



European Securities and  
Markets Authority

## **Response form for the Consultation Paper on scrutiny and approval**



## Responding to this paper

ESMA invites responses to the questions set out throughout this Consultation Paper. Responses are most helpful if they:

1. respond to the question stated;
2. contain a clear rationale; and
3. describe any alternatives ESMA should consider.

ESMA will consider all responses received by 28 September 2017.

## Instructions

In order to facilitate analysis of responses to the Consultation Paper, respondents are requested to follow the below steps when preparing and submitting their response:

4. Insert your responses to the questions in the Consultation Paper in the form “Response form\_Consultation Paper on scrutiny and approval”, available on ESMA’s website alongside the present Consultation Paper ([www.esma.europa.eu](http://www.esma.europa.eu) → ‘Your input – Open consultations’ → ‘Consultation on technical advice under the new Prospectus Regulation’).
5. Please do not remove tags of the type <ESMA\_QUESTION\_SAC\_1>. Your response to each question has to be framed by the two tags corresponding to the question.
6. If you do not wish to respond to a given question, please do not delete it but simply leave the text “TYPE YOUR TEXT HERE” between the tags.
7. When you have drafted your response, name your response form according to the following convention: ESMA\_SAC\_nameofrespondent\_RESPONSEFORM. For example, for a respondent named ABCD, the response form would be entitled ESMA\_SAC\_ABCD\_RESPONSEFORM.
8. Upload the form containing your responses, in Word format, to ESMA’s website ([www.esma.europa.eu](http://www.esma.europa.eu) under the heading ‘Your input – Open consultations’ → ‘Consultation on technical advice under the new Prospectus Regulation’).

## Publication of responses

All contributions received will be published following the close of the consultation, unless you request otherwise. Please clearly indicate by ticking the appropriate checkbox on the website submission page if you do not wish your contribution to be publicly disclosed. A standard confidentiality statement in an email message will not be treated as a request for non-disclosure. A confidential response may be requested from us in accordance with ESMA’s rules on access to documents. We may consult you if we receive such a request. Any decision we make not to



disclose the response is reviewable by ESMA's Board of Appeal and the European Ombudsman.

### **Data protection**

Information on data protection can be found at [www.esma.europa.eu](http://www.esma.europa.eu) under the heading 'Data protection'.

### **Who should read this Consultation Paper**

This Consultation Paper may be of particular interest to investors, issuers, including issuers already admitted to trading on a regulated market or on a multilateral trading facility, offerors or persons asking for admission to trading on a regulated market as well as to any market participant who is affected by the new Prospectus Regulation.



## General information about respondent

Name of the company / organisation	International Capital Market Association (ICMA)
Activity	Other Financial service providers
Are you representing an association?	y
Country/Region	International

## Introduction

**Please make your introductory comments below, if any:**

<ESMA\_COMMENT\_SAC\_1>

Representing a broad range of capital market interests including banks, asset managers, exchanges, central banks, law firms and other professional advisers, ICMA's market conventions and standards have been the pillars of the international debt market for almost 50 years.

See: [www.icmagroup.org](http://www.icmagroup.org).

ICMA is responding in relation to its primary market constituency that lead-manages syndicated, vanilla debt securities issues throughout Europe on behalf of corporate borrowers. This constituency deliberates principally through ICMA's Primary Market Practices Committee, which gathers the heads and senior members of the syndicate desks of 48 ICMA member banks, and ICMA's Legal and Documentation Committee, which gathers the heads and senior members of the legal transaction management teams of 21 ICMA member banks, in each case active in lead-managing syndicated debt securities issues in Europe.

ICMA welcomes the ESMA Consultation Paper (ESMA31-62-650, dated 6 July 2017) on the measures specifying the criteria for the scrutiny of prospectuses, in particular the completeness, comprehensibility and consistency of the information contained therein, and the procedures for the approval of the prospectus (Article 20(11) of the Prospectus Regulation). ESMA has highlighted the general conditions which have to be met for the prospectus to be approved and outlining criteria for the scrutiny of "the three Cs": completeness, comprehensibility and consistency of the prospectus.

There are three points which we would like to draw out in this introduction:

A). We have highlighted our concern regarding NCA's potentially assuming additional liabilities in our response to Question 1, below.

B). Although not addressed specifically in the Questions in this Consultation, there is a point to raise on paragraphs under heading 3.1.6 (*Proportionate approach to prospectus scrutiny*). On one reading, it would that the approach suggested in paragraphs 60 – 64 appears to give individual NCAs the flexibility effectively to 'gold plate' the Prospectus Regulation by requesting additional disclosure items which are not in the Annexes. This would appear to: (i) run counter to the aims of the CMU; (ii) further propagate the complaints about the operation of the current PD that it allows an unlevel playing field to be created; and (iii) allow for NCAs to 'compete for business' and unfairly punishes those who may not be in a position to choose a more favourable home member state.

C). Finally, ICMA notes that the European Commission's Omnibus Regulation proposal published on 20 September 2017 includes suggested changes to Prospectus Regulation (EU) 2017/1129, as well as to other Regulations. ICMA has not addressed the proposal in this response but would be keen to engage in any discussions or consultations on the suggested changes. For the record, ICMA's preliminary view is to question the proposed changes. The Home Member State definition for third country issuers was debated at length during the Level 1 Consultation and Trilogue and a decision was made to retain the status quo. The suggested rationale for centralising approvals does not appear to be borne out by our experience and we query how any appeals process from ESMA might work.



<ESMA\_COMMENT\_SAC\_1>

**1. : Do you agree with the criteria for determining whether a prospectus is complete (Article A(1))? Do you consider that additional completeness criteria are necessary?**

<ESMA\_QUESTION\_SAC\_1>

We note that item A(1) requires, in summary, that:

- the correct schedules and building blocks have been used for drawing up the prospectus (including, assessing the nature of the issuer, the securities and/or the offer/admission); and
- the prospectus reasonably addresses all the information items of the applicable disclosure schedules.

ICMA agrees with the clear acknowledgement that the criteria for determining whether a prospectus is complete will include assessing the nature of the issuer, the securities and/or the offer/admission. This reflects the variable nature of securities and the variable intended audiences for different prospectuses and is to be welcomed.

ICMA's view is it might be sufficient for the criteria simply to include the statement that "*the correct schedules and building blocks have been used for drawing up the prospectus*". The additional limb that "*the prospectus reasonably addresses all the information items of the applicable disclosure schedules*" seems extraneous. Instead, we would suggest that the national competent authorities (NCAs) should simply rely on the obligation imposed by Article 6 of the Prospectus Regulation (EU) 2017/1129 on anyone producing a prospectus that it "*shall contain the necessary information which is material to an investor for making an informed assessment*".

Moreover, the requirement to determine that the prospectus "*reasonably addresses*" certain items may imply a judgement by the NCA on the level of disclosure. This is particularly so in light of the discussion in paragraphs 21 - 23 of the Consultation, which suggest that, whilst NCAs have no obligation to look beyond the prospectus, they may, at their discretion, choose to undertake further diligence on the issuer and raise comments about other information outside the prospectus which might be relevant for inclusion. We would also suggest that, notwithstanding the fact that the draft NCA "disclaimer" contained in the parallel ESMA Consultation on prospectus content (ESMA31-62-532) states that the NCA approval does not constitute an endorsement of the issuer (e.g. item 1.5 in the draft Share Annex at page 41 in Consultation ESMA31-62-532), the suggestion that NCAs have any obligation to assess the completeness or appropriateness of an issuer's disclosure should be avoided.

ICMA would advise removal of the second limb, for the reasons stated above. Should an adapted version remain, ICMA would suggest that the reference to "*all information*" should be modified and restricted only to items which are pertinent to the issuer and the issue. Again, this might perhaps suggest a judgement call on the part of the NCA if the limb remains, even with such an amendment.

ICMA does not consider that any additional criteria are necessary.

<ESMA\_QUESTION\_SAC\_1>

**2. : Do you agree that NCAs should apply different criteria when assessing the comprehensibility of retail and wholesale prospectuses? If yes, do you agree with the criteria proposed in Article A(2)? Please make an alternative proposal if you do not agree with these criteria.**

<ESMA\_QUESTION\_SAC\_2>

We note that the criteria for scrutiny of the comprehensibility of prospectuses at A(2), on page 29 and 30, include (briefly):

- a clear and detailed table of contents;
- easily readable font;
- free from unnecessary reiterations and group related information together;
- structured to help investors understand its contents;

- explain mathematical formulas and clearly describe the product structure, where applicable; and
- in the summary, avoid technical language and explain any technical terms.

We also note the additional criteria for prospectuses for securities not solely available to wholesale investors:

- written in plain language; and
- clearly describes the issuer's operations and principal activities and explain any trade or industry specific terminology used.
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ICMA endorses the approach outlined in paragraph 38 that: "*ESMA is of the view that it should be taken into account who this reader will be, or in other words whether investors in the securities at hand will be of a retail or a wholesale nature. As wholesale investors will be more familiar with investing and therefore able to digest more complex disclosure, ESMA considers that where the securities will be restricted to such investors, a less stringent approach to comprehensibility can be applied. On the other hand, when securities will be available to both retail and wholesale investors, disclosure should be adapted to retail investors and more stringent comprehensibility criteria should apply...*"

Accordingly, ICMA supports the fact that the draft Technical Advice in item A(2), at page 29 of the Consultation Paper, requires the competent authority to take into consideration "*the nature and circumstances of the issuer, the type of securities and the type of investors targeted*" and that a distinction is made for a "wholesale" prospectus, drawn up in accordance with the wholesale debt and derivatives registration document and securities note.

For the avoidance of doubt, we would trust that this means that there will be suitable discretion in assessing the use of more technical language a wholesale prospectus.

It would also seem appropriate to adapt item A(2)(f) for wholesale issuance by removing the need to explain mathematical formulas in a wholesale prospectus.

<ESMA\_QUESTION\_SAC\_2>

**3. : Do you agree with the criteria for assessing the consistency of a prospectus proposed in Article A(3)? Do you consider that additional consistency criteria are necessary?**

<ESMA\_QUESTION\_SAC\_3>

We note that the ESMA has identified, in summary, the following elements for the prospectus to be considered consistent:

- Risks: Material and specific risks in the prospectus also included in the risk factors section;
- Summary: aligned with information elsewhere in the prospectus;
- "Use of proceeds": figures correspond to the amount of proceeds being raised; disclosure aligned to disclosure of the issuer's strategy, where applicable;
- Align description of the issuer in the OFR (where required); historical financial information; description of the issuer's activity; and risk factors;
- Align any working capital statement with: risk factors; auditor's report; use of proceeds and, where applicable, the issuer's strategy and how the strategy will be funded.

ICMA agrees with these criteria.

ICMA does not consider that any additional criteria are necessary.

<ESMA\_QUESTION\_SAC\_3>

**4. : In relation to scrutiny and review of the URD where ESMA proposes that only minimal changes be made to the generally applicable scrutiny criteria, do you**



**consider there to be any further aspects where scrutiny and review of the URD need to differ from the general criteria?**

<ESMA\_QUESTION\_SAC\_4>

In principle, ICMA agrees with ESMA's suggested approach.

<ESMA\_QUESTION\_SAC\_4>

**5. : Do you agree that it is not necessary to address partial/repeated reviews of a URD in the technical advice?**

<ESMA\_QUESTION\_SAC\_5>

In principle, ICMA agrees with ESMA's suggested approach.

<ESMA\_QUESTION\_SAC\_5>

**6. : In order to take a proportionate approach to scrutiny and review of prospectuses, do you agree that NCAs should only be required to scrutinise information which has not already been scrutinised/reviewed/approved, as proposed in Article B(2)?**

<ESMA\_QUESTION\_SAC\_6>

In principle, ICMA agrees with ESMA's suggested approach.

<ESMA\_QUESTION\_SAC\_6>

**7. : Do you believe that application of the proposed criteria will impose additional costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the type and nature of such costs, including whether they are one-off or on-going, and quantify them.**

<ESMA\_QUESTION\_SAC\_7>

In general, no, we do not envisage that application of the proposed criteria will impose significant additional costs on issuers, offerors or persons asking for admission to trading – although there will inevitably be some initial costs as market participants adapt to the new requirements, including in relation to "plain language" requirements" for retail issuance, depending on how it is interpreted by NCAs.

<ESMA\_QUESTION\_SAC\_7>

**8. : Do you have any further suggestions for harmonising the way in which NCAs scrutinise prospectuses? In your view, should ESMA propose more detailed or additional criteria for scrutiny/review in its technical advice?**

<ESMA\_QUESTION\_SAC\_8>

Although ICMA does not suggest additional criteria for scrutiny/review, it is possible that NCAs might adopt different approaches when assessing what "plain language" disclosure for retail prospectuses should entail. This might be addressed via ESMA guidance to NCAs.

ICMA does not think that more detailed or additional criteria for scrutiny/review are required.

<ESMA\_QUESTION\_SAC\_8>

**9. : Has ESMA identified all the necessary amendments to the existing procedures for approval of the prospectus?**

<ESMA\_QUESTION\_SAC\_9>

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<ESMA\_QUESTION\_SAC\_9>



**10. : Do you agree with the provision for providing the appendix to the registration document/URD laid down in Article C(2)(d) and (e)?**

<ESMA\_QUESTION\_SAC\_10>

Articles C(2)(d) and (e) state:

"...(d) where the issuer submits for approval on a stand-alone basis a draft registration document drawn up in accordance with Annex [retail debt and derivatives] of this Regulation and intends to request the notification of this registration document pursuant to Article 26 of Regulation (EU) 2017/1129, an appendix setting out the key information on the issuer as required by Article 26(4) of that Regulation;

(e) where the issuer submits for approval on a stand-alone basis a draft universal registration document and intends to request the notification of this universal registration document pursuant to Article 26 of Regulation (EU) 2017/1129, an appendix setting out the key information on the issuer as required by Article 26(4) of that Regulation, unless such notification is envisaged for the purpose of an offer of non-equity securities for which no summary will be required pursuant to the second subparagraph of Article 7(1) of Regulation (EU) 2017/1129;..."

The requirement for an Appendix is formal, but, as mentioned in paragraph 101 (page 34) is as set out in Article 26(4) of the Prospectus Regulation (*Notification of registration documents or universal registration documents*): "A registration document or a universal registration document notified pursuant to paragraph 2 shall contain an appendix setting out the key information on the issuer referred to in Article 7(6). The approval of the registration document or universal registration document shall encompass the appendix." ICMA therefore agrees with this proposal and the suggestions in paragraph 103 and C(2)(d) and (e).

As a practical matter, the constraints on passporting subsequently (as highlighted in paragraphs 102 and 103 of the Consultation) might cause concerns. The default position for issuers adopting the stand-alone Registration Statement or URD route is therefore likely to become that an Appendix will be prepared as a matter of course, whenever appropriate. It will, though, be important as a procedural matter, to ensure that all issuers are made aware of this limitation when applying for approval.

<ESMA\_QUESTION\_SAC\_10>

**11. : Do you agree with the procedures for approval of the URD?**

<ESMA\_QUESTION\_SAC\_11>

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<ESMA\_QUESTION\_SAC\_11>

**12. : Do you agree with the procedures for filing of the URD? Are there any further considerations which ESMA should take into account in this regard?**

<ESMA\_QUESTION\_SAC\_12>

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<ESMA\_QUESTION\_SAC\_12>

**13. : Do you believe that any of the proposed procedures for approval and filing will impose additional costs on issuers, offerors or persons asking for admission to trading? If yes, please specify the type and nature of such costs, including whether they are one-off or on-going, and quantify them.**

<ESMA\_QUESTION\_SAC\_13>

As mentioned above, ICMA believes there will be some initial (though not significant) adjustment costs.

<ESMA\_QUESTION\_SAC\_13>



**14. : Do you agree that it is not necessary at Level 2 to further specify the conditions for losing the status of frequent issuer? If no, please elaborate on how ESMA should further specify the conditions already established at Level 1.**

<ESMA\_QUESTION\_SAC\_14>

ICMA agrees that it is not necessary to specify these further at Level 2.

<ESMA\_QUESTION\_SAC\_14>

**15. : Do you have any other considerations which ESMA should be aware of when finalising the technical advice covered by this Consultation Paper?**

<ESMA\_QUESTION\_SAC\_15>

TYPE YOUR TEXT HERE

<ESMA\_QUESTION\_SAC\_15>