

**EU Listing Act proposals:
Prospectus Regulation and Market Abuse Regulation amendments¹
Listing Directive repeal²**

ICMA comments

GENERAL/INTRODUCTION

- (A) **Prospectus Regulation amendments** – From the international bond market perspective (over USD 6 trillion raised in bond funding for companies in 2022³), the ongoing efficiency of the ‘core’ regimes⁴ of the Prospectus Regulation (**PR**) are crucial. ICMA is pleased to note these have been mostly maintained, together with some helpful improvements (also touching some of the more ‘specialist’ regimes⁵) in reducing administrative burdens for issuers (e.g. alleviating the ordering of risk factors, the maximum summary length for guarantors, the language requirements and the process for notifying supplements to investors). However, some further improvements and other points to be aware of are necessary to ensure the prospectus regime amendments truly contribute to the Listing Act policy intentions of reducing administrative burdens to promote European public market activity in the context of CMU. Further detail is set out in the body of this comment paper.
- (B) **Market Abuse Regulation amendments** – ICMA welcomes the amendments confirming the soundings regime as a voluntary safe harbour from the prohibition on unlawful disclosure of inside information (without prejudice to disclosure of inside information being otherwise lawful as having been made in the normal exercise of an employment, a profession or duties). In this respect, ICMA notes the need for consequent amendment in due course of (i) RTS EU/2016/960 (notably in terms of its Recital 5 and Article 3.4) and (ii) ITS EU/2016/959 (in terms of its Article 2(b) and related Annex II).
- (C) **Listing Directive repeal** – While the provisions of the Listing Directive are considered to be largely historic and/or redundant, they are understood to underpin certain national “listing” regimes that would be useful to keep. The Securities Official List (SOL) of the Luxembourg Stock Exchange is based on the Listing Directive. ICMA understands the SOL to be of significant size and distinctly that it is open to admitting distributed ledger technology (DLT) bond issuances, which are not currently eligible for admission to full trading platforms under MiFID. Furthermore, some investors’ investment mandates are understood to refer to “listed” securities and so any removal of existing national “listing” regimes could cause problems in practice. While some market participants consider that the Listing Directive could be repealed, others’ preference is to leave the Listing Directive as it stands noting that it is not causing problems in practice and there could be

¹ COM(2022) 762 final.

² COM(2022) 760 final.

³ ION Analytics / Dealogic [DCM Highlights: FY22](#).

⁴ Relating to single document base prospectuses and standalone prospectuses.

⁵ Relating to tripartite prospectuses (for use also in combination with universal registration documents) and secondary issuance / follow-on prospectuses.

unintended consequences if it is amended or repealed. In this respect, ICMA emphasises the need to be very careful in considering any repeal of the Listing Directive in terms of ensuring national listing regimes may subsist (notwithstanding any repeal of the Listing Directive).

PROSPECTUS REGULATION AMENDMENTS

1. **Retain the status quo for fungible issuance exemptions / Increased fungible issuance ‘limited size’ exemption** (New PR Article 1(4)(da) / amended PR Article 1(5)(a)) and **new ‘unlimited size’ exemption** (New PR Articles 1(4)(db) and 1(5)(ba)) – Whilst the policy intention behind the proposed expanded exemptions for fungible issuances is understood, there are serious concerns for investor protection and issuer and underwriter liability. The increased threshold from 20% to 40% means that large size issuances (which are potentially transformative for an issuer’s credit profile) could be raised with no requirement for the issuer to refresh important parts of its disclosure such as its risk factors. For example, a non-EU emerging market issuer that has €1 billion of non-equity securities listed in the EU could offer a further €400 million non-equity securities to EU citizens several years later, without refreshing the disclosure of the material risks and no single source setting out the necessary information that investors need to make an investment decision. The same issuer could also raise an unlimited further amount of debt from EU citizens at any time with only a 10-page disclosure document. This waters down the rules too far and poses significant risks to investor protection in the EU. This could in turn undermine confidence in the EU’s public markets. Given the heightened threat to investor protection, underwriters of new securities issuances are likely to have increased liability concerns. Heightened risks for underwriters will ultimately drive up the cost of capital for issuers seeking to access public markets, which runs counter to the EU’s public policy aim for the Listing Act. This outcome may be particularly acute for riskier issuers, such as SMEs, which are supposed to be at the heart of the EU’s proposals.
 - ➔ The proposed Listing Act Regulation (**LAR**) should consequently be amended to delete:
 - LAR Article 1(1)(b)(i) adding points (da) and (db) to current PR Article 1(4);
 - the first limb of LAR Article 1(1)(c)(i)(1) replacing point (a) in current PR Article 1(5), as marked in the box below;
 - LAR Article 1(1)(c)(i)(2) adding point (ba) to current PR Article 1(5).

LAR Article 1(1)(c)(i)(1) replacing point (a) in current PR Article 1(5):

<< (1) points ~~(a) and (b)~~ is ~~are~~ replaced by the following:

~~‘(a) securities fungible with securities already admitted to trading on the same regulated market, provided that they represent, over a period of 12 months, less than 40% of the number of securities already admitted to trading on the same regulated market;~~

(b) [...]; >>

Separately, many securities will only become fungible after issuance (e.g. 40 days later due to technical requirements arising under US securities laws) and it should be clear that this circumstance is also covered by this alleviation.

2. **Incorporating future financials by reference into base prospectuses** (New PR Article 19(1b)) – LAR Recital 37 explains: *“To remove unnecessary costs and burdens and to increase the efficiency and effectiveness of the incorporation into the prospectus of information by reference, companies should not be required to publish a supplement for updating the annual or interim financial information incorporated by reference in a base prospectus which is still valid.”* (Underlining added for emphasis.) This proposal is welcome and will indeed remove unnecessary costs and burdens. The operative provisions currently provide for one aspect of

this proposal, namely that companies should not be required to publish a supplement for updating annual or interim financial information. However, they do not address an important corresponding element, namely that such updated financial information will need to be incorporated by reference into the prospectus automatically. Without this additional element in the operative provisions, issuers will need to continue to prepare supplements for updated financial information if such information is material and needs to form part of the prospectus.

➔ The second limb of proposed LAR Article 1(17)(b) (adding new PR Art.19(1b)) should consequently be amended as marked in the box under #3 below.

3. **Mandatory incorporation by reference** (Amended PR Art.19(1)) – Comprehensibility and legibility risk can arise from incorporation by reference, so it should not be mandatory. For example, it may sometimes be more comprehensible, in a ‘drawdown’ prospectus for an issue under a programme, for terms and conditions from the base prospectus to be set out in full with changes reflecting the individual issue the subject of the drawdown – rather than having to incorporate by reference terms and conditions from a base prospectus and then make many individual amendments to them. Another example could be where the document including the information concerned was not drafted to PR standards of clarity.

➔ LAR Article 1(17)(a)(i), amending the introductory wording of PR Article 19(1), should be deleted. And consequently the first limb of proposed LAR Article 1(17)(b) (adding new PR Article 19(1a)) should also be deleted, as marked in the box below.

LAR Article 1(17)(b), adding new PR Articles 19(1a) and 19(1b):

<< *(b) the following paragraphs ~~1a and 1b~~ is ~~are~~ inserted:*

~~*‘1a. Information that is not to be included in a prospectus may still be incorporated by reference in that prospectus on a voluntary basis, where it has been previously or simultaneously published electronically, drawn up in a language fulfilling the requirements of Article 27 and where it is contained in one of the documents referred to in paragraph 1, first subparagraph.*~~

1b. An issuer, an offeror or a person asking for admission to trading on a regulated market shall not be required to publish a supplement pursuant to Article 23(1) for updating the annual or interim financial information incorporated by reference in a base prospectus that is still valid under Article 12(1). Such updated annual or interim financial information may be incorporated by reference in a base prospectus as and when such financial information is published electronically.’ >>

Incidentally in terms of the proposed mandating of incorporation by reference, ICMA’s understanding is that:

- (i) mandatory incorporation would only be applicable to the extent information is required to be disclosed under the PR (i.e. it is specifically required in the PR disclosure annexes and/or is otherwise material under PR Article 6(1)⁶); and
- (ii) incorporation by reference only relates to specific information and so not necessarily to whole documents (and also only to the extent such information/documents would otherwise be reproduced verbatim in the prospectus),

so the material listed in (a) to (k) of PR Article 19(1) would not necessarily be required to be incorporated by reference.

⁶ So, for example, a wholesale debt prospectus prepared by an issuer which also has listed equity is not required to incorporate by reference all the equity-required regulated information, such as interim financial information, published by that issuer.

4. **New EU Follow-on prospectus** (New PR Article 14b, new related PR Article 7(12b) and related PR Annex V) – In terms of **general use**, it is currently unclear whether this proposed new PR regime will be useful in a bond market context, to the extent many of the requirements seem equity-like and/or imposing more onerous requirements than the ‘core’ PR regimes relating to bonds, and so would need to be amended in order to be of use in a bond context. A list of these is annexed in case helpful.

→ ICMA would be happy to discuss further if desired.

In terms of **tripartite use**, the follow-on regime should also be available for ‘tripartite’ prospectuses (consisting of registration document or URD, securities note and if applicable a summary).

→ The proposed LAR should consequently be amended as marked in the box below.

LAR Article 1(12), adding new PR Article 14b(4):

<< 4. The EU Follow-on prospectus shall ~~be drawn up as a single document containing the minimum information set out in Annex IV or Annex V, depending on the types of securities.~~ >>

5. **Page limit** (new PR Article 6(4)) / **Standardised format** (amended PR Articles 6(2) and 13(1)) – As a general point (notwithstanding that the restriction on page numbers is technically limited to an equity-only context), imposing restrictions on issuers is inconsistent with the overriding policy purpose of helping issuers and encouraging access to public markets by easing administrative burdens. Issuers face very significant civil liability (regardless of regulatory liability) if they do not clearly include material information in a prospectus and should be allowed full freedom to discharge fully their obligations in this respect.

→ The proposed LAR should consequently be amended to delete:

- LAR Article 1(6)(b) amending existing PR Article 6(2);
- LAR Article 1(6)(c) first limb adding new PR Article 6(4), as marked in the box below;
- LAR Article 1(10)(a)(i) amending existing PR Article 13(1); and
- new PR Article 14b(5) inserted by LAR Article 1(12).

LAR Article 1(6)(c), adding new PR Article 6(4):

<< (c) the following paragraphs ~~4 and 5~~ is ~~are~~ added:

~~‘4. A prospectus that relates to shares or other transferrable securities equivalent to shares in companies shall be of maximum length of 300 sides of A4-sized paper when printed and shall be presented and laid out in a way that is easy to read, using characters of readable size.~~

5. [...] >>

6. **ESG disclosure** (New PR Article 13(f)) – The operative provision needs to be aligned with the intention clearly expressed in LAR Recital 23 (“Companies that offer equity securities to the public or seek the admission to trading of equity securities on a regulated market should therefore...”). Currently, the operative provision is not limited to issuers of equity securities.

→ The proposed LAR should consequently be amended as marked in the box below.

LAR Article 1(10)(a)(ii), adding new PR Article 13(f):

*<< (f) whether the issuer of equity securities is required to provide sustainability reporting, together with the related assurance opinion, in accordance with Directive 2004/109/EC and Directive 2013/34/EU of the European Parliament and of the Council*²; >>*

ICMA will be looking to engage in due course on any ESG amendments to the PR's disclosure annexes and disclosures for sustainable bonds more broadly (whether arising from the PR itself or the EU Green Bond Standard).

7. **Replacement (universal) registration documents** (PR Article 10) – The base prospectus regime works very well for bond issuers, but some targeted amendments could be made to improve efficiency and transparency further without affecting investor protection. One is to allow the updating of tripartite base prospectuses for new registration documents (**RDs**): When the one-year validity of a RD expires and a new RD is approved, it is not straightforward to update tripartite base prospectuses constituted with the expired RD (that remain valid for their own one year since their approval) to reflect the new RD. This concern is understood to have resulted in Q&A 3.4 and 3.5 of ESMA's *Questions and Answers on the Prospectus Regulation*⁷. A simple amendment to allow tripartite base prospectuses to be constituted with a RD and any replacement RD (as supplemented from time to time) would fix this issue and further strengthen the function of the RD as a central and continuous source of disclosure on the issuer. As the replacement RD then has an effect similar to a supplement, PR Article 23(2) should apply. This could be achieved by amending current PR Article 10(1) as set out below.

<< The registration document and its supplement, where applicable, and a registration document expressly replacing it, and its supplement, where applicable, accompanied by the securities note and the summary shall constitute a prospectus, once approved by the competent authority. Upon publication of a replacement registration document, Article 23(2) shall apply (as if a supplement had been published). >>

→ The proposed LAR should consequently be amended as marked in the box below.

LAR new Article 1(8A), amending existing PR Article 10(1), last paragraph:

<< (8A) in Article 10(1), the third subparagraph is replaced by the following:

'The registration document and its supplement, where applicable, and a registration document expressly replacing it, and its supplement, where applicable, accompanied by the securities note and the summary shall constitute a prospectus, once approved by the competent authority. Upon publication of a replacement registration document, Article 23(2) shall apply (as if a supplement had been published).'; >>

The same concern and approach would apply *mutatis mutandis* in relation to universal registration documents (URDs) to amending existing PR Article 10(3), last paragraph.

→ ICMA would be happy to discuss further if desired.

8. **Equivalence centralisation** (Replacement PR Article 29) – The direction of travel of the amendments is welcome, but some of the proposed requirements are quite granular (e.g. proposed PR Article 29(5)'s list of conditions to be met before an implementing act determining equivalence can be made). It would be unfortunate if this granularity ultimately meant it were challenging to reach any decisions on equivalence. In this respect, ICMA's [February 2022 consultation response](#) stated: "In terms of the equivalence determination itself, this would likely need to involve [assessment] whether the relevant third country or market's initial disclosure regime provides adequate investor protection in line with the objectives of the Prospectus Regulation rather than the third country regime being exactly identical to the EEA regime." (Underlining added for emphasis.)

→ ICMA would be happy to discuss further if desired.

⁷ [ESMA/2019/ESMA31-62-1258](#).

Furthermore the provision is much too narrow to be effective, in assuming that an issuer from third country 'A' will necessarily have published a prospectus under the laws of country 'A' and not country 'B'. (For example, many South American issuer prospectuses are published under US securities laws.)

→ The proposed LAR should consequently be amended as marked in the box below.

LAR Article 1(22), replacing existing PR Article 29:

<< [...]

1. A third country issuer may seek admission to trading of securities on a regulated market established in the Union after prior publication of a prospectus drawn up and approved in accordance with, and which is subject to, the national laws of a ~~the~~ third country issuer, provided that all of the following conditions are met:

[...]

(f) ESMA has concluded cooperation arrangements with the relevant supervisory authorities of the third country issuer under whose laws the prospectus has been drawn up and approved, in accordance with Article 30.

2. A third country issuer may also offer securities to the public in the Union after prior publication of a prospectus drawn up and approved in accordance with, and which is subject to, the national laws of a ~~the~~ third country issuer, provided that all the conditions referred to in points (a) to (f) of paragraph 1 are met and that the offer of securities to the public is accompanied with an admission to trading on either a regulated market or an SME growth market established in the Union.

[...] >>

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ANNEX

**EU Follow-on prospectus (New PR Article 7.12b, new PR Article 14b and related PR Annex V):
Requirements seeming equity-like and/or
imposing more onerous requirements than the ‘core’ PR regimes relating to bonds**

No availability of wholesale-only alleviations / imposition of more burdensome retail disclosure

- A. **Article 14b(3)** – The requirement for the follow-on prospectus to be legible to *“especially retail investors”* does not seem appropriate given that it may be used for wholesale-only issuance (as allowed under PR Article 6(1) and DR EU-2019-980 Articles 8 and 16).
- B. **Article 7(12b)** – Proposed PR Annex V appears to suggest that a **summary is always required** for a follow-on prospectus. This does not sit well with PR Article 7(1) which contains the exemption from the summary requirement for non-equity securities admitted to qualified investor-only regulated market segment or with a minimum denomination of €100,000. Given that proposed PR Article 7(12)(b) only derogates from paragraphs 3 to 12 of PR Article 7, such that the summary exemption in PR Article 7(1) may still be used in a follow-on prospectus context, it would be helpful to clarify the drafting of proposed PR Annex V, paragraph I to make it clear that the summary is only required where the exemption is unavailable.
- C. **Annex V specific line items** – The below are not required under the current wholesale (admission-only / exempt offer) requirements:
- (II) – the *“principal markets”* where the issuer competes;
 - (VI)(b) – *“information on any known trends, uncertainties, demands, commitments or events that are reasonably likely to have a material effect on the issuer’s prospects for at least the current financial year”*;
 - (VII) – whole line item (offer information);
 - (VIII)(c) – whole line item (offer information);
 - (IX) – the requirement for net proceeds to be *“broken into each principal intended use and presented in order or priority of such uses”*.

Going beyond the current retail and wholesale annex requirements

- D. **Article 14b(2)(a)** – The reference to *“significant changes in the [...] business position of the issuer”* goes beyond the current retail and wholesale annex requirements (notably in terms of its focus on wider ‘business’ conditions rather than narrower ‘financial’ conditions) and is also not followed in the requirements of proposed PR Annex V(V).
- E. **Article 14b(2)(a)** – The reference to disclosing *“prospects”* does not seem to benefit from the final paragraph in PR Article 6(1) (that qualifies this headline test by reference to the type of securities involved).
- F. **Article 14b(2)(c)** – The reference to *“impact on the [...] overall capital structure of the issuer”* goes beyond the current PR Article 6(1) and the retail and wholesale annex requirements.

- G. **Annex V(VI)(a)** – The reference to *“the most significant recent trends in production, sales and inventory, and costs and selling prices since the end of the last financial year to the date of the EU follow-on prospectus”* goes beyond the current retail and wholesale annex requirements (notably in terms of not being subject to a materiality qualification and by being very specific about the trends to be covered - i.e. trends in production, sales and inventory etc).
- H. **Annex V(IX)** – Where *“proceeds will not be sufficient to fund all proposed uses”* there is a requirement to *“state the amount and sources of other funds needed”* which does not apply to the current retail and wholesale annex requirements.

Prior general points made also applicable

- I. **Article 7(12b), 2nd sub-paragraph** – Regarding the **summary page limit** (of 5 sides), the points made in #5 of this comment paper on page limits also apply.
- J. **Article 14b(4)** – Regarding the requirement for the follow-on prospectus to be presented as a *“single document”*, the points made in #7 of this comment paper regarding (universal) registration documents in the context of tripartite prospectuses also apply.
- K. **Art.14b(7)** – Regarding the requirement for the follow-on prospectus to be presented in a *“standardised format”* (as well as in a standardised sequence as set out in Annex V), the points made in #5 of this comment paper on standardised formats also apply.