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

30 December 2024

Introduction

By way of this letter, De Brauw Blackstone Westbroek provides its feedback on the Consultation Paper on draft technical advice concerning Regulation (EU) 2017/1129 (the "**Prospectus Regulation**") and on updating the Commission Delegated Regulation (EU) 2019/979 (the "**CDR**") on metadata.

For our responses, we draw from our vast experience working in the relevant markets. For non-equity securities, our practice focusses predominantly on issuers of wholesale non-equity securities. As a consequence, our responses may not incorporate concerns which are specific to issuers of retail non-equity securities.

In this letter, we address several key questions posed by ESMA where we believe our expertise allows us to contribute meaningfully. We welcome the majority of the proposed changes in content, format and sequencing of the prospectus annexes, viewing them as an important step towards reducing unnecessary disclosure burdens for issuers and fostering a more equitable environment for both issuers and investors.

While we have not provided detailed input on the questions relating to ESMA's proposal to amend the CDR on metadata – given its greater relevance to NCAs than to our practice – we generally support these updates. In particular, we endorse ESMA's proposal to streamline the submission of information to the European Single Access Point through the Prospectus Register.

We wish to flag, however, that while we agree with the general approach to harmonize deadlines in the approval processes for prospectuses by NCAs, we must strongly object to the proposed "pens-down" period. This measure, which prohibits issuers from submitting changes or supplementary information during the final 10 working days of the approval period, poses significant challenges. As detailed below, the rigidity of this proposal fails to account for the dynamic nature of market conditions. Such inflexibility risks undermining the integrity and adaptability of the approval process by potentially compelling issuers to submit prospectuses that are outdated or incomplete. This outcome is inconsistent with the overarching goal of protecting investors through accurate and current disclosures. We propose that ESMA adopt a more pragmatic approach, allowing issuers to provide critical updates during the pens-down period under well-defined circumstances, such as significant new information or urgent, unforeseen developments.

Q1: 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.

We generally believe the changes in format and sequencing are helpful. We understand that ESMA's approach for the standard equity and non-equity annexes has been to take the existing annexes as a starting point rather than prepare completely new annexes from scratch. We feel this approach to limit changes to the standard equity and non-equity annexes is prudent. However, we believe the impact of the changes may be limited since they do not materially decrease the burden for first-time issuers.

On a more general note, we are in favour of and support the development of standardised documents that are uniform or mostly uniform across member states. Any efforts by ESMA or other organisations are very welcome in promoting the capital markets union.

Regarding the tension between Annexes II and III in the Amending Regulation and Articles 24 and 25 CDR, we believe there is indeed scope for confusion as to the correct place of the risk factors in the equity prospectus. The proposed language for Articles 24 and 25 CDR, does in our view not suffice to avoid any confusion. We understand that the intention of the proposals in the CDR is to follow the strict sequencing set out in the Amending Regulation, with the exception of the risk factors. If this is indeed the case, we suggest to make this explicit in the CDR by amending the sequence in the relevant annexes to the CDR to clarify the correct location of the risk factors. Alternatively, we suggest to clarify this in a Q&A on prospectus disclosure.

Q2: 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?

We anticipate that the reduced time period for the financial information will have a limited impact on the market for equity securities. Historically, the market has adhered to a standard of three years of financial statements, and there may be reluctance to deviate from this established norm. The financial information provided is often a critical component of the equity story, serving as a key element that investors rely on to make informed decisions. This reliance creates a natural incentive for companies to include comprehensive financial data, rather than opting for less information.

However, the reduced time period could prove beneficial in specific situations where preparing historical financial information is particularly challenging or in cases where the transaction is more technical in nature (e.g., a redomiciliation). For instance, in the context of a complex carveout, the burden of compiling extensive historical data can be significant. In such cases, the flexibility to provide a shorter time frame of financial information could alleviate some of the preparation difficulties, making the process more manageable without compromising the overall quality and reliability of the financial disclosures.

In contrast to equity securities, we anticipate that the reduced time period will be more readily accepted by the market for non-equity securities, also because the financial information is typically only incorporated by reference in non-equity prospectus and no extensive disclosure is otherwise included.

We understand that issuers of non-equity securities see this is a welcome change, that will relief the burden on issuers to some extent, for example, in case of a recent change in auditor.

Q3: Do you agree with ESMA's sustainability-related assessment in relation to the 'standard' equity registration document? If not, please explain why?

We concur with the assessment that incorporating the wording of Part III of Annex II of the Amending Regulation should adequately address the sustainability information requirements for equity issuers under the Amending Regulation.

We believe that harmonizing the required sustainability disclosures across various areas of European law by explicitly linking them to the requirements under the CSRD would be advantageous for the prospectus regime. This approach would help eliminate the current uncertainty regarding the extent of sustainability disclosures and the differing approaches among member states.

However, it is important to note that the CSRD regime is still in its early stages, and there is considerable uncertainty about its application. As the CSRD framework evolves, it will be crucial to monitor its implementation and address any emerging challenges to ensure that the sustainability disclosure requirements are clear and consistent across all jurisdictions.

Q4: 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?

We concur with ESMA's proposal to allow non-equity issuers under the Accounting Directive or Transparency Directive to provide an electronic link to their sustainability information, as this reduces the administrative burden for issuers looking to share entity-level sustainability information.

Q5: What are you views in relation potential implications of the proposed single non-equity disclosure framework?

We generally believe that streamlining and standardising disclosure requirements and template documents can be helpful in reducing the administrative burden for issuers and competent authorities. However, in our view, a central element of this standardisation

and streamlining effort should also include an evaluation of whether the differences between categories of non-equity securities warrant different disclosure levels.

Regarding the proposed single non-equity disclosure registration template, the proposed Annex 6 clearly demarcates which items are applicable to only certain types of non-equity securities, and only limited new disclosure requirements are introduced in ESMA's proposition. As such, we anticipate that the proposed single non-equity registration document is sufficiently clear and we generally expect it to have limited impact on the administrative burden of issuers.

We view this differently with regards to the proposed single non-equity disclosure note template, as the proposed Annex 13 only to a very limited extent differentiates between the different types of non-equity securities, and consequently, introduces multiple new disclosure items for issuers of wholesale non-equity securities. To a certain extent these new requirements for issuers of wholesale non-equity securities also deviate from what we typically observe in the market.

In light of the above, we anticipate that ESMA's proposal in respect of the single non-equity disclosure note template would result in an additional burden, for issuers of wholesale securities in particular. We have doubts about whether this increased burden is proportionate to ESMA's goal of streamlining and standardising disclosures, especially given the different investor profiles for each type of security and the corresponding appropriate disclosure levels. To limit disclosures to those actually necessary for investor protection we suggest keeping the current system in place with different templates for wholesale and retail non-equity securities notes.

Q6: Do you have any other concerns about the disclosure items as proposed? If so, please explain.

We welcome the proposed general simplification annexes, including the removal of many smaller disclosure requirements. In particular, we are in favour of the proposed removal of the Operating and Financial Review section and the Capitalisation and Indebtedness tables from the equity annexes. Both sections are among the most burdensome for issuers and advisors in the preparation of a prospectus. We do note that the impact in practice will likely depend to a large extent on whether markets are willing to accept the decrease in disclosure. In particular, US market practice and established expectations may result in a section like Operating and Financial Review being retained in practice.

We note that ESMA's proposal does not amend the disclosure requirements regarding director and management remuneration. The current annex requirement refers only to the remuneration paid over the last full financial year. However, in the context of for example an IPO, we often see that director and management compensation packages are amended significantly upon completion of the transaction. This entails that the remuneration information provided in the prospectus is often of limited value for investors to determine the future compensation packages of management and directors. To provide

more relevant information for investors, we would suggest to amend the disclosure requirement to instead cover the current or future remuneration package of management and directors and only cover the remuneration over the last full financial year in case the current or future package is not yet available. This also aligns more closely with the ongoing annual disclosure requirements for an issuer on this topic that the issuer will generally face after obtaining its listing.

Q7: In your view, will these proposals add or reduce costs? Please explain your answer.

We welcome any simplification of disclosure requirements and efforts to reduce the burden on issuers, in particular first-time issuers. The proposed changes will in our view lead to cost reductions, since the disclosure requirements are made less burdensome. This streamlining of requirements should ease the compliance process for companies, potentially resulting in lower administrative expenses.

However, we note that the impact of the changes on market practice is uncertain. Investor and banks' expectations on disclosure are to an extent also driven by US market practice. It is not unthinkable that banks will refuse to accept more limited disclosure if that reduced disclosure would not meet US market practice expectations.

Q8: 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.

We generally concur with ESMA's approach to disclosure requirements for non-equity securities that are advertised as taking into account ESG factors or pursuing ESG objectives. We have formulated some specific concerns in relation to Annex 21 and the proposed definitions in our responses to some of the questions below.

Q9: 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 appreciate ESMA's approach to formulating definitions for use of proceeds bonds and sustainability-linked non-equity securities in the interest of legal certainty. We consider it particularly valuable that these definitions are expected to be broadened beyond the environmental aspect of 'ESG', as currently envisaged in the definitions in the Green Bonds Regulation.

However, for consistency and clarity, we would suggest aligning the proposed definitions on all other aspects with the definitions currently used in the Green Bonds Regulation. We have formulated a suggestion for a revised definitions in the CDR below, which should resolve any relevant discrepancies between the current definitions:

- *'**sustainability-linked non-equity securities'** means non-equity securities whose financial or structural characteristics vary depending on the achievement by the issuer of predefined ESG objectives, including bonds defined in point (6) of Article 2 of Regulation (EU) 2023/2631.*

- *"**non-equity security marketed as sustainable'** means a non-equity security whose issuer provides investors with a commitment or any form of pre-contractual claim that the bond proceeds are allocated to economic activities that contribute to an ESG objective, including bonds defined in point (5) of Article 2 of Regulation (EU) 2023/2631.*

Q10: 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.

We anticipate that ESMA's proposal to include by reference the pre-issuance fact sheet for European Green Bonds and include the relevant parts of the voluntary pre-issuance disclosures in the prospectus will alleviate the regulatory burden.

Q11: 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.

We believe that issuing European Green Bonds should remain attractive to issuers, and therefore, the administrative barriers should not be unnecessarily increased with the proposed amendments to the CDR. Additionally, disclosure requirements should be consistent and clear.

We understand that many items in Annex 21 would also be applicable to issuers of European Green Bonds, because it includes items which are not expressly contemplated under the pre-issuance fact sheet for European Green Bonds. While the administrative burden of such issuers may be reduced by the requirement to incorporate relevant items by reference, it may not always be clear in the beginning when the requirements of Annex 21 are met. For consistency and harmonisation, and in order to reduce administrative burden and provide investors with one single point of information, ESMA may want to consider:

- integrating the pre-issuance fact sheet for issuers of European Green Bonds and Annex 21, and clarify which items or parts thereof only have to be disclosed by issuers of European Green Bonds, to ensure there is one single document on pre-issuance disclosure requirements for European Green Bonds

- delaying the adoption of Annex 21 and monitor market developments first to promote innovation and provide sufficient flexibility. In the interim, ESMA may want to consider making the voluntary pre-issuance disclosures also accessible to issuers of non-equity securities with socially sustainable or governance objectives.

Because the templates for voluntary post-issuance disclosures have only been published for consultation recently, kindly note that our comments pertain mostly to European Green Bonds and only to a lesser extent to green bonds and sustainability-linked bonds.

Q12: 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.

Before addressing specific items in Annex 21, we would like to emphasize that with the Green Bonds Regulation, the European Union "*is aiming to set a clear gold standard for green bonds*".[1] For this reason, the European Commission also builds on these templates for its disclosure guidelines for issuers of bonds marketed as environmentally sustainable and of sustainability-linked bonds. We assume it is not ESMA's intention to impose with Annex 21 additional disclosure requirements which go beyond what is included in the Green Bonds Regulation or aligned with market practice.

Whereas some items in Annex 21 are aligned with market practice, for example the disclosure of ESG risk factors, we have doubts as to whether it will be possible for issuers of ESG-products to comply with all disclosure requirements. We have included some examples below.

Item	Concerns
Item 1.1: "*Prominent disclosure of risk factors that are material to the securities being offered and/or admitted to trading in order to assess the risks associated with the ESG profile of these securities and the market risk in the section headed 'Risk Factors'. The risk factors should disclose the* ***possible impact of the materialisation of the risks on the ESG profile of the securities*** *and the* ***likely financial effect***."	Although issuers may be able to give some generic indication for the items highlighted in **bold**, it is difficult to quantify and assess this. In line with market practice, we would assume that such risks and effect does not

[1] European Commission, ' The European green bond standard – Supporting the transition', https://finance.ec.europa.eu/sustainable-finance/tools-and-standards/european-green-bond-standard-supporting-transition_en.

	need to be quantified.
Item 2.1 (a): *"If the non-equity securities offered to the public or admitted to trading on a regulated market are advertised as complying with, aligned with, eligible under or otherwise adhering to the EU Taxonomy, in accordance Regulation (EU) 2020/852 of the European Parliament and of the Council1, or a third country Taxonomy,* ***unequivocally state how*** *the criteria in Article 3 of the Taxonomy Regulation or third country taxonomy are 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.*	Issuers may not be able, or it might be relatively burdensome, to provide the statements highlighted in **bold**. Providing more general confirmations is what we typically see in the market.
Item 4.1.1: "*Disclosure of the material risks regarding key performance indicators (KPIs) and associated sustainability performance targets (SPTs); including but not be limited to,* ***risks concerning potential conflicts of interest when such KPIs are selected and monitored****. Furthermore, owing to the nature of 'sustainability-linked' bonds, the impact of the issuer's* ***overall firm-level sustainability performance on the security*** *should be clear in the risk factors*."	Issuers may not be able, or it might be relatively burdensome, to provide the information highlighted in **bold**.

Additionally, for item 3.1.3 we assume that is allowed to provide general statements, as depending on the activities of the issuer, detailed information may be more challenging to provide.

Q13: Do you agree with the proposal to require disclosure about whether post-issuance information 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.

We agree with ESMA's approach to require disclosure about whether post-issuance information shall be provided and the scope of these disclosures. For the avoidance of doubt, and from a practical perspective, we assume that for item 6.4 it will suffice to refer to a category of persons providing the assurance instead of a single person, such as for example a second party opinion provider, or the management board. This would also be in line with what we typically observe in the market.

Q17: 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.

We support ESMA's proposal to facilitate the disclosures to be made via final terms. In order to continue to comply with Clause 14.1 of the Green Bonds Regulations, we assume that in such case, a base prospectus could indicate that it may be used for issuing European Green bonds or other sustainable bonds, which will be unequivocally identified in the final terms.

Q18: 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.

We do not expect any significant costs for or burden on issuers as a result of the suggested approach to incorporate by reference the relevant information for European Green Bonds factsheets and the templates for voluntary pre-issuance disclosures into base prospectuses via final terms.

Q19: Do you agree with ESMA's assessment regarding changes to the URD annex?

The practice of issuers using URDs has not been widely adopted in the Netherlands, and the market remains relatively unfamiliar with both the document and the associated process. Consequently, we anticipate that the changes to the URD regime will have limited impact in the Netherlands. In addition, the relevance of the URD regime has been limited by the expansion of prospectus exemptions under the Amending Regulation. The relevance of the URD remains largely limited to frequent issuers of multiple different kinds of instruments.

However, only minor adjustments to the URD annex seem necessary. These limited changes should help streamline the process without causing significant disruption or confusion in the market. As the URD framework evolves, it will be important to monitor its adoption and effectiveness to ensure it meets the needs of all stakeholders.

Q20: 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 agree with the proposal to replace Article 40 with Article 21b, as it aligns with the evolving need for regulatory flexibility while ensuring investor protection. By allowing NCAs to request additional disclosures for specific products or transactions, the approach strikes a necessary balance between market innovation and transparency, particularly for novel financial products. This approach is consistent with the core principle of the Prospectus Regulation: providing sufficient and relevant information for investors to make informed decisions.

However, a lack of harmonization in the application of Article 21b could lead to regulatory fragmentation. ESMA's own analysis shows that NCAs differ significantly in their interpretation and application of the current additional scrutiny criteria, with some NCAs adopting a stricter approach. Diverging practices could undermine market confidence and create competitive disparities among jurisdictions.

While we appreciate that the objective of the newly proposed article is to provide NCAs with sufficient flexibility to address new developments, we believe that some degree of harmonization is necessary. This would ensure that all NCAs operate within a shared framework, thereby reducing the risk of regulatory arbitrage. Harmonization could be achieved through measures such as:

- Encouraging greater convergence through supervisory coordination and the publication of best practices and regularly updated supervisory briefings;
- Requiring publication of internal guidelines by NCAs, similar to the approach adopted by the Italian NCA; and
- Establishing a feedback loop for supervisory cases at the ESMA level to encourage convergence and minimize discrepancies between NCA practices.

A uniform approach would enhance predictability and consistency, making it easier for issuers to comply across borders while maintaining high standards of investor protection.

Q21: 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.

We believe that the proposed changes will not materially increase administrative burdens or costs. Article 21b merely formalizes practices already permitted under the Prospectus Regulation, clarifying the scope of NCAs' powers without introducing new obligations for

stakeholders. The enhanced clarity and flexibility could, in fact, reduce compliance costs by providing issuers with a more predictable regulatory framework.

However, we caution that inconsistent implementation across NCAs could indirectly increase costs for stakeholders operating in or selecting between multiple jurisdictions. If NCAs vary in their application of Article 21b, issuers may incur additional legal and advisory expenses to navigate these differences. While the concepts of providing flexibility to the NCAs and harmonization across the EU may not always align, clearer ESMA guidelines or efforts toward supervisory convergence could mitigate potential inefficiencies. A consistent approach would reduce uncertainty and encourage cross-border capital market activity.

Q22: 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.

We broadly agree with ESMA's assessment but believe this principle requires careful application. Articles 6, 13, 14a, and 15a PR establish comprehensive disclosure requirements, ensuring that all material information is included for investor decision-making. However, ESMA acknowledges situations involving new or unconventional financial products, such as SPACs or crypto-assets, where existing disclosures may fall short.

In such cases, NCAs must retain the flexibility to request additional disclosures under Article 21b, provided these requests are reasonable, necessary, and aligned with investor protection principles. To balance this need for flexibility with the goal of harmonization, ESMA should ensure that NCAs follow uniform criteria when exercising these powers, preventing excessive or inconsistent demands.

Q23: 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 agree with the approach to harmonise deadlines in the approval processes. The proposal provides predictability for issuers and ensures consistency across Member States, which is critical for fostering a level playing field in EU capital markets. By establishing a minimum 10-working-day response period and a maximum total review period of 120 working days (with a single 90-working-day extension), the approach strikes a balance between flexibility for issuers and operational efficiency for NCAs.

However, we strongly object to the proposed "pens-down" period as currently formulated. Prohibiting issuers from submitting updates or supplementary information during the final 10 working days of the approval period is impractical and does not reflect the realities of

market circumstances. Capital markets operate in a dynamic environment where new material information can emerge unexpectedly, and it is vital that issuers retain the ability to provide critical updates to prospectuses to reflect these changes.

The rigidity of the pens-down period could result in outdated or incomplete information being disclosed to investors, undermining the accuracy and reliability of the prospectus. This not only disadvantages issuers but also potentially harms investor confidence.

We recommend that ESMA revise this proposal to allow issuers to submit updated or supplementary information during the pens-down period under clearly defined conditions, such as significant new information or material, unforeseen changes. Such flexibility would better align with the practical needs of issuers and the goal of maintaining high standards of market transparency, without materially disrupting the approval timelines.