LUX CMA
Luxembourg Capital Markets Association

ESMA CONSULTATION PAPER

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

WORKING GROUP

Listing Act

DECEMBER 2024

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Draft technical advice on the standardised format and standardised sequence of the prospectus, the base prospectus and the final terms

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 Commission Delegated Regulation 980/2019 (CDR on scrutiny and disclosure) on scrutiny and disclosure? Please give reasons for your concerns and suggest alternative approaches.

ESMA's approach to limit changes to the 'standard' equity and non-equity annexes is welcomed. For the more complex non-equity structures, the current framework of building blocks works well and therefore LuxCMA would not see a need to propose material changes to it. In addition, the issuers would need to invest time and money to revise their prospectuses to meet the new requirements which may go against the initial intention to make the administrative burden less burdensome and expensive. It is important to have a common, standardized format and sequencing, however, given that the issuers bear the responsibility for the information contained in the prospectus, the requirements should not be too prescriptive and the issuers should have certain freedom to decide how to present material information in it.
LuxCMA agrees with ESMA approach to keep the order set out by Articles 24 and 25 of CDR on scrutiny and disclosure, but to redraft the order of information disclosed in CSR Annexes 10 and 13 in line with Annexes to Amending Regulation. Our understanding is that this should help issuers who are unable to achieve compliance with the CDR Annexes, to still reply on Articles 24(5) and 25(6) and provide a list of cross-references.
Regarding the proposed changes to the CDR on scrutiny and disclosure, LuxCMA would like to mention that the introduction of a cover note may result in differing approaches being taken and additional (not necessarily essential) information being included. This could be contrary to the aim of standardization and simplification.

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?

This is a reasonable approach aimed at reducing the burden for issuers.

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

LuxCMA mostly agrees with ESMA approach. On the positive side, these requirements (if possibly proper sector aligned) will enhance transparency and help investors make more informed decisions. They provide clear and consistent information about sustainability practices, allowing investors to compare "apples to apples" and track the development of the same issuer over time.
However, on the downside, to avoid a simple "tick the box" exercise, companies are at different stages of development and have varying targets over different timeframes. This does not create a level playing field for laggards or smaller players with good initiatives. Compared to more established players, these smaller companies may not receive the same level of support that is really deserved.

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?

For the benefit of issuers and the market overall, and to avoid unnecessary impositions, this proposal should remain optional.

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

LuxCMA believes that the proposed single non-equity disclosure framework, particularly Annex 13 (non-equity note), may lead to confusion among issuers. The suggested amendments, in our opinion, could complicate the disclosure regime rather than streamline it. For example, sections 3, 4, and 4a are not currently specified as being applicable solely to retail or wholesale contexts, yet sections 3 and 4a are evidently redundant. The introduction to Item 3.1 and the title of section 4 imply that sections 3 and 4 should be exclusive to retail, but this could be clarified further. Another instance of ambiguity is in the breakdown of expenses in Item 1.7 of Annex 13, which should be relevant only to offer information in the retail context and not to the admission to trading context.

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

Concerning the request for feedback regarding **the cash flow statement**, it is noted that the existing requirement for a cashflow statement in the retail non-equity registration document, as specified in Item 5.1.5(c) of Annex 6 (non-equity registration document), has been a considerable deterrent to retail offerings. Considering this, and noting that such information is absent from the current wholesale non-equity registration document as well as from the Commission's mandate exceptions for aligning retail and wholesale disclosures, LuxCMA recommends the removal of this requirement.

The inclusion of Item 5.4 (**KPI for retail securities**) in Annex 6 is an additional requirement that increases administrative burdens. The proposed requirement seems to come from Item 5.4 in current Annex 25 (EU growth registration document for non-equity securities). This requirement may indeed be relevant for simpler “growth” issuers (in particular where no other, more established metrics are available). However, this should not be imposed on other entities, where a range of references across a complex corporate organization might be subject to impromptu prospectus inclusion and related liability risk, even if they are wholly immaterial to investment decisions. This would be a significant additional burden and a disincentive to retail offerings, as the only generally recognized debt capital market KPIs are in a Sustainability Linked Bonds context. Additionally, in a financial context, there are already provisions on alternative performance measures.

A new requirement is added in Item 6.1.2 in Annex 6 requiring “A description of any arrangements, known to the issuer, the operation of which may at a subsequent date result in or prevent a **change in control of the issuer**”. This additional disclosure obligation increases administrative burdens instead of simplifying them. LuxCMA understands that this information may be important in case of emerging 'growth' issuers, where the perception of the issuer's solvency is closely tied to the original

managers or owners remaining in their positions, however it should not be extended to more established entities.

The **retail tax treatment** disclosure requirement under Item 3.1.14 of Annex 13 (retail non-equity securities note) has proven to be complex and discouraging to retail offerings. This information is neither included in the current wholesale non-equity registration document nor in the Commission's mandate exceptions for aligning retail disclosure with wholesale disclosure. Therefore, LuxCMA recommends that this requirement be removed.

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

Proposals aimed at standardizing and streamlining current reporting obligations will tend to reduce costs for all stakeholders in a long term. However, most issuers will have to invest to change their established disclosure approaches.

Draft technical advice on the disclosure requirements for non-equity securities advertised as taking into account ESG factors or pursuing ESG objectives

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.

LuxCMA agrees with ESMA's approach. However, these disclosure requirements might be too stringent, especially for first-time issuers. This could discourage issuers from reflecting their ESG objectives. Additionally, investors apply varying levels of ESG factor assessment. Some are satisfied with ICMA standards, while others prefer labels or specific quantitative assessments. Major data providers are also trying to standardize factors based on their own models. Essentially, involving industry experts in issuing technical standards (similar to rating agencies applying sensitive financial ratios) could be a beneficial first step to serve as a benchmark, in addition to issuer discloser. Moreover, Annex 21 that goes beyond the currently established 'use of Proceeds Bonds' and 'sustainability-linked bonds' may hinder the development of new instruments that possess ESG attributes at the instrument level. This is due to the imposition of detailed requirements that may not align well with the unique characteristics of such new instruments. In addition, it could be beneficial for the market participants to have more clarity on the scope of application of this Annex 21. ESMA explains that Annex 21 is to be used in combination with applicable annexes for non-equity securities. However, it should be clarified that Annex 21 should not be used for "pure play" companies issuing conventional bonds and not 'use of proceeds' bonds or 'sustainability-linked bonds', repackaging of bonds and issuers that include entity level disclosure on their transition plans or strategy.

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?

Yes. These definitions should already be well understood in the market.

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.

LuxCMA tends to agree.
One additional point that merits being raised again here, albeit indirectly connected to the questions being posed by ESMA, concerns the subjection of EuGB issuers to the Prospectus Regulation (PR) and its liability regime. Once again, LuxCMA believes it is worth reminding that the risk that this legislative option will undermine the attractiveness of the EU GBS is high, seeing that it introduces a de facto mandatory regime, whereas it would have been essential to keep the EU GBS voluntary and propose measures to incentivise its uptake among issuers in order for the standard to succeed and be adopted globally (as initially recommended to the EC by the High-Level Expert Group and the Technical Expert Group on Sustainable Finance).
Although LuxCMA understands that the proposed solution aims at providing for long-term credible investor protection and the avoidance of inconsistent or potentially misleading information, it may be too stringent to allow for a real EuGB market to even develop, and it will distance itself from (successful) market-led standards which have been widely used by issuers worldwide. At a time where the benefits of streamlining and harmonising existing regulation are being discussed (this CP is an example of this), particularly regarding sustainable finance frameworks, this should be a point for further reflection.

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.

Yes, see LuxCMA response to Question 10.
In addition, requirements under Annex 21 and the EuGB factsheet, as well as the voluntary disclosure provisions under consultation are not identical. This discrepancy complicates the identification of 'relevant' factsheet information items that could satisfy Annex 21 requirements and potentially causing friction for EuGB issuance. A key aspect is the application of Article 6(1) of the PR, beyond just risk factors, especially given the timing mismatch between the EuGB regime and the amended prospectus regime. ESMA could consider including a new distinct section in Annex 21 that just applies to EuGB Regulation issuance, into which any finalized requirements could be added as and when ready (being Category C information, this would not cause supplement related disruptions).

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.

Proportionality in disclosure requirements is key to balancing transparency with regulatory burden. LuxCMA finds the requirements proportionate at high level. KPIs are tailored to the specific environmental and social impacts of each sector, ensuring that disclosures are relevant and

meaningful for investors. The categorization into 'Category A', 'Category B', and 'Category C' helps prioritize the most critical information while still providing comprehensive insights.

Adherence to as Specific Standard or Legislative Framework

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.

LuxCMA agrees with the proposal.

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?

Item 2.1 should be amended to allow clear disclosure of the extent to which an instrument does not align with the relevant reference. Issuers should disclose any elements that are not met. These statements shall be clear, specific, and provide measurable outcomes, with purpose to make it easy for investors and stakeholders to understand how the company meets its ESG objectives. They should also reference recognized standards and initiatives, adding credibility to the claims.

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.

LuxCMA agrees with the proposed categorization.

Interactions with the SFDR

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.

LuxCMA mostly agrees. ESMA's approach to disclosure for structured products with a sustainability component aims to enhance transparency and ensure that investors have access to comprehensive information about the ESG aspects of these products. This includes detailed disclosures on how the underlying assets contribute to sustainability goals and the specific ESG criteria they meet.
However, there is a risk of "double accounting" of green efforts, particularly if a structured green bond invests in other green bonds. This could lead to the same green projects being counted multiple times across different financial products. To mitigate this risk:

- Clear Attribution Rules: Establishing clear rules for attributing green efforts to specific projects can help ensure that the same project is not counted multiple times.
- Transparency in Reporting: Requiring detailed disclosures about the underlying assets and their specific contributions to sustainability goals can help investors identify and avoid double counting.

By addressing these potential issues, ESMA can further enhance the integrity and effectiveness of its disclosure requirements for structured products with a sustainability component.

Use of the base prospectuses for European Green Bonds

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.

This initiative is welcomed as it is aimed at simplification, decreasing costs, and lowering administrative burdens.

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.

Please refer to our answer to Question 17.

Draft technical advice on the content of the URD

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

The question remains unanswered.

Draft technical advice on the content of the criteria for scrutiny of the completeness, comprehensibility and consistency of the information contained in prospectuses

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.

The question remains unanswered.

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.

The question remains unanswered.

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.

LuxCMA agrees with ESMA's assessment. NCAs should not have different powers and go beyond what is necessary for the supervision under the PR regime.

Draft technical advice on the procedures for the approval of prospectuses

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.

The question remains unanswered.

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.

The question remains unanswered.

Update of the CDR on metadata

Question 25: Do you agree with ESMA's proposal to amend Commission Delegated Regulation 979/2019 on metadata (CDR on metadata), on metadata to account for the new types of prospectuses stemming from the Amending Regulation? Please explain your answer and present any alternative proposals.

The question remains unanswered.

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.

The question remains unanswered.

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.

The question remains unanswered.

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.

The question remains unanswered.

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.

The question remains unanswered.

About the LuxCMA – Luxembourg Capital Markets Association

Created on 1 March 2019, the LuxCMA is a not-for-profit association (a.s.b.l.), registered at the RCSL (F12205), whose registered office is 6 rue Jean Monnet, L-2180 Luxembourg. The LuxCMA today represents memberships detailed on LuxCMA's website, which is composed by banks, law firms and services providers, amongst others.

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About the Listing Act Working Group

The primary objective of the Listing Act Working Group (WG) is to thoroughly analyse the legislative proposals of the Listing Act and their impact on the EU and Luxembourg capital markets, while also monitoring their development during the EU legislative process. The WG provides feedback and participates in consultations related to the texts at both the EU and national levels, ensuring that the analysis takes into account the interests of capital market participants from different sectors due to the WG members' extensive and varied experience.

For more information, please visit our website at www.luxcma.com or contact info@luxcma.lu.

LuxCMA - Luxembourg Capital Markets Association
6 rue Jean Monnet | L-2180 Luxembourg
info@luxcma.lu | www.luxcma.com