France Completes Implementation of Shareholder Notification Requirements under EU Transparency Directive (Updated)

On March 30, 2008, the French market regulator (the “Autorité des Marchés Financiers” or “AMF”) released final amendments to the mandatory disclosure rules applicable to purchases or sales of equity securities in publicly traded French companies (the “Revised AMF Regulations”). The Revised AMF Regulations are the second set of regulations released in implementation of the EU Transparency Directive and a French Parliamentary Act of July 26, 2005 which substantially overhauled aggregation and disaggregation requirements applicable to the disclosure of group holdings (the “French Implementing Act”).

The Revised AMF Regulations specifically implement EU Commission Directive 2007/14/EC of March 8, 2007 laying down detailed rules for the implementation of certain provisions of the Transparency Directive (the “Implementing Directive”) with the stated aim of enabling investors to acquire or dispose of shares in full knowledge of changes in the voting structure, as well as of enhancing effective control by issuers and the overall market transparency of important capital movements.

All Member States of the EU were required to have implemented the Implementing Directive into their legal systems by March 8, 2008.

1. Disclosure Thresholds

1.1. Statutory Disclosure Thresholds

An investor, acting alone or through concerted action, whose percentage ownership of outstanding shares or voting rights in a publicly traded French company rises above or falls below thresholds of 5%, 10%, 15%, 20%, 25%, 33% \(\frac{1}{3}\), 50%, 66% \(\frac{2}{3}\), 90% or 95% (“Statutory Disclosure Thresholds”) must notify...
the issuer and the AMF, within 5 trading days,\(^6\) specifying the number of shares it holds and corresponding number of voting rights.

Statutory Disclosure Thresholds may be crossed whether an investor's ownership interest in an issuer rises above or is reduced below the relevant thresholds.\(^7\) Reductions below a threshold may result from a sale of shares or voting rights, issuance by the company of additional shares or voting rights, or an allocation of double voting rights to other shareholders.

The crossing of Statutory Disclosure Thresholds must be reported on a standard disclosure form based on the model set forth under Instruction No. 2008-02 of February 8, 2008 regarding shareholder notifications (the “Instruction”).\(^8\) The notice must be drafted in French or another language customary in the financial world (i.e., English) and signed by the declarant.\(^9\)

The information disclosed must include, among others: (1) the identity of the reporting person; (2) where applicable, the identity of the individual or legal entity entitled to exercise voting rights on behalf of the reporting person; (3) the date on which the threshold was crossed; (4) the reason why the threshold was crossed; (5) the resulting situation in terms of shares and voting rights; (6) where applicable, any potential aggregation of the shares or voting rights held by the reporting person; and (7) where applicable, the chain of control (as defined below) through which the shares and voting rights are held.\(^10\)

The notice must also specify whether the investor holds, directly or indirectly, any additional securities covering shares of capital stock of the relevant company and the number of voting rights attached thereto; such as, convertible or redeemable securities or bonds with attached warrants, but excluding straight warrants or stock options.\(^11\) These additional securities are not taken into account when determining whether a threshold has been crossed. They are simply mentioned on the disclosure form at the time a Statutory Disclosure Threshold is crossed.\(^12\)

### 1.2. Calculating Thresholds

In calculating Statutory Disclosure Thresholds, the declarant must take account of the shares and voting rights that it holds as well as all shares and voting rights that must be aggregated therewith (as discussed under Section 3 below), and must determine the portion of capital and voting rights that it holds, based on the total number of shares making up the share capital of the issuer and the total number of voting rights.

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\(^6\) Article 222-12-3 of the AMF’s General Regulations; Article R 233-1 of the Commercial Code.

\(^7\) Article L. 233-7, I, second paragraph.

\(^8\) Article 223-14(9°) of the AMF General Regulations. The Instruction generally follows the format of the “standard forms to be used for the purposes of notifying the acquisition or disposal of major holdings of voting rights and of major holdings of financial instruments, and of notifying the activity of market makers in the context of Directive 2004/109/EC” published by the European Commission in cooperation with the Commission of European Securities Regulators (CESR).

\(^9\) Article 223-14(9°) of the AMF General Regulations.

\(^10\) Item (I) of the Instruction.

\(^11\) Article L. 233-7, I, last paragraph, of the French Commercial Code; Item (I) of the Instruction.

\(^12\) Item (I) of the Instruction.
attached to such shares.\textsuperscript{13}

The total number of voting rights is calculated on the basis of all shares to which voting rights are attached, including shares whose voting rights have been suspended.\textsuperscript{14} For these purposes, issuers are required, at the end of each month, to disclose the total number of voting rights (including suspended voting rights) and shares making up their share capital if these have changed relative to previous disclosures.\textsuperscript{15}

\textbf{1.3. Thresholds Determined in Company Bylaws}

A publicly-traded French company may impose more stringent notification requirements in its bylaws, for holdings of less than the statutory 5\%, in increments as small as 0.5\%.\textsuperscript{16} In practice, the bylaws of many companies impose notification requirements for crossing thresholds set at small increments, generally from 0.5\% to 2\% of the capital or voting rights of the company. Statutory Disclosure Thresholds continue to apply despite lower thresholds stipulated in the company’s bylaws. Notifications required by the bylaws are purely internal to the issuer, and notification is made only to the issuer and not to the AMF.

Issuers are required to disclose thresholds stipulated in their bylaws in their annual reports filed with the AMF and available on the AMF’s website: \url{http://www.amf-france.org/}.\textsuperscript{17}

\textbf{2. Statements of Intent}

An investor whose ownership interest exceeds thresholds of 10\% or 20\% of the shares or voting rights of a company must also submit a statement of intent to the AMF and the issuer describing the objectives it intends to pursue with respect to the company in the twelve month period following notification.\textsuperscript{18}

The statement of intent must specify whether the investor is acting alone or in concert with other investors; whether it seeks to purchase additional securities of the company; whether it intends to acquire control; and whether it intends to request the appointment of directors.\textsuperscript{19} The AMF publishes the statement of intent, and the investor must issue a press release to the same effect.

The statement of intent may be amended only in the case of a significant change in circumstances relating to the investor, the investor’s shareholders, or the issuer. The AMF and the issuer must be notified of any change to the statement of intent.\textsuperscript{20}

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\textsuperscript{13}Article 223-11 of the AMF General Regulations.
\textsuperscript{14}Article 223-11 of the AMF General Regulations.
\textsuperscript{15}Article 223-16 of the AMF General Regulations implementing Article 15 of the Transparency Directive.
\textsuperscript{16}Article L. 233-7, III.
\textsuperscript{18}Article 233-7, VII of the French Commercial Code.
\textsuperscript{19}Id.
\textsuperscript{20}Id.
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3. Shareholding Aggregation Principles

3.1. Aggregation of controlling interests

To determine whether statutory thresholds have been crossed, the investor must aggregate the shares and voting rights held by other entities it “controls” as such term is defined by Article L. 233-3 of the French Commercial Code.

For these purposes, Article L. 233-3 of the French Commercial Code (the “Code”) defines “control” broadly as:

(i) the direct or indirect ownership of a majority of voting rights at shareholders meetings (de jure control test);

(ii) a contractual right to direct by itself a majority of voting rights pursuant to an agreement entered into with other shareholders or members of the company in question (contractual control test);

(iii) ownership of sufficient voting rights to exercise de facto control over the outcome of shareholder meetings (de facto control test); or

(iv) the right to appoint or remove a majority of the members of the administrative, management or supervisory board (e.g., the board of directors) (board control test).

Control is presumed whenever an entity owns directly or indirectly more than 40% of voting rights and no other person holds directly or indirectly a greater percentage of voting rights. Unlike the first four control tests, which constitute irrebuttable presumptions of control, the 40% presumption may be rebutted by contrary evidence.

Legal commentators have argued that even if an investor meets the de jure control test, he may not necessarily have effective control over the company’s policies if, for instance, the investor did not appoint a majority of the members of the board of directors of the company in question.

Nevertheless, French case law and the AMF take a narrow approach in interpreting the de jure control test and do not deviate from the terms of the statute. If the investor holds directly or indirectly more than 50% of voting rights at shareholders meetings, control is established in the view of the AMF.

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21 The aggregation principles do not apply to the computation of thresholds determined in company bylaws or to declarations of intent.
23 Implementing Article 2(f) of the Transparency Directive.
24 Under the de jure control test, holding only 50% of the shares of a company thus does not suffice to establish control so long as none of the other criteria below apply.
26 Bull. COB, sept 1985, p. 9. The Commission des opérations de bourse (the “COB”) is the predecessor market regulator to the AMF.
27 See Round Table, la limitation de l’autocontrôle des sociétés, J.C.P. 86, éd. E, II, 14749.
notwithstanding any factual circumstances that would point to the absence of actual control.\textsuperscript{28}

By this standard, informational barriers or other Chinese walls would not be effective in disproving control to the extent the parent company holds more than 50% of its subsidiary’s voting rights. However, an investor holding 50% or less of voting rights in a company could attempt to prevent the \textit{de facto} control test from applying by setting up appropriate organizational mechanisms that prevent it from exercising the fundamental incidents of control listed in the statute: \textit{i.e.}, control of the outcome of shareholder meetings; or the right to appoint or remove a majority of the members of the administrative, management or supervisory board.

The \textit{de facto} control test widens the scope of the \textit{de jure} control test by encompassing circumstances in which an issuer’s capital is so spread out among multiple shareholders or the attendance rate at shareholders meetings is so low that an investor is able to exercise \textit{de facto} control even with a percentage of voting rights that is less than 50%.

In determining \textit{de facto} control, the AMF examines, \textit{inter alia}, the existence of “directors in common, cash management, services, offices or registered offices in common, common or complementary corporate objects.”\textsuperscript{29}

Doctrinal commentators have argued that additional elements such as the public float of the issuer, the distribution of holdings, the number of proxies left blank at shareholders meetings, the existence of common directors or officers between the investor and the issuer, the attendance rate at shareholders meetings, or the way shareholder votes at shareholders meetings should all be taken into account in assessing \textit{de facto} control.\textsuperscript{30}

In this regard, it should be noted that the French prosecutor’s office and the AMF are authorized to bring court proceedings to establish the existence of control over one or more companies.\textsuperscript{31}

\textbf{3.2. Timing of Disclosure}

\textit{(a) Active Acquisitions or Disposals of Shares}

Under current French regulations, the crossing of Statutory Disclosure Thresholds must be notified to the issuer and the AMF, within 5 trading days from the date the relevant threshold is crossed.\textsuperscript{32}

This regime is slightly different than what is required by Article 12(2)(a) of the Transparency Directive, which states that the notification must be effected “not later than 4 trading days, the first of which shall be the day after the date on which the shareholder (…) learns of the acquisition or disposal or of the

\textsuperscript{28} J-Cl., fasc. 165-2, \textit{groupes de sociétés}, n° 7.
\textsuperscript{29} Bull. COB, sept 1985, p. 9.
\textsuperscript{30} \textit{Lamy sociétés commerciales} 2006, n° 1950; \textit{Jurisclasseur}. Sociétés, fasc. 165-2, n° 11.
\textsuperscript{31} Article L. 233-5 of the French Commercial Code.
\textsuperscript{32} Article R 233-1 of the Commercial Code.
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 (...).”

The eleventh preamble to the Implementing Directive states that “it is reasonable to assume that natural persons or legal entities exercise a high duty of care when acquiring or disposing of major holdings. It follows that such persons or entities will very quickly become aware of such acquisitions or disposals, or of the possibility to exercise voting rights, and it is therefore appropriate to specify only a very short period following the relevant transaction as the period after which they are deemed to have knowledge.”

Accordingly, Article 9 of the Implementing Directive provides that for the purposes of Article 12(2)(a) of the Transparency Directive, “the shareholder, or natural person or legal entity referred to in Article 10 of the [Transparency Directive], shall be deemed to have knowledge of the acquisition, disposal or possibility to exercise voting rights no later than two trading days following the transaction.”

The AMF has not yet implemented these provisions as it considers that Article 9 of the Implementing Directive can only be implemented under French law through amendments to the Regulatory Section of the French Commercial Code, which, as of the date hereof, are still pending.33

(b) Events Triggering a Passive Change in the Breakdown of Voting Rights

Statutory Disclosure Thresholds may also be crossed passively. What may not be a controlling interest one day may become one following changes in the capital or voting structure; such as, a capital reduction or cancellation of double voting rights.

For these purposes, the knowledge qualifier applicable under Article 12(2)(b) of the Transparency Directive applies without the limitation discussed above: the shareholder is not deemed to have knowledge of the change in voting rights within two trading days, as is the case with active acquisitions or disposals of shares or voting rights. Instead, the shareholder is able to rely on the information disclosed by the issuer regarding the total number of voting rights and capital published at the end of each calendar month during which an increase or decrease of such total number has occurred.34

To the extent the impact of changes in holdings may not readily be detected by investors, the AMF’s predecessor market regulator (the Commission des opérations de bourse or “COB”) had partially eased the burden on investors by presuming compliance with disclosure requirements so long as the investor abides by the following principles:

(i) “the investor must act in good faith when assessing control in light of all information the investor may obtain without undue burden;

34 Article 223-16 of the AMF General Regulations implementing Article 15 of the Transparency Directive.
(ii) changes in an issuer’s shareholding do not automatically trigger statutory disclosure requirements based on indirect control; these duties arise out of factual circumstances, and in particular, the long-term nature of the facts giving rise thereto, and whether a shareholder intends to assume control or to accept it.\textsuperscript{35}

It seems likely that the AMF will continue to apply these principles until the Commercial Code is amended as discussed above.

3.3. Aggregation of interests held in concert with others

The investor must also aggregate the shares and voting rights it holds with shares or voting rights held by other investors with whom it “acts in concert.”\textsuperscript{36}

Investors are considered to be “acting in concert” if they have entered into an agreement to jointly acquire or sell securities of the company or to exercise their voting rights in common, in implementation of a common policy regarding the company.\textsuperscript{37}

Executive officers of an investor, or investors controlled (as such term is defined above) by or under common control with an investor, are presumed to be “acting in concert.”\textsuperscript{38}

The concerted action aggregation rule and the control aggregation rule are linked: two or more investors acting in concert are deemed to jointly control a company where they exercise de facto control over the outcome of shareholder meetings.\textsuperscript{39}

In a recent landmark decision involving the takeover bid for Eiffage by its Spanish rival Sacyr Vallehermoso, the AMF ruled that six of Eiffage’s Spanish shareholders were acting in concert with Sacyr in order to gain control of Eiffage without abiding by the laws on shareholder disclosure and mandatory bids. The AMF grounded its decision on the fact that the successive acquisitions of shares in Eiffage by Sacyr and the six Spanish shareholders did not arise from individual and autonomous transactions but rather through a collective undertaking in pursuit of a common objective (i.e., to obtain, by surprise, enough seats on the board of directors of Eiffage to be able to implement a friendly takeover).\textsuperscript{40}

On April 2, 2008, the Paris Court of Appeals overturned the AMF’s decision on procedural grounds. However, the Court upheld the AMF’s finding of concerted action on the ground that Article L. 233-10 of the Commercial Code does not require the agreement to jointly acquire or sell securities of a company or to exercise voting rights in common “to be in writing, nor does it need to be legally binding.”\textsuperscript{41}

\textsuperscript{35} Bull. COB, sept 1985, p. 10.
\textsuperscript{36} Article L. 233-9, I, 3° of the French Commercial Code.
\textsuperscript{37} Article L. 233-10, I of the French Commercial Code.
\textsuperscript{38} Article L. 233-10, II of the French Commercial Code.
\textsuperscript{39} Article L. 233-3, III of the French Commercial Code.
\textsuperscript{40} AMF Decision No 207C1202 of June 26, 2007.
\textsuperscript{41} Paris Court of Appeals, 1\textsuperscript{st} Chamber, Section H, April 2, 2008, RG No 2007/11675, p. 13.
decision has been widely viewed by legal commentators as an expansion of the code definition of concerted action.

3.4. Other Aggregation Rules

Implementation of the Transparency Directive into French law has led to the creation of additional aggregation requirements. An investor must also aggregate the shares and voting rights it holds with:

- Shares or voting rights held by a third party in its own name on behalf of that investor;\(^{42}\)
- Shares or voting rights such investor (or any other entity with whom aggregation is required) is entitled to acquire at such investor’s sole discretion pursuant to an agreement;\(^{43}\)
- Shares in which the investor has a life interest;\(^{44}\)
- Shares or voting rights held by a third party under an agreement entered into with the investor providing for the temporary transfer of the shares or voting rights in question;\(^{45}\)
- Shares deposited with the investor, if the investor can exercise voting rights attached to such shares at its discretion in the absence of specific instructions from the relevant shareholder;\(^{46}\) and
- Voting rights that the investor may exercise as a proxy where the investor can exercise the voting rights at its discretion in the absence of specific instructions from the relevant shareholder.\(^{47}\)

4. Exemptions from Shareholding Aggregation Principles

As stated in the preamble to the Transparency Directive: “in order to clarify who is actually a major holder of shares or other financial instruments in the same issuer throughout the European Union, parent undertakings should not be required to aggregate their own holdings with those managed by undertakings for collective investment in transferable securities (UCITS)\(^{48}\) or investment firms, provided that such undertakings or firms exercise voting rights independently from their parent undertakings and fulfill certain further conditions.”\(^{49}\)

In application of this recital, the French Implementing Act and the AMF Regulations provide for an exemption from aggregation for management companies and investment firms.

\(^{42}\) Article L. 223-9, I, 1° of the French Commercial Code, implementing Article 10(g) of the Transparency Directive.
\(^{43}\) Article L. 223-9, I, 4° of the French Commercial Code, implementing Article 13(1) of the Transparency Directive.
\(^{44}\) Article L. 223-9, I, 5° of the French Commercial Code, implementing Article 10(d) of the Transparency Directive.
\(^{45}\) Article L. 223-9, I, 6° of the French Commercial Code, implementing Article 10(b) of the Transparency Directive.
\(^{46}\) Article L. 223-9, I, 7° of the French Commercial Code, implementing Article 10(c) and (f) of the Transparency Directive.
\(^{47}\) Article L. 223-9, I, 8° of the French Commercial Code, implementing Article 10(h) of the Transparency Directive.
\(^{48}\) “Undertakings the sole object of which is the collective investment in transferable securities of capital raised from the public and which operate on the principle of risk-spreading and the units of which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings’ assets.” Article 2(g) of the Transparency Directive.
\(^{49}\) Recital 21 of the Transparency Directive.
4.1. Scope of the Exemption

Pursuant to that exemption, an investor need not aggregate the shares and voting rights it holds with:

- shares held by funds managed by a management company it controls (as such term is defined above), except as otherwise provided by the AMF’s General Regulations;

- shares held in a portfolio managed by an investment firm it controls (as such term is defined above) which such investment firm manages on a client-by-client basis (pour compte de tiers) pursuant to conditions laid out in the AMF’s General Regulations and except as otherwise provided by the AMF’s General Regulations.

The Revised AMF Regulations also reflect the stated position in the Transparency Directive that the exemption for management companies or investment firms not be limited to firms licensed or authorized in the European Economic Area (the “EEA”), and extend to any firms that are subject to national regulation as investment managers or advisers if under those national regulations, the investment managers or advisers are required:

- to be free in all situations to exercise, independently of their parent undertaking, the voting rights attached to the assets they manage; and

- to disregard the interests of their parent undertaking or of any other controlled undertaking of the parent undertaking whenever conflicts of interest arise.

To benefit from the exemption, group companies must comply with all the conditions set out below and, in addition, must attest in a certificate filed with the AMF that, with respect to each non-EEA investment firm or adviser for which they are claiming the exemption, they comply with the above two conditions.

4.2. Conditions to qualify for the Exemption

To benefit from the exemption, group companies must submit, without delay, to the AMF a list of management companies or investment firms they consider eligible for the exemption from aggregation rules. This list must set forth the competent authorities that supervise them and state that, in the case of each such management company or investment firm, the parent undertaking complies with the conditions.

50 For these purposes, a management company is defined as a company whose regular business is the management of UCITS.
51 For these purposes, an investment firm is defined as a firm licensed to make discretionary investment decisions in relation to financial instruments on a client-by-client basis. In this regards, discretion should extend to decisions on the exercise of voting rights attached to any shares held in the managed portfolio.
52 Article L. 223-9, II of the French Commercial Code.
54 More specifically, the exemption is available to firms having registered offices outside the EEA if they would have required an authorization in accordance with Article 5(1) of the UCITS Directive or, regarding portfolio management, under point 4 of section A of Annex I of the MiFID Directive, had their registered office, or, only in the case of investment firms, their head office, been located within the EEA.
55 Article 223-12-1(1° and 2°) of the AMF’s General Regulations.
56 Article 223-12-1(3°) of the AMF’s General Regulations.
57 If they are not supervised by competent authorities, the certificate must simply mention that fact.
set out below.  No reference needs to be made regarding relevant individual securities giving rise to the list. The list must be updated on an ongoing basis. It is unclear from the regulations whether the list may be drafted in English as is the case with Statutory Disclosure Threshold notices.

Entities filing the exemption must be able to demonstrate to the AMF, on request, that:

- their organizational structures, as well as those of the management companies or investment firms, are such that voting rights are exercised independently by the management companies or investment firms and this is reflected in written policies and procedures designed to prevent the distribution of information between parent undertakings and the management company or investment firm in relation to the exercise of voting rights;
- the individuals who decide how the voting rights are to be exercised act independently; and
- if the parent undertaking is a client of the management company or investment firm or has holding in the assets managed by the management company or investment firm, there is a clear written mandate clearly demonstrating mutual independence between the parent undertaking and the management company or investment firm.

These new regulations should induce investment firms to set up informational barriers, such as Chinese Walls, through written policies and procedures designed to restrict the flow of information about the exercise of voting rights within investment firms.

Pursuant to AMF Regulations, an investor is not entitled to the exemption and the principle of aggregation applies if the management company or the investment firm may only exercise voting rights under direct or indirect instructions from the investor or another entity controlled (as such term is defined above) by the investor.

The Revised AMF Regulations define “direct instruction” as any instruction given by the investor, or another entity controlled by the investor, specifying how the voting rights are to be exercised by the management company or investment firm in particular cases. “Indirect instruction” is defined as any general or particular instruction, regardless of the form, given by the investor, or another entity controlled by the investor, that limits the discretion of the management company or investment firm in relation to the exercise of the voting rights in order to serve specific business interests of the parent undertaking or another entity controlled by the parent undertaking.

With respect to shares held in portfolios managed by investment firms, the AMF Regulations set out two additional alternative conditions:

58 Article 223-12(II) of the AMF’s General Regulations, implementing Article 10(2) of the Draft Implementing Directive.
59 See Article 223-14(9°) of the AMF General Regulations.
60 Article 223-12(III) of the AMF’s General Regulations.
61 Article 222-12-1, II of the AMF’s General Regulations, implementing Articles 12(4) and 12(5) of the Transparency Directive.
62 Article 223-12(IV) of the AMF’s General Regulations, implementing Article 10(4) of the Implementing Directive.
the investment firm may only exercise voting rights attached to such shares under instructions from the principal; or

the investment firm must guarantee that individual portfolio management services are being conducted independently of any other services.

Accordingly, an investment firm must not only refrain from taking direct or indirect instructions from its parent company but must also put in place appropriate mechanisms to ensure that voting rights are being exercised under direct instructions (preferably written) from clients or, alternatively, guarantee that individual portfolio management is exercised independently from proprietary trading.

The Transparency Directive’s third condition that the investment firm exercise its voting rights independently from the parent company has not been included in the Revised AMF Regulations as the AMF considers this condition to be redundant with the general French statutory principle that a management company exercise voting rights attached to shares in the exclusive interests of the fund’s shareholders.

5. Disclosure Rules during Tender Offers

More stringent disclosure rules apply to purchases or sales of equity securities of the target of a tender offer. The same rules apply to the equity securities of the bidder initiating an exchange offer.

Pursuant to AMF regulations, any person concerned by the tender offer, members of their board of directors, supervisory boards, or management, the presenting banks and the advisors, the persons or legal entities holding, directly or indirectly, at least 5% of the share capital or voting rights at shareholders meeting and the other persons or entities acting in concert with them, must report their purchases or sales of equity securities on a daily basis to the AMF at the close of the market.

The same disclosure obligations apply to persons or legal entities that have acquired or come into possession, either directly or indirectly, since the filing of the preliminary tender offer document, of securities representing at least 0.5% of the share capital of the companies concerned by the tender offer.

Any transaction resulting in the immediate or subsequent transfer of ownership of the securities or voting rights of the companies concerned by the offer must also be reported under the same conditions.

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64 Article 223-12(I) of the AMF’s General Regulations, implementing Article 12(5) of the Transparency Directive.

65 Article 12(5) of the Transparency Directive requires that instructions be in writing or by electronic means.

66 Article L. 533-4, 8° of the French Monetary and Financial Code.

67 Article 231-38 of the AMF Regulations.

68 Id.

69 Id.
Furthermore, any person or legal entity having increased its shareholding in the target company by more than 2% of the total number of shares or voting rights of the target company or having acquired or come into possession of a number of shares representing more than 5%, 10%, 15%, 20%, 25%, or 30% of the share capital or voting rights of the target company, must immediately disclose its intent with respect to the tender offer in progress.\textsuperscript{70}

The AMF had to remind these rules to market participants during the Mittal Steel / Arcelor bid in 2006.\textsuperscript{71}

6. Sanctions

Failure to comply with disclosure obligations can result in civil, administrative and criminal sanctions.

Failure to comply with the statutory notification requirements results automatically in the suspension of the investor’s voting rights in excess of the relevant threshold for a two-year period following the date of rectification of the notification. In addition, the company, its shareholders, or the AMF may request a French commercial court to suspend all or part of the non-complying investor’s voting rights for a period of up to five years.\textsuperscript{72}

The investor may also be subject to a criminal fine of up to € 18,000.\textsuperscript{73} Furthermore, the AMF may impose a monetary sanction where it appears that the investor acted with \textit{scienter} in failing to comply with statutory notification requirements.\textsuperscript{74}

Failure to comply with notification requirements established in company bylaws may result in the suspension of voting rights. However, in contrast to the statutory notification rules, this sanction is not automatic: the bylaws must expressly state that such a sanction will be imposed, and the imposition of the sanction must be requested at the general meeting of the shareholders. The request must be made by one or more shareholders holding, cumulatively, at least the minimum percentage of shares required for reporting under the notification provisions of the bylaws.\textsuperscript{75}

As in the case of Statutory Disclosure Threshold requirements, the company, its shareholders or the AMF may request a French commercial court to suspend all or part of a non-complying shareholder’s voting

\textsuperscript{70} Article 231-40 of the AMF General Regulations.
\textsuperscript{71} AMF Press Release of February 6, 2006.
\textsuperscript{72} Article L. 233-14 of the French Commercial Code.
\textsuperscript{73} Article L. 247-2, I of the French Commercial Code.
\textsuperscript{74} On November 9, 2006, the AMF imposed a € 30,000 fine on a management company (Jousse Morillon Investissement) for having failed to disclose a 5% stake taken by one of the funds it managed in an issuer listed on Euronext within the five-trading day limit. The AMF grounded the sanction on the fact that the management company had acted with \textit{scienter} by deliberately postponing the disclosure of the 5% threshold for several months until such time that it had accumulated 9.9975% of the share capital of the issuer (which incidentally was the target of an ongoing takeover bid). The sanction is administrative in nature as it is based on the breach by a management company (under the jurisdiction of the AMF) of its “professional obligations imposed by applicable laws, regulations and professional rules of conduct.” In such circumstances, the AMF could also have imposed the following range of sanctions: warning, reprimand, temporary or permanent prohibition from providing certain services, and/or a financial penalty of up to € 1.5 million or ten times the amount of profits realized (AMF Decision dated November 9, 2006, Société Jousse Morillon Investissement).
\textsuperscript{75} Article 233-7, VI of the French Commercial Code.
rights for a period of up to five years.\textsuperscript{76} The Commercial Code may be interpreted as imposing a criminal fine for violations of bylaw notification requirements, but this has not yet been the subject of any case law.\textsuperscript{77}

Failure to comply with declaration of intent requirements may be punished by both an administrative fine imposed by the AMF of up to € 1.5 million,\textsuperscript{78} and by civil sanctions, including suspension of the investor's voting rights in excess of the relevant threshold, effective for a two-year period following the date of rectification of the notification.\textsuperscript{79} The company, its shareholders or the AMF may request a French court to suspend all or part of the non-complying investor's voting rights for a period up to five years.\textsuperscript{80} A criminal fine of up to € 18,000 may also be imposed.\textsuperscript{81}
If you have any questions regarding this client memorandum, please contact your regular Fried Frank attorney or the attorneys listed below.

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