

# European Securities Markets Expert Group (ESME)

## Position on Article 10 of the Prospectus Directive in relation to the Transparency Directive

Adopted Brussels, 4 June 2008

### 1. Introduction

- *The position deals with the request by the European Commission to analyze the relationship between Art. 10 of the Prospectus Directive and the Transparency Directive.*
- *ESME suggests abolishing the requirement according to Art. 10 PD.*
- *The Transparency Directive refers to the same issuers.*
- *In addition, the Transparency Directive provides investors with principally the same information, but in a more comprehensive, updated and even more convenient manner.*

The European Commission has asked the European Securities Markets Expert Group (ESME) in its meeting on 5 March 2008 to analyze the relationship between Article 10 Prospectus Directive and any comparable disclosure obligations contained in the Transparency Directive.

ESME had already suggested deleting Article 10 in its Annex to the Report on the Prospectus Directive published on 5 September 2007 referring to the Transparency Directive as the intended platform for European company information. Based on the present more detailed analysis prepared for this position ESME confirms its view. The Transparency Directive refers to the same type of issuers and it provides the investors with principally the same information, but in a more comprehensive, every time updated and easy accessible manner. Art 10 is also redundant in relation to the Market Abuse Directive.

Art. 10 Prospectus Directive could simply be deleted. This deletion would not have any negative consequences for the information of the public.

As a result, ESME recommends the European parliament and council to abolish Article 10 of the Prospectus Directive without any substitute regulation when amending the Prospectus Directive. ESME recommends the Commission to include the aspect into the assessment according to Art. 31 Prospectus Directive.

## 2. History and Objectives of Art. 10 PD and Transparency Directive

- *Art. 10 PD initially pursued the concept of enabling issuers for an annual registration document, but was changed during the debate on the Directive in autumn 2002.*
- *When the Prospectus Directive was adopted the Transparency Directive with its consistent concept on periodic and ongoing information was still under discussion.*

Article 10 PD requires issuers whose securities are admitted to trading on a regulated market to provide and file with the competent authorities a document containing or referring to all information they have published or made public in the course of the last twelve months according to their obligations with regard to companies and securities legislation at European community or national levels and third country levels.

The wording and intention of Art. 10 had been significantly changed in the process of composing the Prospectus Directive in autumn 2002. Initially the draft of the Prospectus Directive had intended to oblige the issuers to annually prepare (and update) a registration document and therefore enable them to be permanently prepared for launching new securities. That requirement was abolished during the discussion based on the fact that many share companies do not launch securities on a regular basis. The wording was modified in order to provide investors as a substitute document annually and at one glance with an overview on all available information published according to various laws. At that time, the Transparency Directive had not been adopted by European parliament, its concept of ongoing company information was still under discussion. It was only adopted in 2004.

The Transparency Directive has implemented a new and consistent concept in relation to the disclosure of periodic and ongoing information about issuers whose securities are already admitted to trading on a regulated market situated or operating within a Member State. It mainly refers to annual financial reports, half-yearly financial reports and interim management statements as well as ongoing information on major holdings or voting rights. Furthermore, Art. 21 TD (and the subsequent regulation) contain detailed rules on the access by investors to this information. These rules effectively require issuers (or legal persons having made a request for admission to a regulated market without the consent of the issuer) to publish, disclose and keep all information on the internet for a period of five years.

Section (5) of the position paper presents a detailed overview on the various applicable rules of Prospectus Directive, Transparency Directive and Market Abuse Directive.

### 3. The Annual Document in Current Practice

- *Art. 10 PD is in contradiction to the remainder of the Directive which refers to the offering and admission to trading of securities and always requires updated information.*
- *The Annual Document only contains historical information. The issuers do not accept liability for the correctness of any information at the time when the document is filed.*
- *For the investors it is only of limited value due to the annual publication mode.*

The Annual Document according to Art. 10 PD shall contain or refer to information published in the past. The information is not been provided in connection with a concrete offer or listing of (new) securities, but only in relation to already existing securities. Art. 10 is in contradiction to the Prospectus Directive, whose purpose according to Art. 1 “is to harmonize requirements for the drawing up, approval and distribution of the prospectus to be published *when* securities are offered to the public or admitted to trading on a regulated market.”

The Annual Document does not contain current information, but a collection of historical information only. Therefore, the issuers only accept liability for correctly having collected the required data, not for the correctness of the information at the time of publication of the document. This is reflected by the statement of the issuer normally contained in the Annual Document: Examples are "Information included or referenced in this annual document may be out of date." and "The information referred to below is not necessarily up to date as at the date of this annual information and the Company does not undertake any obligation to update any such information in the future."

Most issuers have decided for the reference mode, so that the Annual Document is more or less a “list of contents”. According to the Prospectus Directive the Annual Document has to be filed with the competent authorities after the publication of the financial statement. In most cases, issuers prepare the annual document in spring or early summer.

For the investor the annual publication modus means, that the information becomes less valuable to an investor the longer the date of publication has elapsed, for example when he consults a document in December which was filed with the competent authorities in April. If the investor were interested in any information to be published in the meantime he could only refer to any further disclosure obligation according to the Transparency Directive.

Therefore, in any case, the Annual Document has been a document of very limited value for the investors, even prior to the implementation of the Transparency Directive. Its preparation has only required a perfect and careful archive – a burdensome and time consuming task indeed.

However, as there are no detailed rules regarding the document, Art. 10 has been subject to divergent interpretation by the competent authorities, as ESME stated in its Report on the Prospectus Directive as of 5 September 2007 recommending at least a harmonization process among competent authorities in order to create clarity for issuers which are subject to different competent authorities.

#### 4. The Provisions of the Transparency Directive in Comparison

- *Transparency and Market Abuse Directives cover almost all information required under Art. 10 PD and allow for investors to be informed on an ongoing basis.*
- *The requirements regarding the accessibility and the record keeping of any information are far more suitable to investors than the rules of Art. 10 PD.*
- *In the case of an amendment of the Prospectus Directive, Article 10 should be abolished without implementing any substitute regulation.*

The Transparency Directive, as already mentioned, has implemented a new and consistent concept of periodic and ongoing information. Together with the ad hoc information required by the Market Abuse Directive in practice it covers any significant information which may be of interest to the markets. ESME has only been aware of one small difference.

Art. 10 Prospectus Directive refers not only to the obligations under community law and rules, but also to obligations under the company law directives and national law and rules dealing with the regulation of securities. This might lead to discrepancies, if information is only requested based on the company law directives or by national laws and rules, but not by the Transparency Directive, and if the respective national laws and rules do not require the publication of the information on the web site of the issuer. However, if this information could be important to investors as inside information, then it should be subject to the Market Abuse Directive – and again be available to investors on the website of the issuer. Therefore, the discrepancy is only for information subject to the company law directives and national law and rules, but not subject to the Market Abuse Directive and the Transparency Directive and not subject to publication on the web site.

By far more important is the difference of the Transparency Directive in relation to the completeness of information, the record keeping and the accessibility. Any new information has to be made available in due course to the public, has to be published on the internet and has to be kept for five years. The Annual Document can cope with none of these crucial elements of investor information. This makes the provisions of Art. 10 PD even more obsolete.

Even a potential remaining argument, that the Annual Document provides the historical information at a glance, is not convincing. Almost all issuers provide investors with the required information according to Transparency and Market Abuse Directives under a special section of their web site, mostly under the section “Investor relations”.

ESME considers any discrepancies as acceptable and confirms its position of abolishing Art. 10 when amending the Prospectus Directive. However, ESME recommends to the Commission to introduce consistent publication requirements relating to all Directives and Regulations obliging issuers to make all information required by law available under one specified section of their websites, at least as long as there is no overall archiving or publishing system within the EU. Although many issuers already voluntarily publish the information under the section “investor relations”, such requirement could be made obligatory simply to ensure that this tendency becomes real market standard for all issuers throughout the EU. It would significantly ease the process for investors of quickly finding all relevant publications at one place.

## 5. Prospectus, Transparency, Market Abuse Directive in Comparison

The following section provides an overview on the comparable rules contained in the Prospectus, Transparency and Market Abuse Directive.

Directives	Scope of Information	Period	Publication Channel
Art 10 PD Art. 27 PD Implementing Regulation	Information published or made available to the public in compliance with obligations under  a) Community law, b) National law, c) Rules dealing with regulation of securities, issuers of securities and securities markets,  and in particular information required pursuant to  a) <i>Company law directives</i> , b) The codified listing directive (2001/34/EC), c) The IFRS-regulation (No 1606/2002)	Annually (preceeding 12 months)	a) Filing with the Competent Authority b) Statement of where the information might be obtained (unless repeated in the document) c) Publication through a channel recognized under Art. 14 PD
Art. 2.1 (k) TD Art. 4.1 TD Art. 5.1 TD Art. 21 TD Art. 12 TD Implementing Directive Art. 6 MAD	Regulated information, i.e  a) Regular information under TD, b) Ad hoc information under MAD, c) Information subject to national disclosure requirements.	a) At least five years for annual and half-yearly financial reports, b) Ad hoc information shall be available to the public for an “appropriate period”.	a) Information through a EU-wide information channel and the officially Appointed Mechanism, b) Ad Hoc information shall be put on the issuers web site (Art. 6.1 MAD)