AFME Response

ESMA CP on draft technical advice concerning the Prospectus Regulation and metadata

31 December 2024

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.

AFME response: AFME believes a prescriptive fixing of the order of disclosure is unhelpful, as it would restrict the flexibility of issuers to present the relevant information in the order (of importance among other things) that is most beneficial for the offering, the issuer and potential investors.

Whilst AFME supports the objective of streamlining disclosure documents, AFME believes the best way to help ensure streamlined prospectuses that would be more useful and easily comprehended by investors would be to encourage supervisory convergence of NCAs' approaches to the current "plain language" rules in the EU. The EU Prospectus Regulation requires that *"[T]he information in a prospectus shall be written and presented in an easily analysable, concise and comprehensible form"*, taking into account certain information that is deemed necessary for investors to make an investment decision. As practitioners, AFME members note that these requirements are not uniformly monitored and enforced by all European NCAs. In the U.S., SEC Rules 421(b) and 421(d) set out how to write in plain language and provide examples for acceptable disclosure in this regard. The U.S. also appears to have a more robust framework for monitoring compliance and addressing any shortcomings. Similarly, the Hong Kong Stock Exchange (the regulator of listed offerings in Hong Kong) has published guidance on producing prospectuses that are clear, concise and in plain language. We agree that further progress towards a consistent approach to supervising, monitoring and addressing derogations from the existing plain language and comprehensibility requirements would make EU prospectuses more accessible to, and useful for, investors. The current framework and proposals may (or may not) help to increase simplicity and investor understanding, but the approaches mentioned above would, we believe, more likely lead to improvements.

With regards to the prospectus and the summary in particular, AFME members are concerned that prescriptive and restrictive formatting requirements, including with respect to the template, layout, font size and style requirements, would be deeply problematic and counter-productive to the aims of improving capital formation in Europe and ensuring full and clear disclosure for detailed and prudent investor analysis and decision-making. Taken into consideration alongside the page limit set out in Article 7 of Regulation (EU) 2017/1129, there is a risk of situations occurring where it is impossible to meet both the content requirements of the summary (including that the summary shall be accurate, fair and not misleading) and the format requirements (including that the summary shall be presented and laid out in a way that is easy to read using

characters of a readable size). Unduly prescriptive and restrictive requirements may severely reduce the levels of accuracy and completeness of issuer information available in the summary.

Members who offer structured products have also observed a potential error in the proposed Annex 13 (applicable to securities note for non-equity securities) in the CDR on scrutiny and disclosure. Item 7.1(a) requires the inclusion, where applicable, of the information referred to in items 2.1 and 2.2 of Annex 26 with respect to the issuer of the underlying shares. Annex 26 has been deleted in its entirety from the proposed text of the CDR. Historically, items 2.1 and 2.2 of Annex 26 were required for an EU Growth security note for equity securities or convertible/exchangeable bonds. These items should not be applicable to a share-linked structured product. We suggest item 7.1(a) be removed from the new Annex 13.

AFME supports the deletion of the requirement to rank the most material risk factors, agreeing that it will ease the burden for issuing parties. The requirement to list, in each category, the most material risk factors in a manner which is consistent with the assessment undertaken by the issuer, is a more sensible approach. Further, it should be made clear that, when an issuer determines that a category of risk factors should be divided into two sub-categories, this should not count (against the maximum number of categories that certain NCAs impose) as three categories, but indeed only two.

With respect to the location of the risk factors within an equity prospectus, Annexes II and III of the Amending Regulation and the proposed amendments to the CDR on scrutiny and disclosure suggest that equity prospectuses, prepared in accordance with Annex I of the CDR, would follow the order set out in Annexes II and III of the Amending Regulation. This means that the risk factors would appear, roughly, in the middle of a prospectus. This is a change from the current practice which may not benefit investors who would be better served by seeing this important information earlier in the document. Members believe that the better approach would be for all equity prospectuses, not just "non-standard" prospectuses, to follow the order set out in Article 22 of the CDR. Members accept that this would entail a less literal interpretation of the Amending Regulation, but this would be an extension of the approach ESMA has already taken in its proposed amendments to the CDR.

We believe that aligning the level of disclosure of the standard prospectus to that currently required under the EU Growth prospectus regime will lower disclosure standards by reducing required flexibility in relation to larger and more complex companies, to the extent of causing both negative consequences for investor protection and increased liability risks for issuers, controlling shareholders, directors and underwriters. At any rate, and subject to the 300 page limit when applicable, issuers should always be allowed to include additional information that they deem appropriate or is standard in any other jurisdiction into which the offering is also included.

In our view, in the context of the Euronext Growth Market, recent simplification of the disclosure of some informational items (for example, in the case, for example, of the business plan) has resulted in an overall reduction in both informational quality and of the degree of comprehensiveness of the disclosed information, Any lowering of disclosure standards in this manner might further exacerbate this problem and cause NCA's to more frequently request additional information, which would in turn have a negative effect on costs and efficiency.

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?

AFME response: Members believe it is useful to set some limits on the age of financial information required in a prospectus. However, they are cautious about creating rules that could reduce flexibility or make the EU less competitive compared to other jurisdictions. Restrictions on including financial information greater than two years old would be a detriment to the capacity to accurately substantiate the equity story, including trends where two years' financial information may be insufficient, in certain scenarios. Moreover, the existing obligation to ensure that prospectuses contain all material information, market practice, assurance requirements, and investor expectations largely drive the age of financial information regardless of any regulatory intervention.

Parties should also have the flexibility to show progression of the business through more than two years of financial information if they believe it necessary to substantiate the equity story, aid in marketing, support valuation, and meet requirements for U.S. accounting comfort. When extending an offer into the United States, we believe that it is particularly important to ensure as much alignment as possible in the offering documents with US regulation and market practice (which, for example, may require the disclosure of three years of historical financial information). This alignment is necessary in order to ensure that the information provided in the US-style Offering Circulars and in EU-style Prospectuses are mutually consistent. Any differences might generate difficulties in obtaining the required legal and accounting comfort for prospectus documentation or result in EU investors being provided with two years of financial information and US investors with three years of financial information.

Furthermore, parties should not be obliged to disclose additional historical financial information and other financial information, including where such information is already available to investors, where it is not relevant to the issuance. Any unnecessary information may detract attention away from the more important substantive disclosure.

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

AFME response: There may be an issue related to auditor practices. We generally note that there are different auditing practices across the EU and in some cases between offices of the same firm in different countries. More specifically, we note that in the past, auditors had been reluctant to include certain EU-required audit reports in US offering memoranda for fear of extending any potential liability related to such reports to the US market. If parties are required to include the CSDR report (which contains the auditor report) in the prospectus, we might run into a similar situation with respect to the international offering memorandum.

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?

AFME response: It should be made very clear that this is an option at the entire discretion of the issuers. Issuers should not be obliged to take prospectus liability on that type of information if they deem that it is not necessary

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

N/A

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

N/A

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

AFME response: For the reasons outlined above, AFME supports permitting the information included in a URD to be included in a prospectus without regard to the standardised format, the standardised sequence, the maximum length, the template and the layout including the font size and style requirements.

Members believe that minimum content requirements of the URD should be aligned with the level of disclosures for secondary issuances and also with (and being capable of being combined with) annual reporting and other ongoing disclosures, in each case in a manner which avoids unnecessary duplication of effort and cost.

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.

AFME response: We have no general objection to deleting article 40 and introducing a new article 21b into CDR on scrutiny and disclosure. We also believe that the proposals for additional information related to (a) disclosure requirements from other annexes that would not normally apply to the type of the securities covered by the prospectus based on Articles 2 – 21a CDR on scrutiny and disclosure; and (b) additional disclosure in relation to a new type of product, transaction or issuer that is insufficiently covered by existing annexes to CDR on scrutiny and disclosure, are reasonable and would provide flexibility in disclosure for different transaction and circumstances. In any case, this flexibility should be maintained and, in line with ESMA's broad discretion as to what information should be included in a particular prospectus, these

enumerated categories should not be considered a complete or exhaustive list of situations where additional information may be provided if the parties deem it necessary.

Q21: Do you agree with ESMA that the deletion of Article 40 CDR on scrutiny and disclosure and the inclusion of Article 21b in CDR on scrutiny and disclosure should not lead to additional administrative burden or costs for stakeholders? If not, please quantify the costs as much as possible.

AFME response: It is difficult, at this time, to say whether these changes will result in <u>any</u> additional costs, but considering that we do not think that the proposed changes will result in significant or burdensome changes to current practices, we don't think that the deletion of Article 40 CDR on scrutiny and disclosure and the inclusion of Article 21b in CDR on scrutiny and disclosure should lead to any significant additional administrative burden or costs for stakeholders.

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.

AFME response: While Articles 6, 13, 14a and 15a PR provide a good framework for such informational requirements, we cannot be sure that these items constitute a complete and comprehensive list of all information that would be necessary or advisable to include in every possible transaction or circumstance. We therefore agree that these provisions provide an adequate basis for analysis and disclosure and no further prescriptive provisions are required. However, we think that it is very important that parties are afforded adequate flexibility to include other information if they deem such information necessary to provide investors with all relevant information and to tell the full equity story.

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.

AFME response: AFME supports the objective of streamlining and making more consistent/predictable NCAs prospectus approval processes. With respect to equity capital markets transactions, we note that in some cases there may be significant differences in the manner in which different national competent authorities assess draft prospectuses. These differences can sometimes be a factor influencing choice of jurisdiction of incorporation of the issuer or listing venue.

AFME also generally supports ESMA's proposed conditions for derogations from timeframes and agree that it is beneficial to all stakeholders involved to avoid legal debates over extension conditions.

We also note that under normal circumstances the existing deadlines generally provide ample time for the issuing parties. However, we think it would be helpful for ESMA to consider some exceptions to the deadline[s] for the submission of changes and supplementary information, since this type of information (e.g., price range or most recent financials), due to its nature, is expected to become available at a later stage; it would be helpful to be able to provide this information as it becomes available. We should careful that any timeframe for prospectus approval is not so long that puts the parties' intended outcomes at risk.

At any rate, issuers and NCAs should always have the possibility to agree to deviate from these deadlines. It is often the case that at the outset of the transaction, the issuer and the NCA agree on a review calendar and it may be that this does not comply, for reasons that are acceptable to all, with such deadlines.

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.

AFME response: No. We do not believe that ESMA's proposal will impose additional costs and/or burdens for issuers. Providing certain time limits for issuer responses and NCA approvals would likely reduce the time (and related costs) that some parties might otherwise take to complete these processes. If implemented properly, this will help the proposals to achieve their intended effect of streamlining the prospectus approval process and making NCA prospectus approval processes more certain and consistent.

Further Considerations

While not covered by the consultation paper, we appreciate this opportunity to address the following AFME member concern:

There is an apparent contradiction between the newly inserted Article 19(1b) and existing Article 26(4) of the Prospectus Regulation. While the new Article 19(1b) allows issuers to incorporate by reference future-dated financial statements, Article 26(4) provides that the issue specific summary must be aligned with the Registration Document Appendix approved by the NCA. This results in an odd situation as the prospectus now incorporates more up-to-date financial figures than the Registration Document Appendix.

The Registration Document Appendix should be deemed to be updated by the new financial figures without a supplement to the Registration Document. Otherwise, the usefulness of incorporation of future-dated financial statements will be severally compromised. In any event, issuers should be permitted to update the issue specific summary to reflect the latest financial figures. It would be helpful for ESMA to provide guidance on how to reconcile Article 26(4) with Article 19(1b).

Q25: 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.

AFME response: Yes. The Prospectus Regulation provides a key role in equity issuances by ensuring that investors receive fulsome accurate information to support their investment decision. We believe that an ESAP database would be a useful place to hold prospectuses.

Q26: 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.

No Response.

Q27: 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)? Please explain why.

AFME response: We believe that the ESAP database could represent a useful repository to hold relevant market information, including the information that must be submitted by NCAs. This should increase the information that is readily available to stakeholders. However, it is very important that this does not result in duplications or other inefficiencies (i.e., time. Costs, increased administrative burdens) for NCAs or stakeholders, which could have a negative knock-on effect for investors. It is that we avoid duplication and administrative burdens for listed companies and end investors.

Q28: 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.

No Response.

Q29: 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

No Response.

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