil argued that the press release was not misleading because it had not decided at the time whether to purchase the shares or not. The CONSOB decision has been later upheld by the Turin Court of Appeals,[44] although the fines were significantly reduced, and by the Italian Supreme Court (*Corte di cassazione*).[45]

Therefore, in Italy, despite the Fiat case, the CONSOB does not view CSDs as being equivalent to shares. In November 2007, the CONSOB was given by the Parliament the power to decide whether CSDs should be included or not in the calculation of the threshold for disclosure and for takeover purpose.[46] Following this reform, the CONSOB issued a Position Paper in October 2009.[47] In the paper, the CONSOB expressed its reluctance to extend disclosure to CSDs because of the costs associated with such extension and the complexity and variety of these instruments. However, the CONSOB also acknowledged that more vigorous enforcement of the current provisions would only occur after the abuse had been committed. As of July 2011, the CONSOB has not indicated its position.

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41. See *Comunicato CONSOB*, 7 February 2006, on *Notiziario settimanale della CONSOB*, n. 7 of the 13 February 2006.
42. Deliberation n°15760, *Bolletino CONSOB*, 1-15 February 2007, 13
43. See *Delibera CONSOB*, n. 15760 of the 9 February 2007, which referred to the misleading communications given by IFIL and some of its directors; *Delibera CONSOB*, n. 16068 of the 1 August 2007, regarding Exor and some of its directors; both available at <www.consob.it>.
44. *Sentenza della Corte d'Appello di Torino - Sezione prima civile 5.12.2007/23.1.2008 'Opposizione promossa in unico grado a norma dell'art. 195 D.Lgs. 24.2.98 n. 58 da Ifil Investments spa contro la CONSOB'*, *Bollettino CONSOB*, 1-15 February 2008, 41.
45. *Cass. civ. Sez. Unite*, 30-09-2009, n. 20935, n. 20936, n. 20937, n. 20938, n. 20939.
46. Article 120, paragraph 4, lett. d-ter of Law 58/98, as modified by Article 1 Legislative Decree No. 195 of 6 November 2007.
47. See Position Paper CONSOB '*In tema di trasparenza proprietaria sulle posizioni in derivati cash-settled*', 8 October 2009, available at <www.consob.it>.

In France, faced with pressure from listed issuers, the legislator adopted in January 2009 a new regime.[48] However, because of opposition by the banks, the new regime did not include CSDs in the calculation of thresholds. The law only imposes, if a threshold is crossed, an obligation to disclose: 'the issued shares covered by any agreement or financial instrument mentioned at Article L. 211-1 of the Monetary and Financial Code which is exclusively cash-settled and which, for that person, has an economic effect similar to that of owning said shares'.[49] Therefore the loophole was left open.

However, the French securities regulator, the AMF (*Autorité des marchés financiers*), adopted an alternative approach. In January 2011, the Enforcement Committee of the AMF issued the maximum possible fine to Wendel and to the chair of its management board. The fine was issued on the ground that, the decision on 3 September 2007, by the management board of Wendel, which is a listed company, to unwind the swaps and to purchase the shares of Saint-Gobain on the market constituted privileged information relating to the building of a large stake in Saint-Gobain. This privileged information had to be disclosed immediately to the market.[50] In addition, the AMF held that the conclusion of the last equity swap in June 2007, while at the same time securing loans for an amount equivalent to the price of the shares, created a duty to disclose since, according to the AMF General Regulation:

> Any person that is preparing a financial transaction liable to have a significant impact in the market price of a financial instrument, or on the financial position and rights of holders of that financial instrument, must disclose the characteristics of the transaction to the public as soon as possible.[51]

The indirect approach adopted by the AMF is innovative but its legal certainty is disputed. The case has been appealed to the Paris Court of Appeals.

However, because of the LVMH case, the Ministry of Finance has announced in November 2010 that the FSA approach would be adopted in France. No bill has been introduced so far, possibly because the Ministry is waiting for the decision of the Paris Court of Appeals in the Wendel case.

From the Member States studied, only the UK and Germany have included so far CSDs into the calculation of thresholds. However, in the meantime, the issue has also been raised at the EU level and a reform of the EU Transparency Directive seems preferable.

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48. Ordinance of 30 January 2009 regarding share buy backs, declaration of crossing of treshold and declaration of intents (*Ordonnance relative aux rachats d'actions, aux déclarations de franchissement de seuils et aux déclarations d'intentions*), J.O. of 31 January 1835. On the new French regime, see P.-H Conac, 'Le nouveau régime des franchissements de seuils issu de l'ordonnance n°2009-105 du 30 janvier 2009 et du Règlement général de l'AMF', *Revue des sociétés* 3 (2009): 477.
49. Article L. 233-7-II, al. 2 French Commercial code.
50. The AMF did not exclude that the conclusion of the last equity swap, in June 2007, already consisted in privileged information.
51. Article 223-6 AMF General Regulation.

3. THE REFORM OF THE EU TRANSPARENCY DIRECTIVE

A reform of the Transparency Directive, leading to an EU-wide regime rather than allowing a mosaic of regimes to be created at the Member States level seems, indeed, much more preferable (A). Reports issued, since 2009, at the European level have unanimously argued in favour of including CSDs in the calculation of thresholds (B).

3.1. The Justification and Content of a Reform of the EU Transparency Directive

The issue of whether to let Member States solve the issue or to have an intervention at the EU level has been subject to debate (3.1.1). The possible content of an EU reform is also open to debate (3.1.2).

3.1.1. Arguments against and in Favour of an EU Reform of the Transparency Directive

Several arguments can be raised against and in favour of a European regime for CSDs.[52]

A first argument against is that, as illustrated by examples provided in section 2, the issue relates closely to takeovers which is another and very sensitive area of EU law. Therefore, the European Commission should preferably deal with the issue when it works on the revision of the Takeover Directive. Given that takeovers are a very sensitive area where Member States have strong and diverging opinions, it might not be the most efficient way to deal with CSDs. Accordingly, some argue in favour of an optional regime. However, the experience acquired with the implementation of the Takeover Directive shows that the result might be worse than doing nothing. In addition, it can be argued that it is not only an issue of takeovers but more of creeping control, especially considering the tendency in Europe in the recent years for some activist investors not to launch a takeover but to try to influence the management simply by holding a significant, or even a small, participation.

Another argument against a reform of the Transparency Directive is that it is not an issue of control of voting rights, which is what the directive is concerned with, but an issue of market transparency and information about the free float. Therefore, this is another area, outside the scope of the directive, which deals only with issuers. The argument is stronger. However, there is no logical reason why the scope of a directive should be carved into stone without any flexibility. This approach proceeds from a too formalistic view of the directives. A directive is not

52. For a general critique of an intervention at the EU level, see D. Zetzsche, 'Against Mandatory Disclosure of Economic-only Positions referenced to Shares of European issuers – Twenty arguments against the CESR proposal', *EBOR* 11 (2010): 231.

a prison for the mind. Actually, in 2000, the European Commission started a codification process of EU financial regulation with the adoption of the Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, which consolidated most of the financial directives. This shows that formalistic divisions of texts should not be overestimated. The process unravelled with the implementation of the Financial Services Action Plan and the adoption of several directives in the mid 2000s. However, it does not mean that it cannot resume, especially with the European Commission working towards the development of a Single rule book.

Two arguments can be raised in favour of a reform at the EU level.

First, most Member States have not dealt with the issue at national level and some might never do. Therefore, given the importance of the issue, there is room for action at the EU level to prevent the loophole from continuing.

Second, in any case, an EU-wide regime is much preferable in terms of simplicity, cost and legal risk than to navigate through twenty-seven different Member States regimes. As pointed out 'the present differences in implementation of the [Transparency directive] in all Member States truly leads to administrative costs for asset management companies operating on a cross-border scale'.[53] Actually, the more there are different national regimes developing to deal with the issue of cash-settled derivatives, which seems to be the current direction in Europe, the more there is a need for a single European regime. Understanding the different regimes through expert advice is very costly and not all investors will want to pay for it. Having potentially to deal with twenty-seven different regimes would also create important legal risks. This area of the law is highly technical, often subject to uncertainties and changing interpretations by regulators in response to unanticipated developments. In addition, in many Member States, crossing of threshold is a regulatory minefield for investors due to stiff sanctions. Many Member States provide strong sanctions such as criminal sanctions, and automatic or non-automatic loss of voting powers which increase the risk of non-compliance for investors.

Therefore, action at the EU level seems preferable. However, the content of such reform is also subject to discussion.

3.1.2. The Possible Content of an EU Reform

Four main issues can be discussed on the content of an EU reform.

The first main issue is whether CSDs should be aggregated to shareholdings or should be disclosed as a separate threshold or disclosed only if a threshold has been crossed.

Several arguments have been raised against aggregation in the course of various consultations at the European or Member States level. Some arguments are weak whereas others are stronger.

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53. European Securities Markets Expert Group (ESME), 'Views on the issue of transparency of holdings of Cash-Settled derivatives', November 2009, 11.

A first argument is that aggregation of CSDs is not sufficiently justified. However, the reverse is also true. Another, argument, is that it would represent a major cost for the banks.[54] However, this classical 'May Day' argument was not substantiated. In addition, aggregation of CSDs applies to all shares listed in prescribed markets in London and banks there did not especially complain since the entry into force of the new regime.

Other arguments against aggregation seem stronger. The first argument is that including CSDs risks over-inclusiveness and information overflow.[55] Positions totally irrelevant for corporate governance purposes may be included which might even confuse the market. The argument is quite correct but, as the UK example shows, can probably be partially dealt with by exemptions for client servicing transactions or adopting a delta-based approach. In addition, it seems, after more than two years of application in the UK, that there is no information overflow due to the new regime.

A second argument is that the concept of 'acting in concert' under the Transparency Directive could catch the situation of creeping control.[56] However, proving acting in concert is difficult and the result is unpredictable due to the necessary subjectivity regulators and judges must exercise if investors and the banks, as will usually be the case, deny acting in concert. The same can be said for shares held by the bank for hedging purpose which could be considered, in certain cases, to be held 'on behalf' of the investor. The shares held by the bank would need to be disclosed by the investor according to Article 10(g) of the Transparency Directive. However, the Article was drafted for the market practice of custodians or for situations of 'at arm's length' investment management. Therefore, the possibility to extend its reach beyond these situations seems doubtful.[57] In addition, this Article does not cover the situation where the investor is not entitled and does not try to influence the voting of the shares.

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54. See for instance the joint answer by the Association for Financial Markets in Europe (AFME), the International Swaps and Derivatives Association (ISDA) and the International Securities Lending Association (ISLA) to CESR Public Consultation on a proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares. The answer mentioned (at 1) that 'The proposed extension of the disclosure regime will be very costly and increase complexity'. The answer can be viewed at <www.esma.europa.eu>, in the section 'Consultations/Past consultations and responses'.
55. See for instance, 'Crédit Agricole Corporate Investment Bank' answer to the Commission Consultation document on the modernisation of the 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 answer (at 7) mentioned that 'The disclosure of cash-settled derivatives must be meaningful and give the right information to the market without overloading it with useledd and confusing information'. The answer can be viewed at <http://ec.europa.eu/internal_market/securities/transparency/index_en.htm>.
56. See for instance, Natixis' answer to CESR Public Consultation on a proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares, 1. The answer can be viewed at <www.esma.europa.eu>, in the section 'Consultations/Past consultations and responses'.
57. European Securities Markets Expert Group (ESME), 'Views on the issue of transparency of holdings of Cash-Settled derivatives', November 2009, 13.

A third argument is that the concept of fraud could also be enough to deal with the issue. However, as the situation in Germany or the AMF decision in the Wendel case clearly shows, fraud cannot be invoked easily in a civil law country because it implies that a legal obligation was circumvented in the first place, which is not the case if there was no duty to include CSDs. Continental Europe regulators and judges are usually reluctant to rely on the concept of fraud and prefer to base their decisions on violation of provisions of the law.

In addition to the arguments already put forward, two other arguments can be raised in favour of aggregation rather than separate disclosure. First, there is an international tendency, especially in major markets, to include CSDs (United States, UK, Switzerland, Hong Kong, Australia). Second, there is an absolute necessity to close the loophole. In this regard, the Volkswagen case is a game changer and protection is needed EU-wide. Not adding CSDs to shares leaves the loophole intact as the French example illustrates.

The second issue is whether an EU regime should be full or minimum harmonisation. Full harmonisation implies that a Member State cannot impose requirements which would be stronger or weaker than those of a directive. The competence for full harmonisation of notification thresholds can be based on Article 114 of the Treaty on the Functioning of the European Union (previously Article 95 EC), which authorises the European Parliament and the Council to adopt measures for the approximation of the provisions laid down by regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.[58] In favour of minimum harmonisation, it can be said that the Transparency Directive is of minimum harmonisation, except for the host Member State.[59] There might not be a reason to change this. In favour of full harmonisation, it can be said that minimum harmonisation would not solve the issue and the risks and costs associated with different Member States regime. In addition, it can also be argued that this is more an issue of market transparency and financial integration, which has been addressed with maximum harmonisation like the Markets in Financial Instruments Directive (MiFID), than issuer disclosure which is traditionally subject to minimum harmonisation. Although from a technical point of view full harmonisation is preferable, ultimately the decision is political.[60]

The third issue is the possible role of the newly established European Securities and Markets Authority (ESMA) in developing an EU-wide regulation. The Transparency Directive already required the adoption of Level 2 provisions regarding, for instance, the types of derivatives financial instruments covered by the duty to disclose.[61] A possible approach at the EU level could be simply to set

58. See H. Fleischer & K.U. Schmolke, 'The Reform of the Transparency Directive: Minimum or Full Harmonisation of Ownership Disclosure', *EBOR* 12, No. 11 (2011):131.
59. Article 3(2) of the Transparency Directive.
60. Supporting 'targeted' full harmonisation, see H. Fleischer & K.U. Schmolke, 'The Reform of the Transparency Directive: Minimum or Full Harmonisation of Ownership Disclosure', *EBOR* 12, No. 11 (2011).
61. Article 13(2) of the Transparency Directive.

the principle of inclusion of CSDs in the Transparency Directive. The UK or Italian solution, where the securities regulator is provided with a wide discretion could be emulated because it allows for maximum flexibility. Therefore, ESMA could be allowed to act through binding technical standards, subject to Commission approval, mitigating any concern of petrification of the law in case of unforeseen developments or disadvantages in the new regime. These concerns over the risk of petrification would be all the more stronger if the regime adopted is of full harmonisation.

Finally, as to the definition of CSDs, the directive should avoid an exhaustive list because this would increase the risk of avoidance through the creation of new instruments that are not on the list. This catch-all approach has been chosen by the FSA. The FSA Handbook does not provide a set 'list of financial products that fall under the new rules, as financial markets regularly invent new products and the regime is designed to ensure that disclosure is not avoided on the grounds of a technicality'.[62] This is also the approach preferred by the Committee of European Securities Regulators (CESR), which has been replaced since January 2011 by ESMA.[63] Therefore, the directive rtdfd could just refer to all instruments of similar economic effect to holding shares and entitlements to acquire shares. However, a non-exhaustive list of instruments that are subject to disclosure may serve as a guidance to the market and could be drafted and updated by ESMA. This is the approach adopted, for instance, in France[64] and in Switzerland.[65]

3.2. Reports at the European Level

All reports issued at the EU level argued for inclusion of CSDs into the calculation of the notification thresholds, with or without aggregation (3.2.1). Following these reports, the European Commission published its own report and initiated a consultation (3.2.2).

3.2.1. Reports Requested by the European Commission

Reports requested by the European Commission are in favour of including CSDs in the calculation of thresholds.

62. FSA, 'Disclosure of Contracts for Difference – Questions & Answers'. version 3, Point 10.
63. Committee of European Securities Regulators ('CESR'), 'Consultation paper on proposed extension on major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares', CESR/09-1215b (9 February 2010), 11. This document is available at <www.cesr-eu.org/popup2.php?id=6481>.
64. Article 223-14 III 3° of the AMF General Regulation.
65. Article 15(1), let. c, of the Ordinance of the Swiss Financial Market Supervisory Authority on Stock Exchanges and Securities Trading of 25 October 2008 ('Ordonnance de l'Autorité fédérale de surveillance des marchés financiers sur les bourses valeurs mobilières', *OBVM-FINMA*).

A first report was published in November 2009 by the European Securities Markets Expert Group (ESME) at the request of the European Commission.[66] ESME is a group of experts from the private sector which provided legal and economic advice to the European Commission on the application of the EU securities directives.[67] ESME reached the conclusion that holdings of CSDs should be disclosed separately from holdings of shares or financial instruments that result in an entitlement to acquire existing shares with voting rights. The disclosure should be done without netting of short and long positions. Only significant holdings of CSDs should be subject to reporting in order to avoid overloading the market with too much information and adding extra complexity. Therefore, ESME suggested a 5% or 10% threshold. Finally, ESME supported full harmonisation of reporting at the EU level in order to avoid different regimes leading to excessive cost in case of cross-border investment.

A second report is the Transparency Directive Assessment Report of June 2010, prepared by the consulting group Mazars ('Mazars report'). The Mazars report was requested by the Commission in order to prepare its mandated report on the operation of the Transparency Directive to the European Parliament and to the Council.[68] It proposed a separate threshold of 5% for CSDs, subject to certain conditions,[69] which would trigger disclosure of the full position. Once the 5% CSD threshold would have been crossed, CSDs would be aggregated with shares for the purpose of computing the notification thresholds. The Mazars report also strongly supported full harmonisation.

Finally, without any, at least official, request from the Commission, 'in response to recent market developments', CESR opened a consultation in January 2010 on a 'proposal to extend major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares'.[70] The objective of the consultation was to provide an advice to the Commission. CESR proposals seem to have been inspired by the FSA and the Swiss regime. In this consultation CESR pleaded for a notification system with four different baskets (holdings of voting rights, holdings of physically settled financial instruments, holdings of CSDs and total holdings) that would trigger an obligation to

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66. European Securities Markets Expert Group (ESME), 'Views on the issue of transparency of holdings of Cash-Settled derivatives', November 2009.
67. The European Securities Markets Expert Group was created by Commission Decision 2006/288/EC of 30 March 2006 (OJ L 106, 19 April 2006, 4). The decision was applicable until the end of 2009, and the group has since suspended its activities.
68. Article 33 of the Transparency Directive.
69. CSDs held below 5% would be exempted 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).
70. Committee of European Securities Regulators ('CESR'), 'Consultation paper on proposed extension on major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares', CESR/09-1215b (9 February 2010), available at <www.cesr-eu.org/popup2.php?id=6481>.

disclose the holdings of the four baskets when the threshold for any of the four baskets would be reached or crossed. CESR did not address the issue of maximum harmonisation although it recognised 'the need for further harmonisation, and will seek to promote convergence in its advice to the European Commission as part of the review of the Directive'.[71] However, answering the Commission May 2010 consultation on the review of the Transparency Directive (see following section 3.2.2), CESR acknowledged that full maximum harmonisation 'may not be feasible because major shareholding notifications have close links to national civil and company law'.[72] Unsurprisingly, CESR's consultation drew polarised answers, with issuers associations favouring increased transparency and most, but not all, bank associations favouring a status quo or underlying the need for further studies before including CfDs into the calculation of thresholds.

3.2.2. The Position of the European Commission

Following these reports and within the scope of the revision of the Transparency Directive, the European Commission published in May 2010 a report, together with a detailed annex,[73] arguing for 'the need for greater convergence of the rules on the disclosure of major holdings of cash-settled derivatives'.[74] Thereafter, the Commission held a public hearing on the issue in June 2010, where a consensus seemed to emerge among the panel and the participants that action at the EU level was necessary in this area and that, if CSDs were included, maximum harmonisation was preferable.[75]

At the same time that the report was published, the Commission started a consultation.[76] The vast majority of respondents supported increased disclosure

71. Consultation paper on proposed extension on major shareholding notifications to instruments of similar economic effect to holding shares and entitlements to acquire shares, 9 February 2010, CESR/09-1215b, 3.
72. CESR's response to consultation on the modernisation of the Transparency Directive, 25 October 2010, CESR/10-1275b Annex, 3.
73. Commission Staff Working Document, 'The review of the operation of Directive 2004/109/EC: emerging issues, Accompanying document to the Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions Operation of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market', COM(2010) 243.
74. Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, 'Operation of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market', COM(2010) 243 final, SEC(2010) 611, 27 May 2010, 7.
75. The conference of 11 June 2010 on 'Transparency obligations for listed companies: scope for the modernisation of the Transparency Directive?' was webcasted. The conference can be viewed at <http://ec.europa.eu/internal_market/securities/transparency/index_en.htm#conference>.
76. 'Consultation document on the modernisation of the 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', 27 May 2010.

in order to avoid hidden ownership.[77] On the issue of aggregation, a very large majority of the respondents supported this approach, and especially the approach adopted in the UK. However, a small group of respondents preferred the approach proposed by ESME. In case the Commission were to prefer a separate threshold, the views were divided between those arguing for a high level (10%) and those arguing for a lower threshold (3% or 5%). Those arguing for a lower threshold pointed to the fact that attendance rates at general meetings often do not exceed 50% of the voting rights. Therefore, a shareholder with 3% of the voting rights can still exercise a significant influence during the general meeting. Generally, many replies supported the UK experience. However, some respondents supported, as an alternative, an anti-fraud provision approach, through the 'acting in concert' and 'acting on behalf' rules of the Transparency Directive or through other pieces of legislation, such as the Takeover Directive or the Market Abuse Directive. The consultation did not address the issue of full or minimum harmonisation.

4. CONCLUSION

In view of the growing consensus as to an action at the EU level, and the pro-regulation environment in Brussels following the financial crisis, it is highly probable that CSDs will be included in the reform of the Transparency Directive. This would be a welcome development. However, as of July 2011, the European Commission has not made its views known on the reform of the Transparency Directive. This seems to be due to the publication of the Green Paper on 'The EU corporate governance framework' in early April 2011.[78] Since this consultation will also affect the Transparency Directive, the Commission will probably prefer to have received and integrated the answers to this consultation before proposing a proposal of reform. Therefore, the publication of a proposal can be expected before the end of 2011.

The UK system, having already been tested several years, could certainly serve as a model at the European level. Full harmonisation would be also preferable in order to reduce costs, uncertainty and legal risks. This should preferably apply not just to CSDs but to the whole regime of crossing of thresholds, since the arguments in favour of full harmonisation for CSDs are as valid for the other shareholdings. It should be possible to use one single form EU-wide. However, sanctions and possibly the list of assimilations provided by Article 10 of the Transparency Directive could remain under the regime of minimum harmonisation because their enforcement is deeply dependent, at least for some of them, on interpretation by national regulators and judges of their civil and company law. Therefore, flexibility should be preferred in this area.

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77. Feedback Statement, 'Summary of responses to the consultation by DG internal Market and services on The modernisation of the Transparency Directive (2004/109/EC)', 17 December 2010.
78. 'Green Paper on The EU corporate governance framework', 5 April 2011, COM(2011) 164 final.