Rue de la Science 21-23
1040, Brussels
Belgium

+32 2 216 92 47
info@europeanissuers.eu
www.europeanissuers

EuropeanIssuers' Response to

ESMA's Consultation Paper on draft technical advice concerning the Prospectus Regulation and on updating the CDR on metadata

December, 2024

Question 1: What are your views in relation to format and sequencing? Do you agree with ESMA's approach to limit changes to the 'standard' equity and non-equity annexes? And do you have any concerns relating to a potential tension between Annexes II and III in the Amending Regulation and Articles 24 and 25 CDR on scrutiny and disclosure? Please give reasons for your concerns and suggest alternative approaches.

EI supports ESMA's approach to limit changes to the standard equity and non-equity annexes. In this regard, the rationale put forward by ESMA in the consultation paper (CP) appears relevant (paragraphs 19 and 20 of the CP). In particular, we agree that Annexes I, II, and III of the Amending Regulation are "*more suited to transactions such as IPOs or 'plain vanilla' non-equity issues. In those cases, a strict sequence based on Annexes I, II, and III of the Amending Regulation may work well, but it is not clear if such literal sequencing is feasible for (i) a base prospectus that caters for multiple non-equity securities with building blocks…*". Generally speaking, EI considers that the annexes of the Delegated Regulation on format, content, and approval of prospectuses (Delegated Regulation (EU) 2019/980) should not be amended if not explicitly required by the Amending Regulation (Regulation (EU) 2024/2809). Any unnecessary changes to these annexes would impact current practices and thus could result in additional costs and burden for issuers in order to adapt.

As regards the tension mentioned by ESMA between the Amending Regulation and the Delegated Regulation, the best way forward would be to comply with Annexes II and III of the Amending Regulation. In other words, ESMA could delete the reference to risk factors in the list of elements defined in Articles 24 and 25 of the Delegated Regulation. The requirement to disclose risk factors is laid down in Level 1 and the location of this disclosure in the annexes of the Delegated Regulation. When a summary is required, investors would furthermore find the most material risk factors in the summary.

Finally, we do not support ESMA's proposal to require a short cover note. This new requirement is not foreseen by Level 1, does not appear relevant for registration documents and its purpose is not clear: is ESMA aiming at providing legal comfort to an existing practice? Does this practice raise issues in

terms of investor protection? Should the content of the cover note be precisely defined and standardised?

Question 2: Do you have specific comments about the reduced time periods which financial information should cover which need to be considered as part of this work?

EI supports the reduction of time periods covered by historical financial information in accordance with the annexes of the Amending Regulation.

Question 3: Do you agree with ESMA's sustainability-related assessment in relation to the 'standard' equity registration document? If not, please explain why?

Yes, we agree with ESMA's assessment and consider that, indeed, Part III of Annex II of the Amending Regulation sets clear requirements.

Question 4: With respect to sustainability aspects, do respondents have concerns about the proposal which offers non-equity issuers who fall under the Accounting Directive or Transparency Directive an option to provide an electronic link to their relevant sustainability information?

While acknowledging that ESMA is offering an option to issuers required to publish sustainability information, we wonder why the Authority would address an issue not included in the mandate given by the Commission. In general, and as explained above, we would support maintaining a stable platform and not amending annexes of the Delegated Regulation for the sake of amending. Therefore, where there is no explicit requirement to amend or no significant loophole identified in terms of investor protection, we would support keeping the current annexes.

Question 5: What are you views in relation to potential implications of the proposed single non-equity disclosure framework?

We are concerned that the changes proposed by ESMA (deleting the retail framework and amending the wholesale framework) could eventually result in the opposite effect i.e. aligning the wholesale disclosure regime with the more detailed retail regime. The Commission's mandate asks ESMA to align the content of the prospectus for retail non-equity securities with the lighter content of the prospectus for wholesale non-equity securities. The mandate does not require ESMA to delete the annex for retail non-equity securities. Although reducing the number of annexes of the Delegated Regulation is an objective that we support, in this particular case, we believe that ESMA could maintain the current wholesale disclosure framework, notwithstanding the amendments required by Level 1, and amend the retail annexes as follows:

- Adopting the same approach as for the URD in Annex 2, ESMA could indicate that the "issuer shall disclose information in accordance with the disclosure requirements for the [registration document/securities note] for wholesale non-equity securities laid down in Annexes [X] and [Y]" ;
- And list the additional disclosure requirements specific to the retail regime since a total alignment between both regimes does not seem possible. Retail investors for instance will need information regarding the characteristics of the offer. Additional disclosures should however be strictly limited.

Question 6: Do you have any other concerns about the disclosure items as proposed? If so, please explain.

Please refer to our answer to question 19 regarding the equity registration document.

Question 7: In your view, will these proposals add or reduce costs? Please explain your answer.

We support the objective set by the Commission to streamline the content of prospectuses and the level of disclosures. However, and as mentioned above in our answers to questions 1 and 6, changes to the annexes of the Delegated Regulation not aimed at reducing the volume of disclosures would impact established practices and thus could result in additional costs and burden for issuers in order to adapt. We therefore support maintaining a stable platform when changes are not explicitly required in Level 1 and do not reduce disclosures.

Question 8: Do you agree with ESMA's approach to the disclosure requirements for non-equity securities that are advertised as taking into account ESG factors or pursuing ESG objectives? Please explain your answer and provide any suggestions for amendments.

Question 9: Do you agree with the definitions proposed for 'use of proceeds bonds' and 'sustainability-linked non-equity securities'? If not, what changes to the definition would you suggest?

We suggest amending the definitions as follows:

- "Sustainability-linked non-equity securities" means non-equity securities for which the financial and/or structural characteristics are conditional on whether the issuer achieves, **over a given financial year, some or all** predefined ESG objectives, including bonds defined in point (6) of Article 2 of Regulation (EU) 2023/2631.
- "Use of proceeds bond" means non-equity securities whose proceeds are **or are to be** applied to finance or re-finance green and/or social projects or activities.

Question 10: Do you agree with ESMA's approach to dealing with (i) prospectuses relating to EuGBs and (ii) prospectuses from issuers who have opted to use the templates for voluntary pre-issuance disclosures, as referred to in European Green Bond Regulation? Please explain your answer and provide any additional proposals to alleviate the regulatory burden.

Yes, we agree with ESMA's approach and consider that incorporation by reference can significantly alleviate the burden for issuers.

Question 11: Should Annex 21 be disapplied in relation to prospectuses relating to European Green Bonds and/or prospectuses drawn up using the templates for voluntary pre-issuance disclosures? Please explain your answer.

Question 12: Are the proposed disclosure requirements in Annex 21 proportionate? If not, please (i) identify disclosure requirements that could be alleviated and (ii) provide a (quantitative) description of the costs of compliance.

As regards new Annex 21 proposed by ESMA, we consider that the wording of item 2.1 should be simplified to avoid confusion and complexity. Regarding in particular the EU Taxonomy or any other taxonomy, we understand that the use of "*complying with*", "*aligned with*", "*eligible under*" and "*adhering to*" aims at capturing all securities that would make reference to a taxonomy. This wording however can be confusing. Focusing on the EU Taxonomy, economic activities are either eligible or not eligible, and, if eligible, they are either aligned or not aligned. Only aligned activities can meet the criteria of Article 3 of the Taxonomy Regulation (the DNSH criteria, the technical screening criteria, and the minimum social safeguards of Article 18). Therefore, in accordance with ESMA's proposal, only issuers with aligned activities can "*unequivocally state how the criteria in Article 3 of the Taxonomy Regulation* (…) *are met*". Furthermore, we assume that only issuers who are eligible to a taxonomy would use such taxonomy to advertise and sell their securities. Therefore, for the sake of simplicity, we suggest amending item 2.1 (a) as follows:

- "If the non-equity securities offered to the public or admitted to trading on a regulated market are advertised as **taking into account ESG factors or pursuing ESG objectives** ~~complying with, aligned with, eligible under or otherwise adhering~~ **by reference** to the EU Taxonomy, in accordance **with** Regulation (EU) 2020/852 of the European Parliament and of the Council, or a third country Taxonomy, ~~unequivocally state~~ **describe** how the criteria in Article 3 of the Taxonomy Regulation or the criteria in the third country taxonomy are **or will be** met and that they are significant in relation to the ESG features or objective of the non-equity securities and, where relevant, identify the third country taxonomy."

We believe that this wording will allow companies that are eligible, but not yet aligned, to explain how they intend to become aligned, keeping in mind that the challenge is not to ensure that green activities are financed but to allow activities in transition to be financed. Companies that are aligned with a taxonomy will describe how the criteria for alignment are met.

Likewise, we suggest amending item 2.1 (b) as follows:

- "If the non-equity securities offered to the public or admitted to trading on a regulated market are advertised as **taking into account ESG factors or pursuing ESG objectives** ~~complying with, aligned with, eligible under or otherwise adhering~~ **by reference** to a specific market standard or label, ~~unequivocally state~~ **describe** how the criteria in that standard or label are met and that they are significant in relation to the ESG features or objective of the non-equity securities and identify that market standard or ~~the~~ label ~~relating to the ESG features of the securities~~."

We understand ESMA's concern regarding the fact that some issuers only partially comply with a standard or label but consider that this issue should be addressed by said standard and label (through the requirement of a statement of full compliance for instance) and not by the Prospectus Regulation.

Under item 2.4, issuers would be required to disclose "*material information about any specific market standard, label or third country taxonomy relating to the ESG features of the securities*". This new disclosure requirement seems to be somehow redundant with the requirements of items 2.1 and 2.2. The reference to "*material information*" is also not clear. If ESG features of securities are based, for instance, on a third-country taxonomy, the issuer would have to disclose under item 2.1 how the criteria of such taxonomy are met and therefore describe the main features of the taxonomy. Therefore, we suggest deleting items 2.2 and 2.4 and adding in item 2.1 a requirement to include a link to the relevant third country taxonomy, label, or standard along with an explanation of the ESG factors taken into account.

Finally, we consider that under items 6.1 and 6.2 of new Annex 21 issuers should only be required to include in their prospectuses ESG ratings and review, advice, or assurances when these information or reports are public.

Question 13: Do you agree with the proposal to require disclosure about whether post-issuance shall be provided and the scope of this disclosure in items 6.3 and 6.4 of Annex 21? If not, what changes would you propose? Please explain your answer.

Question 14: Do you agree with ESMA's proposal in item 2.1 of Annex 21 concerning unequivocal statements about how the criteria or standard are met and that they are significant in relation to the ESG features or objectives of the security?

Please refer to our answer to question 12.

Question 15: Do you agree with the 'Category A', 'Category B' and 'Category C'46 classification of the items included in Annex 21, in particular in relation to items 2.1, 2.2 and 2.3? Please provide any suggestions for alternative categorisations and explain your answer.

Issuers may use base prospectuses to issue non-equity securities taking into account ESG factors or pursuing ESG objectives. Considering that a base prospectus is valid for 12 months, categorizing items 2.1 and 2.2 under category A will hamper the use of base prospectuses. For instance, at the time of the approval of the base prospectus, the issuer may not meet the criteria of the taxonomy to which the ESG features of the securities relate. We suggest changing the category to category B.

Question 16: Do you agree with ESMA's approach to disclosure for structured products with a sustainability component? Please explain your answer and include any suggestions to improve the approach.

Question 17: Do you support ESMA's proposal to amend Article 26 CDR on scrutiny and disclosure to facilitate the incorporation by reference of the relevant information from EuGB factsheets and the templates for voluntary pre-issuance disclosures into base prospectuses via final terms? Please explain your answer and provide any alternative proposals.

Yes, EI supports ESMA's proposal.

Question 18: Do you think that allowing incorporation by reference of the relevant information from EuGB factsheets and the templates for voluntary pre-issuance disclosures into base prospectuses via final terms will impose any significant costs or burden on issuers? Please explain your answer.

Question 19: Do you agree with ESMA's assessment regarding changes to the URD annex?

Yes, we agree with ESMA's assessment regarding the URD annex. As pointed out by ESMA the content of the URD will be mainly impacted by the changes to the equity registration document. In this regard, we would like to make the following comments:

- We support the objective to streamline and alleviate the disclosure requirements and, in particular, ESMA's proposals to reduce for certain items the period of disclosure to the timeframe between the last financial period and the date of the registration document and to remove the OFR section and replace it by a reference to the management report.

- To further streamline the disclosure requirements, we consider that ESMA should not require disclosures regarding whether management members were previously declared bankrupt; generally speaking, we consider that requiring information on members of the administrative, management, and/or supervisory bodies for the last 5 years is not necessary and that the time period could be reduced, for instance to 2 years.
- ESMA has adapted the content of the equity registration document to the content of the EU growth registration document for equity securities in accordance with the mandate given by the Commission. There are however 2 items for which we consider that the disclosures required by the EU growth registration document are not relevant and should not be retained:
    - Item 2.1.2 of the EU growth registration document requires information regarding the expected financing of the issuer's activities. This requirement seems wider if not just too vague compared to the current disclosure requirements under section 8 of Annex 1 on capital resources. We consider that the current requirement to disclose information on anticipated sources of funds needed to finance investments for which there is a firm commitment should be maintained.
    - Item 5.4 of the EU growth registration document requires information on key performance indicators. When a registration document is part of the tripartite prospectus, key performance indicators related to the issuer are included in the summary of the prospectus. Therefore we don't see the need to require this information in the registration document.

Question 20: Do you agree with ESMA's proposal to delete Article 40 CDR on scrutiny and disclosure and introduce Article 21b into CDR on scrutiny and disclosure? Please explain your answer and present any alternative proposals.

We support the objective of the Amending Regulation, reflected in the Commission's mandate, to strictly define the circumstances where National Competent Authorities (NCA) can use additional criteria for the scrutiny of prospectuses or require information in addition to what is required for drawing up a prospectus. In this regard, we are confused by the Consultation Paper which reminds that the deletion of Article 40 of the Prospectus Regulation does not change the powers of NCAs as regards the "necessary information" test, meaning that NCAs can still require additional information where necessary in order to allow investors to make an informed decision, and later exposes ESMA's view that "*without prejudice to the specific situations foreseen by the delegated acts* (…) *there are no circumstances in which an NCA should require additional information*". There is here a contradiction that is not in the remit of ESMA and should have been resolved at Level 1.
This said, we support ESMA's view and wonder whether the new Article 21b really addresses the point. As a matter of fact, Article 21b says, in a nutshell, that when the securities, transactions, or issuers are not covered by the existing annexes, NCAs can ask for other information. Article 21b does not say that for securities, transactions, or issuers covered by the annexes, NCAs should not ask for additional information. "By way of derogation" does not seem sufficiently restrictive in this regard and we suggest adding at the end of Article 21b a new paragraph that would read: "Except in the circumstances described in paragraphs 1 and 2, the competent authority shall not require additional information."

Question 21: Do you expect the deletion of Article 40 CDR on scrutiny and disclosure and/or the inclusion of Article 21b in CDR on scrutiny and disclosure to lead to additional administrative burden or costs for stakeholders? If so, please quantify the costs as much as possible.

Question 22: Do you agree with ESMA's assessment that there are no circumstances in which an NCA should require additional information in a prospectus over and above that which is required under Articles 6, 13, 14a and 15a PR within the context of the scrutiny and approval of a prospectus? Please explain your answer.

Yes, we agree with ESMA's assessment. Please refer to our answer to question 20 above.

Question 23: Do you agree with ESMA's approach to further harmonising the deadlines in NCAs' approval processes, i.e. trying to keep the deadlines as simple as possible and avoiding complicated administrative procedures? In your answer, please indicate what changes could be made to improve ESMA's advice in this area.

We support the objective to harmonise the NCAs' approval processes but we disagree with the deadlines proposed by ESMA. We suggest reducing the deadline from 120 working days plus 90 days to 90 working days plus 10 days.

Question 24: Do you believe ESMA's proposal will impose additional costs and/or burdens for issuers? Please explain your answer and provide an indication of the related costs.

Question 25: Do you agree with ESMA's proposal to amend CDR on metadata to account for the new types of prospectuses stemming from the Amending Regulation? Please explain your answer and present any alternative proposals.

Question 26: Do you agree that ESMA requires metadata to identify which securities qualify as EuGB (field 39 of draft Annex to CDR on metadata)? If not, why not? Do you think this will create an unreasonable additional burden on issuers? Please explain why.

Question 27: Do you agree with ESMA's proposal to streamline the process of submitting information that will need to be submitted by NCAs to ESAP via the Prospectus Register (Article 11a of the draft RTS amending CDR on metadata)? Do you think this will create an unreasonable additional burden on issuers? Please explain why.

Question 28: With regards to field 5, is it always possible to determine a single venue 'of first admission' in case of simultaneous admission on two or more venues? Please explain why.

Question 29: Do you agree with the other changes proposed on the list of metadata which are proposed in Table 1 of Annex I of the draft CDR on metadata? Do you think these changes will create an unreasonable additional burden on issuers? Please explain why.