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To whom it may concern,

We are pleased to have the opportunity to respond to ESMA's Consultation paper on draft technical advice concerning the Prospectus Regulation and on updating the CDR on metadata dated 28 October 2024 (the "**Consultation Paper**").

Stibbe is an independent, international law firm with main offices in Amsterdam, Brussels and Luxembourg. We regularly advise issuers, underwriting banks and other relevant parties on a broad range of equity and debt capital markets transactions.

Please see below for our responses to selected questions from the Consultation Paper. Capitalised terms used but not defined herein have the meanings ascribed to them in the Consultation Paper.

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[1] CDR on scrutiny and disclosure? Please give reasons for your concerns and suggest alternative approaches.

a. Tension between Articles 24 and 25 CDR and CDR Annexes

(1) Under the Amending Regulation, the sequencing within a disclosure document will become standardised. Recital (17) of the Amending Regulation states that Annexes I, II and III to the Prospectus Regulation (as amended) ("**PR**") "*should be the basis for the Commission to amend any delegated acts that impose a standardised format and sequence of sections of the prospectus, the base prospectus and the final terms, including on the disclosure items within those sections*".

(2) The draft CDR on scrutiny and disclosure contains those more detailed requirements for such standardised sequencing, but those have been included in two different parts of the draft regulation, i.e. in Articles 24 and 25 on the one hand and in the Annexes on the other hand. We are concerned that this will create confusion for market participants. Furthermore, we

[1] In this document we refer to the 'old' Articles 24 and 25, which will be renumbered to Articles 22 and 23 in the proposed CDR on scrutiny and disclosure.

note that Article 24 and the Annexes are contradictory, as Article 24 requires the risk factors to be included immediately after the summary and the Annexes require the strategy to be included before the risk factors.

(3) An alternative approach that would eliminate the risk of confusion would be to delete the items listed in paragraphs 1 (a)-(e) and 2 (a)-(d) of Article 24 and paragraphs 1 (a)-(e) and 2 (a)-(e) of Article 25 of the CDR on scrutiny and disclosure. Any disclosure items that have currently been included in these provisions, can be carried over to the relevant Annexes where necessary. This would achieve that in principle the Annexes provide a comprehensive overview of which building blocks a prospectus must contain and in what sequence and any contradictions are eliminated.

b. Table of contents at the beginning of each Annex

(4) Additionally, to further clarify the standardised sequence, we propose to include a table of contents at the beginning of each Annex to the CDR on scrutiny and disclosure summarising such sequence. In our view, this addition would improve the usability of the Annexes by providing issuers with a clear and immediate overview of the required sequencing.

c. Additional Annexes needed for single document prospectuses

(5) Based on our experience, we find that a significant portion of prospectuses approved in our home markets are prospectuses drawn up as a single document (single document prospectuses, or SDPs). In addition, the Peer Review Report shows that almost half of the prospectuses filed across the EU in the period between 20 November 2020 and 27 January 2022 were standalone prospectuses.[2]

(6) The Annexes to the CDR on scrutiny and disclosure contain detailed information on disclosure items, distinguishing between the Registration Document (Part A, Annexes 1-9) and the Securities Note (Part B, Annexes 10-14). No separate Annexes have been included containing similar information for an SDP. This creates uncertainty as to the sequencing that applies in case of an SDP. Naturally, Annex I to the PR provides a high-level framework for the standardised sequencing of an SDP, but it does not provide the clarity that is needed at a more granular level. As such, the Annexes to the CDR on scrutiny and disclosure in their current form will result in unclarity and confusion as to the standardised sequencing of SDPs.

(7) Our proposed solution would be to include additional Annexes in the CDR on scrutiny and disclosure, detailing the required contents and sequencing of SDPs. This solution would provide issuers with a usable and comprehensive overview of the disclosure requirements. Moreover, the concept of a standardised SDP aligns with the desire of market parties to create

[2] ESMA's Peer review report dated 21 July 2022 (ESMA42-111-7170), p. 38-39.

one standard form of SDPs that is usable across markets and benefits comparability of issuers and securities.[3]

d. Clarification needed on sequencing of additional information

(8) The Annexes to the CDR on scrutiny and disclosure set out the minimum requirements for the relevant disclosure documents, as is clear from the heading of article 13 PR. As such, issuers are permitted to include additional information on top of the information required by the relevant Annex – and they may even be required to do so to meet the overall disclosure standard of article 6 PR.

(9) The CDR on scrutiny and disclosure currently does not clarify where in the standardised sequence such additional information should be included. This creates the risk that different NCAs will treat the sequencing of such additional information inconsistently. Our suggested solution would be twofold:

i. for certain common additional information elements, we would propose to include placeholders in the relevant Annexes. An example is the chapter "Operating and Financial Review", which will no longer be required under the Amending Regulation, but which we expect will continue to be included in certain equity offering prospectuses, in particular for offerings that include an offering to qualified institutional investors (QIBs) in the United States; and

ii. for other additional information, clarify in the CDR on scrutiny and disclosure that issuers are free to include such information wherever they deem appropriate given the contents of the additional information.

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.

(10) We agree with ESMA's proposal to include the provision in the chapter on content of the prospectus instead of the chapter on scrutiny and approval. However, we do have certain reservations as to the contents of Article 21b CDR on scrutiny and disclosure:

i. We believe the heading of Article 21b CDR on scrutiny and disclosure should be amended. This Article addresses exceptional circumstances under which NCAs are allowed to request additional information. The Article's current heading ("*Circumstances leading to the disclosure of additional information*") therefore does not accurately reflect the contents of the provision, as it implies that the Article provides for all circumstances where additional information is required and it does not convey the exceptional nature of the circumstances outlined, also in view of the

[3] See, for example, Euronext's initiative to create a standard form for SDPs, aimed at providing issuers with a template for standardised key investor information. *Financial Times*, "Euronext plans US-style prospectus to boost corporate fundraisings", 8 November 2024.

heading of Section 3 ("*Additional information to be included in the prospectus*"). We would suggest including a heading that more clearly reflects the exceptional circumstances in which NCAs can request additional information and aligns better with the heading of Section 3. Our suggested alternative would be to name Article 21b CDR on scrutiny and disclosure: "*Circumstances not covered by the Annexes*" or similar language.

ii. The wording "*By way of derogation from Articles 2 to 21a*" in the beginning of subparagraphs (1) and (2) of Article 21b CDR on scrutiny and disclosure, is redundant in our view. Subparagraph (1) addresses circumstances involving securities that are not explicitly covered by the Annexes to the CDR on scrutiny and disclosure, but which do share characteristics with those that are. Subparagraph (2) pertains to entirely new types of securities that are not covered by the Annexes in any way. Consequently, the securities covered by the two subparagraphs are securities to which none of the Annexes directly apply. In such cases, issuers already find themselves outside the scope of Articles 2 to 21a CDR on scrutiny and disclosure, and the requirements laid down in subparagraphs (1) and (2) cannot therefore be considered a derogation from Articles 2 to 21a. As a result, we suggest that ESMA remove the phrase "*By way of derogation from Articles 2 to 21a*" in both subparagraphs.

iii. Lastly, we noticed a discrepancy between paragraph (70) of the Consultation Paper and the amendments made to Annex 1 of the CDR on scrutiny and disclosure. Paragraph (70) provides that when, for example, a prospectus relates to non-equity securities with denominations of EUR 1,000, normally Annexes 6 and 14 to the CDR on scrutiny and disclosure would apply. However, as the securities in question have some of the characteristics of equity securities, which materially affect the risk profile of the securities, the relevant NCA can request that the issuer discloses additional information. The example specifically mentions that the NCA can request information on its capital resources and its share capital, as required under sections 8 and 19 of Annex 1. This specific example may cause confusion as section 8 and part of section 19 have been deleted in the revised Annex 1 to the CDR on scrutiny and disclosure. Therefore, we propose including an alternative example to illustrate what additional information an NCA can request that will remain part of Annex 1, to prevent any misunderstanding.

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? If not, please indicate what changes could be made to improve ESMA's advice in this area.

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Q24 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.

(11) Based on our experience, ESMA's proposed maximum timeframe for the process of review and approval of a prospectus by an NCA of 120 working days, with a possible extension of 90 working days, should be more than sufficient for most prospectus review and approval processes. However, we believe issues may arise where processes are put on hold for an extended period (e.g. due to market conditions) and subsequently resumed at a later stage, but still within the total of 210 working days. This could lead to undesirable outcomes where an issuer needs slightly more than the allowed for 210 working days to have the prospectus approved. We appreciate ESMA's reassurance that, in any event, issuers can submit a new application for approval if they are unable to meet the deadlines. Nevertheless, this may result in disproportionate costs for issuers due to filing fees imposed by the NCA. These filing fees differ among jurisdictions, but are generally significant. Examples for equity prospectuses drawn up as a single document are a filing fee of EUR 65,000 in the Netherlands and of 0.11% in EUR of the value of the total amount offered to the public or for which admission to trading is requested in Luxembourg (subject to a maximum of EUR 220,000). In situations where an issuer is on the verge of approval at expiry of the 210 working days deadline, the solution of being able to start a new application process may be overly burdensome due to such filing fees and has the potential to create an unnecessary barrier to capital markets access.

(12) We agree with ESMA's comment that it would not be sensible to attempt to draw up an exhaustive list of possible derogations from the maximum overall timeframe. However, we do not believe that a maximum timeframe without any flexibility to allow exceptions in individual processes, provides a viable alternative. Our suggestion is to amend the provision to include an exception that gives NCAs the discretion to grant an additional extension for the application process beyond expiry of the 210 working days. To emphasise the exceptional nature of such a further extension, ESMA could make such further extension subject to certain appropriate conditions. We believe that providing NCAs with such a possibility to make exceptions to the maximum overall timeframe, within clear limits, aligns more closely with the Commission's mandate and would help prevent that the maximum overall timeframe will impose undue costs on issuers.

Please let us know if you have any questions.

Yours sincerely,

Stibbe