11 February 2022

ICMA RESPONSE TO EUROPEAN COMMISSION TARGETED CONSULTATION

LISTING ACT: MAKING PUBLIC CAPITAL MARKETS MORE ATTRACTIVE FOR EU COMPANIES AND FACILITATING ACCESS TO CAPITAL FOR SMES

This document sets out ICMA's response to the targeted consultation on the Listing Act submitted via the European Commission's online form on 11 February 2022[1].

CONSULTATION QUESTIONS

1. GENERAL QUESTIONS ON THE OVERALL FUNCTIONING OF THE REGULATORY FRAMEWORK

The current EU rules relevant for company listing consist of provisions contained in a number of legal acts, such as the Prospectus Regulation, the Market Abuse Regulation (MAR), the Market in Financial Instruments Directive (MiFID II) and Regulation (MiFIR), the Transparency Directive and the Listing Directive. These rules primarily aim at balancing the facilitation of companies' access to EU public markets with an adequate level of investor protection, while also pursuing a number of secondary or overarching objectives.

1. In your view, has EU legislation relating to company listing been successful in achieving the following objectives? On a scale from 1 to 5 (1 being "achievement is very low" and 5 being "achievement is very high"), please rate each of the following objectives by putting an X in the box corresponding to your chosen options.

	1	2	3	4	5	Don't know/no opinion/not relevant
a) Ensuring adequate access to finance through EU capital markets			X			
b) Providing an adequate level of investor protection					X	
c) Creating markets that attract an adequate base of professional investors for companies listed in the EU					X	
d) Creating markets that attract an adequate base of retail investors for companies listed in the EU			X			
e) Providing a clear legal framework				X		

[1] The targeted consultation document is available at: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/2021-listing-act-targeted-consultation-document_en.pdf.

In this document. the European Commission's commentary and questions are set out in black font, and ICMA's responses are set out in blue font. This document does not include the questions to which ICMA provided no response.

f) Integrating EU capital markets			X			

Please explain your reasoning: *[4000 character(s) maximum]*

ICMA:

This ICMA response is prepared from the perspective of the international bond markets.

The EU's primary bond markets currently function efficiently, particularly in the wholesale space. They provide a crucial source of funding to EU companies. In 2021, international primary bond markets provided around €1.6 trillion worth of financing in the EU.

(1) Wholesale bond markets: The regulatory environment for listing wholesale bonds in the EU is considered to be reasonably well-calibrated, although is perceived to place more emphasis on investor protection than ensuring access to finance for bond issuers.

Given the well-functioning nature of wholesale primary bond markets currently, many ICMA members would welcome only necessary adjustments to the Prospectus Regulation (PR). However, more ambitious proposals to increase flexibility for issuers could also be considered (see Q14). In any event, the base prospectus format, wholesale disclosure regime and flexibility for bond issuers to choose their home Member State work well and must be retained. Similarly, the PR's public offer exemptions and application to securities to be admitted to trading on a regulated market, but not MTFs, give borrowers useful flexibility (see further under SME bonds below).

In relation to MAR, the broad scope (namely its application to securities listed on regulated markets, MTFs and OTFs), the definition of "inside information", obligations relating to insider lists and the market soundings regime are considered problematic or disproportionate.

Changes to the listing-related requirements under MiFID, the Transparency Directive and the Listing Directive are, on balance, not considered to be necessary at this time.

(2) Retail bond markets: Whilst the wholesale bond markets function well, the volume of bonds offered directly to retail investors varies across the EU and retail bond markets tend to be domestic rather than pan-EU. This is likely to be due to a combination of factors, of which regulation is one. Other factors include: (a) many issuers not needing to access retail bond markets because they can access the funding they need in the wholesale bond markets; and (b) some retail investors finding bonds unattractive in a low interest rate environment. Whilst changes to regulation may not alter these market dynamics, adjustments could be made to encourage companies to offer their bonds directly to retail investors. This would need to be approached holistically using the various tools available to protect retail investors. The PRIIPs Regulation and MiFID II product governance rules would also need to be considered. See Q18.

(3) SME bonds: The current lack of direct SME participation in public bond markets (particularly on a pan-EU basis) is also thought to be due primarily to commercial, rather than regulatory, factors. These commercial factors include the cost disadvantages of small size deals (because SMEs typically only need to raise relatively small amounts) and a lack

of liquidity. Related to this, SME bonds may also be ineligible for inclusion in bond indices due to their small sizes. In addition to commercial factors, the regulatory burden imposed by MAR has, anecdotally, caused some SME issuers to avoid public markets (see Q45). It seems unlikely that the PR is a significant barrier to SMEs accessing public bond markets because issuers can choose to offer their bonds on an exempt basis and admit them to trading on a MTF (thereby falling outside the scope of the PR). If the policy objective of the consultation is to be achieved, these aspects of flexibility must be retained in the PR. See also Q7.

The policy objectives of SME issuer and retail investor access to capital markets should be considered separately. Investing in SMEs' securities is likely to carry higher risks than investing in securities of large, established, issuers; and institutional investors seem likely to be in a better position to assess those risks.

……………

As noted by numerous stakeholders and recognised in the CMU action plan, public listing in the EU is currently too cumbersome and costly, especially for SMEs. The Oxera report on primary and secondary equity markets in the EU stated that the numberof listings in the EU-28 declined by 12%, from 7,392 in 2010 to 6,538 in 2018, while GDP grew by 24% over the same period. As a corollary of this, EU public markets for capital remain depressed, notably in comparison to public markets in other jurisdictions with more developed financial markets overall. Weak EU capital markets negatively impact the funding structure and cost of capital of EU companies which currently over rely on credit when compared to other developed economies.

2. In your opinion, how important are the below factors in explaining the lack of attractiveness of EU public markets? Please rate each factor from 1 to 5, 1 standing for "not important" and 5 for "very important".

	Regulated Markets	**SME growth markets**	**Other Markets (e.g. other MTFs, OTFs)**
a) Excessive compliance costs linked to regulatory requirements	4	N/A	3
b) Lack of flexibility for issuers due to regulatory constraints around certain shareholding structures and listing options	N/A	N/A	N/A
c) Lack of attractiveness of SMEs' securities	3	N/A	3
d) Lack of liquidity of securities	4	N/A	4
e) Other (please specify below) ICMA: Please see our response below and our response to Q1.	4	N/A	4

Please explain your reasoning regarding regulated markets: *[4000 character(s) maximum]*

ICMA:

The characterisation of EU's public markets as "unattractive" in general is questionable. As previously noted, the pan-EU wholesale primary bond markets function effectively and have been a critical source of funding for EU companies and other EU bond issuers through the pandemic.

It is worth noting that the EU's wholesale primary bond markets are also effectively integrated into wider global wholesale bond markets and this integration is important. This integration means that third country companies are able to admit their wholesale debt securities to trading on EU regulated markets and offer their wholesale debt securities to wholesale investors in the EU. It also means that EU companies are able to admit their wholesale debt securities to third country trading venues and offer their wholesale debt securities to third country wholesale investors.

This said, EU public bond markets can indeed be contrasted with the more deep and liquid US public markets. One feature of such contrast is the fragmentation that continues to exist along national lines in some segments of the EU's bond markets outside the well-functioning pan-EU wholesale bond markets (notably retail and SME bond markets). This fragmentation is considered to stem primarily from long-standing issues such as cultural bias towards domestic investing on the part of retail investors rather than regulatory and legislative issues. This type of issue is difficult to address via EU regulation, but the CMU action to improve financial literacy (Action 7) is an important and necessary initiative which has the potential to help develop both SME and retail markets. See also our response to Q1.

Please explain your reasoning regarding Other Markets (e.g. other MTFs, OTFs): *[4000 character(s) maximum]*

ICMA:

Please see our response to Q1 and our response to Q2a on regulated markets. In relation to the PR, some aspects of MTF rules are considered to be more flexible and proportionate. The most commonly used EU MTFs for bonds are EuroMTF and the Global Exchange Market. See further Q9. In relation to MAR, please see Q45 on the challenges presented by MAR's application to MTFs and OTFs.

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7. In your view, what are the main factors that explain why the level of institutional and retail investments in SME shares and bonds remains low in the EU?

	Please rate each below element from 1 to 5, 1 standing for "not important" and 5 for "very important"
a) Lack of visibility and attractiveness of SMEs towards investors leading to a lack of liquidity for SME shares and bonds	4
b) Lack of investor confidence in listed SMEs	
c) Lack of tax incentives	
d) Lack of retail participation in public capital markets (especially in SME growth markets)	
e) Other (please specify below)	

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

Whilst SME bonds are not a core area of focus for many of ICMA members, it is understood that a lack of visibility, including a public "track record" of historic financial filings, is a key factor in low levels of SME public bond issuance. This factor (which contributes to the increased levels of due diligence required by institutional investors to purchase SME bonds), combined with the relatively small sizes of funding typically sought by SMEs, combine to mean that the cost/benefit analysis of investing in SME securities may not be commercially attractive to institutional investors. See also our response to Q1.

This lack of visibility and historic financial filings means that it is difficult to reduce disclosure and other corporate governance burdens for SMEs, because investors need more (rather than less) information before investing in SME securities. The answer for SMEs, therefore, may be to improve indirect access to EU capital markets through, e.g. SME securitisations or the introduction of specialised UCITs. Alternatively (or additionally) if direct access for SMEs to capital markets is deemed desirable, the introduction of a regulated rating regime (as has been adopted in the US) might help.

In terms of tax incentives, ICMA has not conducted an analysis of applicable tax laws across the EU and so is unable to comment on whether there is a lack of tax incentives for SME bond issuance. However, it is understood that the tax changes introduced in Italy in 2012 for Italian SME "minibonds" were a key feature in the successful launch of that regime (see "*New Approaches to SME and Entrepreneurship Financing: Broadening the Range of Instruments*", OECD, 2015).

For the reason highlighted in Q1, the policy objectives of SME issuer and retail investor access to capital markets should be considered separately.

2. SPECIFIC QUESTIONS ON THE EXISTING REGULATORY FRAMEWORK

2.1. Prospectus Regulation (Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market)

The Prospectus Regulation (Regulation (EU) 2017/1129), which started applying in July 2019, lays down the rules governing the prospectus that must be made available to the public when a company makes an offer to the public or an admission to trading of transferable securities on a regulated market in the EU. The prospectus is a legal document that contains information about the issuer (e.g. main line ofbusiness, finances and shareholding structure) and the securities offered to thepublic or to be admitted to trading on a regulated market. A prospectus has to be approved by the competent authority of the home Member State before the beginning of the offer or the admission to trading of the securities.

The Prospectus Regulation has been subject to targeted amendments:

I. at the end of 2019 under the SME Listing Act
II. in 2020 under the Crowdfunding Regulation
III. and in 2021 under the capital markets recovery package

However, the prospectus regime remains to be seen by some as burdensome and unfit for attracting companies, in particular SMEs, to public markets. Both the CMU High Level Forum (HLF) and the TESG have highlighted that the process of drawing up a prospectus and getting it approved by the relevant national competent authority is expensive, complex and time-consuming and that targeted yet ambitious simplification of prospectus rules could reduce significantly compliance costs for companies and lower obstacles to tapping public markets.

This section aims at gathering respondents' views on the costs stemming from the application of the prospectus regime as well as on which requirements are most burdensome and how it would be possible to alleviate them without impairing investor protection and the overall transparency regime. Furthermore, this section aims to examine other aspects of the Prospectus Regulation, such as the functioning of thethresholds for exemptions from the obligation to publish a prospectus, the language regime and rules concerning the approval and publication of prospectuses.

2.1.1. Costs stemming from the drawing up of a prospectus

Analysis conducted by Oxera highlights that the efforts required to comply with the regulatory requirements associated with the listing process, and the litigation risk that could emerge, are often cited by industry practitioners as the most significant indirect costs of listing. In particular, many issuers stressed, as a high and growing cost to listing, the increased length and complexity of the prospectus documentation.

8. (a) As an issuer or an offeror, could you provide an estimation for the average cost of the prospectuses listed below (in EUR amount)? If necessary, please provide different estimations per type of prospectus (e.g. prospectus for an IPO, for a right issue, for a convertible bond, for a corporate bond, for an EMTN programme).

Prospectus Type	Your answer
Standard prospectus for equity securities	
Standard prospectus for non-equity securities	€10,000 - €800,000
Base prospectus for non-equity securities	€10,000 - €800,000
EU Growth prospectus for equity securities	
EU Growth prospectus for non-equity securities	
Simplified prospectus for secondary issuances of equity securities	
Simplified prospectus for secondary issuances of non-equity securities	
EU Recovery prospectus (currently available for shares only)	

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

(1) Costs for producing bond prospectuses vary considerably, depending on the type of issuer, whether the prospectus is "wholesale" or "retail", the complexity and variety of structures contained in the prospectus and whether securities are to be sold in the US.

(2) The cost of producing a "retail" bond prospectus, with a summary, is higher than producing a wholesale bond prospectus.

(3) The cost of producing a bond prospectus tends to increase in the year that regulatory changes are implemented because (a) issuers and their advisers need to familiarise themselves with the new requirements and (b) discussions with NCAs in the scrutiny and approval process can be more extensive and time consuming. From the perspective of the international bond market, the PR is currently working well. In particular, the base prospectus and tripartite prospectus regime are generally efficient. However, there are a small number of targeted amendments that could make the PR even more efficient. These include:

(a) permitting incorporation by reference of "future" regulated information (see Q17);

(b) permitting tripartite base prospectuses to be constituted with existing and successor registration documents or universal registration documents (see Q18(c));

(c) separating guarantor disclosure from the securities note (see Q18(c));

(d) removing the requirement for approval of the URD when it is used as a constituent part of a prospectus or passported (see Q38 and Q40);

(e) adjustments to the supplements rules (see Q41(b));

(f) re-introducing the exemption for sovereign guarantor disclosure that applied under PDII (see Q18c); and

(g) re-introducing the flexibility that existed under PDII in relation to voluntary prospectuses (see Q43).

As outlined elsewhere (eg Q14 and Q18), more ambitious changes could be considered, but the key concern for ICMA's members is that the current well-functioning, pan-EU wholesale bond market regime is not unintentionally damaged.

(b) Considering the total costs incurred by an issuer <u>for the drawing up of a prospectus</u>, please indicate what is the relative importance of each of the below costs in respect to the overall costs.

EMTN program prospectus

	Less than or equal to 10% of total costs	More than 10% and less than or equal to 20% of total costs	More than 20% and less than or equal to 40% of total costs	More than 40% and less than or equal to 50% of total costs	More than 50% of total costs	Don't know / no opinion / not relevant
a) Issuer's internal costs						X
b) Auditors costs				X		
c) Legal fees (including legal fees borne by underwriters for drawing- up the prospectus)					X	
d) Competent authorities' fees	X					
e) Other costs (please specify)						

9. What are the sections of a prospectus that you find the most cumbersome and costly to draft? Please rate each of the below sections from 1 to 5, 1 standing for

“not burdensome at all” and 5 for “very burdensome”.

	1 (not burdensome at all)	2 (rather not burdensome)	3 (neutral)	4 (rather burdensome	5 (very burdensome)	Don’t know – No opinion – Not applicable
Summary			X			
Risk factors				X		
Business overview						
Operating and financial review						
Regulatory environment						
Trend information						
Profit forecasts or estimates				X		
Administrative, management and supervisory bodies and senior management						
Related party transactions						
Financial information concerning the issuer’s assets and liabilities, financial position and profit and losses						
Working capital statement						
Statement of capitalisation and indebtedness						

Others (please specify below which sections as well as the rating)				X		

Please explain your reasoning: *[4000 character(s) maximum]*

ICMA:

(A) General

Prospectus Regulation (PR) costs and burdens stem from three main areas: (a) prescriptive disclosure requirements; (b) the liability associated with those disclosure requirements; and (c) NCAs' approaches to scrutinising disclosure. All three areas must be considered when trying to reduce costs for issuers. See also Q8a on the costs associated with regulatory changes. In the case of several of the disclosure requirements outlined below, MTF rules are considered to be more flexible and proportionate. The most commonly used EU MTFs for bonds are EuroMTF and the Global Exchange Market.

(B) Prospectus summary

The prospectus summary represents a source of increased costs for retail issuers compared with wholesale issuers. Some issuers find the prescriptive requirements to be overly burdensome. In jurisdictions where it is common for issuers to prepare summaries in debt prospectuses, eg Germany, market participants are broadly comfortable with the current requirements although consider that the maximum number of risk factors should increase when there is one or more guarantors. They note that the costs have been more manageable under the current regime than under PDII. See further Q16 and Q18b [*Note: Q18.2 in the online form*].

(C) Risk factors

Issuers have incurred additional costs in complying with the revised risk factor regime under the PR. Those additional costs were at their highest for the first prospectus prepared under the revised regime, but the additional liability (in particular that associated with the requirement to disclose the most material risks first) and the requirement to comply with ESMA guidelines on risk factors represent ongoing sources of costs for issuers. Some of the largest wholesale bond investors have informally expressed ambivalence or even a lack of awareness of the revised regime.

(D) Profit forecasts or estimates

In practice it can be difficult (and therefore costly) to determine whether particular disclosure falls within the definition of a profit forecast/estimate. To the extent that given disclosure is a profit forecast/estimate, issuers incur costs in complying with the PR Level 2 and Level 3 requirements for them. Issuers with base prospectuses also incur costs in the requirement to publish a supplement whenever a profit forecast/estimate included in a base prospectus is amended or withdrawn (even if that is not a significant new factor for the purposes of PR Article 23).

(E) Other

(1) **Pro forma financial information:** Whilst pro forma financial information is often not necessary in the context of bond prospectuses, the requirements in Annex 20 are considered to be prescriptive and onerous, in particular the requirements for an independent accountants' report (which investors may not necessarily require) and for the information to be published only in respect of the last completed financial period/most recent interim financial period. These requirements are perceived as a disincentive to issuing bonds within the scope of the PR if pro forma financial information is considered to be necessary. MTF rules are considered to be more flexible and proportionate.

(2) **Legal and arbitration proceedings:** The Level 2 annexes require disclosure of information on legal and arbitration proceedings which may have, or have had in the recent past, significant effects on the issuer and/or group's financial position or profitability. Detailed disclosure on such proceedings is challenging to prepare because the status of such proceedings regularly changes. More general disclosure relating to such proceedings is typically already included in risk factor sections and/or financial statements, and so this specific disclosure requirement seems unnecessary. Also, bond investors are interested in the issuer's solvency (i.e. its ability to honour the terms of the bond), rather than the issuer's profitability (which is relevant in the context of an investment in equity securities).

10. As an issuer or an offeror, how much money do you consider saving with the EU Growth prospectus compared to a standard prospectus (in percentage)?

	Less than or equal to 10%	Between More than 10% and less than or equal to 20%	Between More than 20% and less than or equal to 40%	Between More than 40% and less than or equal to 50%	More than 50%	Don't know / no opinion / not relevant
EU Growth prospectus for equity securities compared to a Standard prospectus for equity securities						X
EU Growth prospectus for non-equity securities compared to a Standard prospectus for non-equity securities						X

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

The EU Growth Prospectus has not been a core area of focus for ICMA's members, and there has been limited usage of it in the international bond markets.

It is possible that this is due to commercial, rather than regulatory, factors. There is often a commercial mismatch between the relatively low levels of funding that individual SMEs need (e.g. tens of millions of euro) and the issuance sizes typical in international bond markets (e.g. hundreds

of millions or billions of euro). SMEs might find it easier and cheaper to issue bonds to a small number of institutional investors via a PR-exempt "private placement" than to do a cross-border offering to a wide range of investors. This flexibility is important. See also Q1.

For bonds, the detailed requirements of the Growth Prospectus and the standard wholesale prospectus are fairly similar and the general duty of disclosure under Article 6 applies to the Growth Prospectus and the standard wholesale prospectus in the same way. It is difficult to see immediately how the requirements for the Growth Prospectus could be reduced given SMEs tend to be companies that investors want more (rather than less) information on.

The answer for SMEs, therefore, may be to improve indirect access to EU capital markets through, e.g. SME securitisations or the introduction of specialised UCITs. Alternatively (or additionally) if direct access for SMEs to capital markets is deemed desirable, the introduction of a regulated rating regime (as has been adopted in the US) might help.

The policy objectives of (a) SME issuer access to capital markets and (b) retail investor access to capital markets should be considered separately. Investing in SMEs' securities is likely to carry higher risks than investing in securities of large, established, issuers; and institutional investors seem likely to be in a better position to assess those risks.

11. As an issuer or offeror, how much money do you consider saving with the EU Recovery prospectus, currently available only for shares, compared to a standard prospectus and a simplified prospectus for secondary issuances ofequity securities (in percentage)? Please put an X in the box corresponding to your chosen option.

	Less than or equal to 10%	More than 10% and less than or equal to 20%	More than 20% and less than or equal to 40%	More than 40% and less than or equal to 50%	More than 50%	Don't know / no opinion / not relevant
EU Recovery prospectus compared to a Standard prospectus for equity securities						X
EU Recovery prospectus compared to a Simplified prospectus for secondary issuances of equity securities						X

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

This ICMA response is prepared from the perspective of the international bond markets. The EU Recovery prospectus is not available for bonds.

2.1.2. Circumstances when a prospectus is not needed

The Prospectus Regulation currently lays down several exemptions for the offer of securities to the public (Article 1(4) and 3(2)) or the admission to trading of securities on a regulated market (Article 1(5)). Moreover, the Prospectus Regulation does not apply to offers of securities to the public below EUR 1 million, in accordance with the conditions laid down in Article 1(3).

12. (a) Would you be in favour of adjusting the current prospectus exemptions so that a larger number of offers can be carried out without a prospectus? Please put an X in the box corresponding to the exemption(s) you would be in favour of adjusting and specify in the textbox what changes you would propose, including (where relevant) your preferred threshold.

Exemptions for offers of securities to the public (Article 1(4) of the Prospectus Regulation)	
1- An offer of securities addressed to fewer than 150 natural or legal persons per Member State, other than qualified investors (Article 1(4), point (b))	
2 - An offer of securities whose denomination per unit amounts to at least EUR 100 000 (Article 1(4), point (c))	
3 - An offer of securities addressed to investors who acquire securities for a total consideration of at least EUR 100 000 per investor, for each separate offer (Article 1(4), point (d))	
4 - Other exemptions – please specify ICMA: The definition of "public offer" is broad and capable of capturing (a) communications that are non-contractual in nature; and (b) secondary market non-exempt offers. Given these deficiencies, ICMA has previously argued that the definition of "public offer" should be narrowed. As an alternative, the European Commission may wish to consider introducing additional exemptions for CCPs, stock exchanges and other FMIs in respect of activities such as displaying prices for securities on screens. The European Commission confirmed in a letter to the London Stock Exchange in 2015 that such secondary market activities would not require a prospectus, but a formal exemption in the regulation itself would be useful.	X

Exemptions for the admission to trading on a regulated market (Article 1(5) of the Prospectus Regulation)	
5- 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 20 % of the number of securities already admitted to trading on the same regulated market (Article 1(5), first subparagraph, point (a)) ICMA: There is currently some uncertainty as to whether bonds that are, upon issue, intended to be fungible with existing bonds but, for US securities law purposes, are not immediately fungible, can benefit from this exemption. Such bonds will typically become fungible with the existing securities after a short compliance period (e.g. 40 days). A small change to Article 1(5), first subparagraph, point (a) to reference "intended to be fungible" would clarify that these bonds can benefit from the exemption.	X
6 - Shares resulting from the conversion or exchange of other securities or from the exercise of the rights conferred by other securities, where the resulting shares are of the same class as the shares already admitted to trading on the same regulated market, provided that the resulting shares represent, over a period of 12 months, less than 20 % ofthe number of shares of the same class already admitted to trading on the same regulated market, subject to the second subparagraph of this paragraph (Article 1(5), first subparagraph, point (b))	
7 - Other exemptions – please specify	
Exemptions applicable to both the offer of securities to the public and admission to trading on a regulated market	
8 - Non-equity securities issued in a continuous or repeated manner by a credit institution, where the total aggregated consideration in the Union for the securitiesoffered is less than EUR 75 000 000 per credit institution calculated over a period of 12 months, provided that those securities: (i) are not subordinated, convertible or exchangeable; and (ii) do not give a right to subscribe for or acquire other types of securities and are not linked to a derivative instrument (Article 1(4), point (j) and Article 1(5), first subparagraph, point (i))	

9 - From 18 March 2021 to 31 December 2022, non-equity securities issued in a continuous or repeated manner by a credit institution, where the total aggregated consideration in the Union for the securities offered is less than EUR 150 000 000 per credit institution calculated over a period of 12 months, provided that those securities: (i) are not subordinated, convertible or exchangeable; and (ii) do not give a right to subscribe for or acquire other types of securities and are not linked to a derivative instrument (Article 1(4), point (l), and Article 1(5), first subparagraph, point (k))	
10 - Other exemptions – please specify	

(b) Would you consider that more clarity should be provided on the application of the various thresholds below which no prospectus is required under the Prospectus Regulation (e.g. on total consideration of the offer and calculation of the 12 month-period)? If yes, please explain in the textbox below on which thresholds and on which elements more clarity is needed.

- Yes
- **No** ✓
- Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

We do not consider there to be a need for further clarity on the most commonly used public offer exemptions in the international bond market (i.e. the €100,000 minimum denomination exemption, the "qualified investor only" and "150 person" exemptions).

The most commonly used public offer exemption in the international bond market is the €100,000 minimum denomination exemption (Article 1(4)(c)). This exemption is favoured because it relates to a hardwired feature of the securities rather than a behavioural element of the offer of the securities, and so it is easier to confirm that the offer is exempt. ICMA has previously noted the importance of this exemption for the bond market. In addition, the "qualified investor only" and "150 person" exemptions are important for the bond market. It is important to recall that the €100,000 minimum denomination exemption is separate from the €100,000 minimum denomination threshold that distinguishes the wholesale and retail disclosure regimes. The retail disclosure regime is discussed in Q18b below [*Note: Q18.2 in the online response form*].

(c) **Could any additional types of offers of securities to public and admissions to trading on a regulated market be carried out without a prospectus while maintaining adequate investor protection? If yes, please specify in the textbox**

below which additional exemptions you would propose.

- o Yes
- o **No** ✓
- o Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

It is not immediately obvious that additional types of offers of non-equity securities to the public or admissions to trading of non-equity securities on a regulated market could be carried out without a prospectus while maintaining adequate investor protection.

ICMA is aware of the recommendations in the Final Report of the Technical Expert Stakeholder Group on SMEs to add a specific category of "qualified retail investor" or "knowledgeable retail investor" and to revise the current definition of "professional client" in order to encourage participation of individual investors in capital markets. Per ICMA's response to Q.42 of the European Commission's 2020 MiFID II consultation, it is likely to be simpler to adjust the definition of "professional client" to allow a broader group of individuals to have professional client status upon request, rather than introduce a new category of client, which may involve a significant re-papering exercise. Any such broadening of the definition of "professional client" would flow through to the definition of "qualified investor" under the Prospectus Regulation and have the effect of broadening the "qualified investor only" exemption (Article 1(4)(a)).

2.1.3 The standard prospectus for offers of securities to the public or admission to trading of securities on a regulated market (primary issuances)

Several industry practitioners have stressed that the increasing length and complexity of the prospectus documentation is one of the most important costs associated to the listing process. According to a survey which analysed the average length of the IPO prospectus for the 10 most recent IPOs in the main EU markets as of March 2019, the median length of an IPO prospectus was 400 pages in Europe, with significant divergence among countries, ranging from 250 pages in the Netherlands to over 800 pages in Italy.

The excessive length – and thus high cost – of a prospectus is deemed particularly challenging for smaller issuers of both equity and non-equity securities. Data show that there is currently little proportionality with respect to the length of the IPO prospectus based on the size of the issuer: the mean number of pages for issuers with a market capitalisation between EUR 150 million and EUR 1 billion is even higher than for issuers with a market capitalisation above EUR 1 billion (577 versus 514 pages, respectively).

General issues

14. (a) Do you think that the standard prospectus for an offer of securities to the public or an admission to trading of securities on a regulated market in its current form strikes an appropriate balance between effective investor protection and the

proportionate administrative burden for issuers?

- Yes
- **No** ✓
- Don't know/ no opinion / not relevant

(b) If you answered "No" to question 14(a), please indicate whether you consider that (please put an X in the box corresponding to your chosen option andprovide details):

1. The standard prospectus should be replaced by a more streamlined and efficient type of prospectus (e.g. EU Growth prospectus)	
2. The standard prospectus should be significantly alleviated	X
3. The standard prospectus for the admission to trading on a regulated market should be replaced by another document (e.g. an admission document)	
4. Other (please specify)	

(c) If you chose 14(b)(2), what are the disclosures that could be removed or alleviated from a standard prospectus? (You may take as reference the disclosures outlined in the table on question 9)

Please explain your reasoning: *[4000 character(s) maximum]*

Whilst the current Prospectus Regulation regime generally works well for wholesale bond issuers, the "registration document" requirements for bond prospectuses could be significantly alleviated. This could be achieved through:

1. applying a general disclosure test that requires disclosure of information that is material to an assessment of the issuer's ability to meet its obligations under the bond to pay interest and repay principal (i.e. its credit);

2. granting more flexibility to the issuer to determine what information needs to be disclosed to meet that test; and

3. permitting increased use of incorporation by reference, including "future" financial information (see further Q17).

In relation to point 1, bond market participants generally interpret Article 6 of the Prospectus Regulation in this way already, but the drafting could be made clearer. A clear and objective test for the information that issuers need to include in their prospectus is critical. It helps issuers to produce prospectuses that are easier to read and understand for investors and contain only the information that investors actually need.

In relation to point 2, more flexibility could be achieved by stating that the disclosure items in the Level 2 annexes are needed only to the extent they are necessary to meet

the general disclosure test, or by deleting the extraneous requirements. A more radical approach would be to remove the Level 2 registration document annexes altogether and rely only on the general disclosure test. This would give issuers maximum flexibility but could present challenges for harmonising approaches across the EEA.

In relation to specific disclosure requirements that are considered to be particularly cumbersome, please see our response to Q9.

Point 3 (increased use of incorporation by reference) has the potential to alleviate burdens for bond issuers quite significantly and could be adopted with or without points 1 and 2. See further Q17.

In considering points 1 and 2, it is important to emphasise again that the current standard wholesale bond disclosure regime works well, and a key concern for ICMA members is to avoid unintentional damage to the wholesale bond markets. For more targeted suggestions to make the regime work even more efficiently, see Q18.

15. (a) Would you support introducing a maximum page limit to the standard prospectus?

- o Yes
- o **No** ✓
- o Don’t know/ no opinion / not relevant

Please explain your reasoning: *[4000 character(s) maximum]*

ICMA:

A maximum page limit for prospectuses is a blunt instrument that would give rise to significant liability risks for issuers and run counter to the stated aims of the consultation. If issuers are unable to include in their prospectuses all information that they consider to be material for investors and to meet the disclosure test set out in Article 6 of the Prospectus Regulation it will negatively impact issuers’ ability/appetite to issue securities and would run counter to the aim of making listing of securities on EU public markets more attractive for companies.

<u>Prospectus summary</u>

The prospectus summary is one of the three components of a prospectus (alongside the registration document and the securities note). Its purpose is to provide, in a concise manner and in non-technical language, the key information that investors need in order to understand the nature and the risks of the issuer, the guarantor and the securities that are being offered to the public or admitted to trading on a regulated market. The prospectus summary is to be read together with the other parts of the prospectus, to aid investors, particularly retail investors, when considering whether to invest in such securities. Views are welcome as to whether room for improvement exists.

16. (a) Do you believe that the prospectus summary regime has achieved its objectives (i.e. make the summary short, simple, clear and easy for investors to understand)? Please put an X in the box corresponding to your chosen optionfor each type of summary listed on the table.

Type of prospectus summary	Yes	No	Don't know/no opinion/not relevant
1. Summary of the standard prospectus (Article 7 of the Prospectus Regulation, excluding paragraph 12a)		X	
2. Summary of the EU Growth prospectus (Article 33 of Commission Delegated Regulation (EU) 2019/980)			X
3. Summary of the EU Recovery prospectus (Article 7(12a) of the Prospectus Regulation)			X

(b) if you answered in the negative to question 16(a), could you please explain how could it be further improved?

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

(1) As set out in our response to Q9, the summary regime is used extensively in bond prospectuses in some jurisdictions, including Germany. Market participants there are broadly comfortable with the current requirements, although they consider that the maximum number of risk factors should be increased (e.g. from 15 to 20) where there is one or more guarantor.

(2) In other jurisdictions, it is less common to see summaries in debt prospectuses. This might be due to less active national retail bond markets in those jurisdictions, meaning that bond issuers consider the additional costs of preparing a summary and retail disclosure to outweigh the potential commercial benefit of being able to offer bonds to retail investors. In addition, regulatory disincentives for the issuance of bonds to retail investors exist outside the Prospectus Regulation (PR) regime (e.g. PRIIPs Regulation and MiFID II product governance regime). It might also be the case that some issuers did not re-introduce a retail option and summary into their base prospectuses when the PR was implemented, having previously removed it as a result of the onerous PDII summary regime.

(3) Whilst it is widely acknowledged that the current regime is improved from the PDII regime, some market participants continue to view the current prospectus summary requirements as very prescriptive and therefore burdensome. In addition, some market participants query whether prospectus summaries are clear and easy enough for retail investors to understand. It is worth knowing that in some Member States separate information booklets or other similar documents (which fall within the definition of

"advertisement" under the PR but otherwise do not have highly prescriptive contents requirements) are provided to retail investors which effectively fulfil the function of a summary. See also Q18 on the retail disclosure regime more generally, of which the summary is one element.

Incorporation by reference

The "incorporation by reference" mechanism allows the information contained in one of the documents listed in Article 19(1) of the Prospectus Regulation to be incorporated into a prospectus by including a reference. However, this information must have already been previously or simultaneously published electronically and drawn up in a language fulfilling the language requirements laid down in Article 27 of the Prospectus Regulation. Incorporation by reference facilitates the procedure of drawing up a prospectus and lowers the costs for issuers.

17. Would you suggest any improvement to the existing rules on incorporation by reference, including amending or expanding the list of information that can be incorporated by reference?

- **Yes** ✓
- No
- Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

A useful (and simple) amendment would be to permit future (as well as past) annual and interim financial information to be incorporated by reference into base prospectuses. This approach is permitted in other jurisdictions such as the US and under the London Stock Exchange's International Securities Market Rulebook. In order to ensure that the information incorporated into a prospectus does not become too difficult to track, the option to incorporate by reference future financial information should not be "open-ended" and should not replace the need for a base prospectus to be updated annually. It could, though, be used to limit the need for base prospectuses to be supplemented during the year, thus avoiding additional costs for issuers, and rectify the current situation in which a supplement to incorporate financial information into a prospectus is often not published on the same day that the financial information is published. If necessary, an issuer could simply give notice to the market each time any such future information is incorporated by reference and withdrawal rights could apply in appropriate circumstances from the date of publication of any such notice. ICMA would be happy to make drafting suggestions for this idea, if that would be useful.

The standard prospectus for non-equity securities

In the Prospectus Regulation non-equity securities are subject to specific rules, such as the possibility to draw up a base prospectus (normally for offering programs) and the dual regime for retail non-equity securities versus wholesale non-equity securities. The latter are non-equity securities that have a denomination per unit of at least EUR 100 000 or that are to be traded only on a regulated market, or a specific segment thereof, to which only

qualified investors can have access for the purposes of trading in those securities. Wholesale non-equity securities are exempted from the prospectus for the offer to the public and are entitled to a lighter prospectus for the admission to trading ona regulated market (e.g. no prospectus summary, flexible language requirement, lighter disclosures), as set out in Commission Delegated Regulation (EU) 2019/980.

18. (a) Do you think that the prospectus (including the base prospectus) for non-equity securities, with differentiated rules for the admission to trading on a regulated market of retail and wholesale non-equity securities, has been successful in facilitating fundraising through capital markets?

- o **Yes** ✓
- o No
- o Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

Overall, the Prospectus Regulation works well from the perspective of the wholesale international bond markets, and there are limited areas that need fixing. In particular, the base prospectus is a cost-effective way of allowing issuers to access the markets at short-notice. The familiarity of issuers and their advisors with the regime also helps to reduce costs for issuers.

There are some targeted amendments that could be made to make the base prospectus regime work even more effectively. These include:

(a) permitting incorporation by reference of "future" regulated information (see Q17);

(b) permitting tripartite base prospectuses to be constituted with existing and successor registration documents or universal registration documents (see Q18(c));

(c) separating guarantor disclosure from the securities note (see Q18(c));

(d) removing the requirement for approval of the URD when it is used as a constituent part of a prospectus or passported (see Q38 and Q40);

(e) adjustments to the supplements rules (see Q41(b));

(f) re-introducing the exemption for sovereign guarantor disclosure that applied under PDII (see Q18c); and

(g) re-introducing the flexibility that existed under PDII in relation to voluntary prospectuses (see Q43).

See also our response to Q14 for some more ambitious suggestions.

(b) Would you be in favour of further aligning the prospectus for retail non-equity securities with the prospectus for wholesale non–equity securities, tomake the retail prospectus lighter and easier to be read?

- o **Yes** ✓

- No
- Don’t know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

ICMA previously suggested a simplified approach to the bond disclosure regime under the PR involving one, wholesale-standard, disclosure regime that would apply to any issue of bonds regardless of minimum denomination. This proposal was based on evidence suggesting that retail investors do not read or understand disclosure; and so would be better protected through other tools such as advice from MiFID authorised intermediaries or product intervention. The aim of ICMA’s suggestion was to encourage more issuers to issue bonds with lower denominations (which could help to increase participation in bond markets) and to protect retail investors through more effective forms of investor protection compared with prospectus disclosure. For further details, please see pages 48 – 52 of ICMA’s response to the EC Prospectus Directive consultation of May 2015.

If the retail disclosure regime is to be retained but aligned further with the wholesale disclosure regime, three aspects should be considered:

(1) The detailed requirements set out in the annexes to EC Delegated Regulation 2019/980. These are already reasonably similar for retail and wholesale bonds, and so it is not clear whether significant alleviation would be achieved through adjustments to the annexes alone.

(2) The applicability of the prospectus summary requirements, which apply to retail, but not wholesale, prospectuses. This is the most significant Prospectus Regulation-based difference between the two regimes currently.

(3) The approach to scrutiny of retail prospectuses compared with wholesale prospectuses by NCAs. The more intense review of retail prospectuses is another factor in the higher costs associated with retail prospectuses.

In addition, if more issuers are to be encouraged to offer bonds directly to retail investors, then the impediments to retail bond issuance presented by other regulatory regimes (e.g. PRIIPs and MiFID II product governance) would also need to be addressed.

(c) Would you consider any other amendment to the existing rules?

- **Yes** ✓
- No
- Don’t know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

The base prospectus regime works very well for bond issuers, but some targeted amendments could be made.

(A) Updating 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 connected tripartite base prospectuses (that remain valid) to reflect the new RD. This concern is understood to have resulted in ESMA's Q&A 3.4 and 3.5. A simple amendment to allow tripartite base prospectuses to be constituted with a RD or URD and any successor RD or URD (as supplemented from time to time) would fix this issue.

(B) Guarantor disclosure in tripartite prospectuses

Currently, guarantor disclosure for non-equity securities is required to be set out in the securities note. This means that supplementing guarantor disclosure in tripartite prospectuses is inefficient and cumbersome. A more sensible approach would be to separate the guarantor disclosure from the securities note, in order to facilitate any necessary updates to guarantor disclosure. The prospectus would then have up to four elements: the summary, the securities note, the issuer registration document and (if applicable) the guarantor registration document.

(B) Sovereign guarantees

Annex 21 of EC Delegated Regulation 2019/980 requires a guarantor to disclose information about itself as if it were the issuer of the securities. Under PDII, a Member State guarantor was exempt from such guarantor disclosure requirements. This exemption was helpful where a Member State's guarantee was not unconditional and irrevocable and therefore the securities were in-scope of PDII. There is no similar exemption for Member State guarantors under the current regime, but it is not clear why. We suggest this exemption is re-introduced.

(D) Other

See our responses to Q17 on "future" incorporation by reference and Q41 on supplements.

2.1.4. Prospectus for SMEs

SMEs and other categories of beneficiaries (e.g. mid-caps listed on an SME growth market) defined in Article 15(1) of the Prospectus Regulation, can choose to draw up an EU Growth prospectus for offers of securities to the public, provided that they have no securities admitted to trading on a regulated market. The EU Growth prospectus is more alleviated than a standard prospectus, as it contains less disclosures (e.g. board practices, employees, important events in the development of the issuer's business, operating and financial review) and in some cases more alleviated ones (e.g. principal activities, principal markets, organisational structure, investments, trend information, historical financial information, dividend policy). As this development is relatively recent, there is limited data available to assess whether the introduction of the EU Growth prospectus has affected the average length of prospectuses for SMEs. However, feedback from market participants indicates that there has not been a substantial decrease in the lengthof documents submitted after July 2019.

19. Do you believe that the EU Growth prospectus strikes a proper balance between

investor protection and the reduction of administrative burdens for SMEs?

- Yes
- No
- Don't know/ no opinion / **not relevant** ✓

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

Please see our response to Q10, in which we note that the EU Growth Prospectus has not been a core area of focus for ICMA's members and outline our views on the possible reasons why there has been limited usage of the EU Growth Prospectus in international bond markets.

2.1.5. The format and language of the prospectus

Electronic Prospectus

The Prospectus Regulation sets out an obligation for issuers to provide a copy of the prospectus on either a durable medium or printed upon request of any potential investor. It has been noted that, due to the current prevalence of digital mediums, this may be an unnecessary cost and administrative burden for issuers.

20. Do you agree that the above mentioned obligation should be deleted and that a prospectus should only be provided in an electronic format as long as it is published in accordance with Article 21 of the Prospectus Regulation?

- **Yes** ✓
- No
- Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

The requirement to provide a copy of the prospectus on either a durable medium or printed upon request of any potential investor is now outdated and could be removed.

As a related matter, the requirement for prospectuses to remain publicly available for at least 10 years (Article 21(7)) seems rather arbitrary given bonds will have a range of maturities, and it does not acknowledge that prospectuses are not updated throughout the life of the security. It is appreciated that ESMA's register will "archive" prospectuses for at least 10 years. Perhaps it is sufficient for prospectuses to be available on ESMA's register for 10 years, but otherwise the 10-year requirement (which does not recognise that prospectuses are not updated throughout the life of the security), could be removed.

Language rules for the prospectus

The TESG in its final report argued that publishing a prospectus only in English, as the

customary language in the sphere of international finance, independently from the official language of the home or host Member States could reduce the burden on companies offering securities in several Member States and contribute to creating a level playing field amongst market participants.

21. Concerning the language rules laid down in Article 27 of the Prospectus Regulation, with which of the following statements do you agree? Please put an X in the box corresponding to your chosen option.

Statement	Choice
It should be allowed to publish a prospectus **only** in English, as the customary language in the sphere of international finance.	X
It should be allowed to publish a prospectus **only** in English, as the customary language in the sphere of international finance, except for the prospectus summary.	
It should be allowed to publish a prospectus **only** in English, as the customary language in the sphere of international finance, for any cross-border offer or admission to trading on a regulated market, including when a security is offered/admitted to trading in the home Member State.	
It should be allowed to publish a prospectus **only** in English, as the customary language in the sphere of international finance, for any cross-border offer or admission to trading on a regulated market, including when a security is offered/admitted to trading in the home Member State, except for the prospectus summary.	
There is no need to change the current language rules laid down in Article 27 of the Prospectus Regulation.	
Don't know/ no opinion / not relevant	

2.1.6. The prospectus for secondary issuances of issuers already listed on a regulated market or an SME growth market and/or for transfer from a SME growth market to a regulated market

The Prospectus Regulation currently lays down a simplified regime for secondary issuances of companies whose securities have already been admitted to trading on a regulated market or on an SME growth market continuously and for at least the last 18 months. Such companies are already subject to periodic and ongoing disclosure requirements, such as under the Transparency Directive and the Market Abuse Regulation. It can therefore be argued that there is less of a need to require a prospectus for secondary issuances. A simplified prospectus for secondary issuances can also be used, in accordance with the conditions laid down in Article 14(1), point (d), of the Prospectus Regulation, to transfer from an SME growth market to a regulated market(aka "transfer prospectus").

Furthermore, the capital markets recovery package introduced the new EU Recovery prospectus regime (Article 14a of the Prospectus Regulation) to allow for a rapid re-capitalisation of EU companies affected by the economic shock of the COVID-19 pandemic. The EU Recovery prospectus consists on a single document, of only 30 pages and includes a 2 page-summary (neither the summary nor the information incorporated by reference are taken into account to determine the page-size limit), focusing on essential information that investors need to make an informed decision. This new short- form

prospectus is meant to be easy to produce for issuers, easy to read for investorsand easy to scrutinise for national competent authorities. The EU Recovery prospectus is only available for secondary issuances of shares of issuers listed on a regulated market oran SME growth market continuously and for at least the last 18 months. It is currently intended as a temporary regime.

The TESG in its final report highlighted the need to further simplify the prospectus burden for subsequent admissions to trading or offers of fungible securities and recommended that a new simplified prospectus (replacing the current simplified prospectus for secondary issuances), similar in its form to the EU Recovery prospectus, be adopted on a permanent basis for secondary issuances and for transfers from an SME growth market to a regulated market, provided that specific conditions are satisfied.

22. Do you agree that, for issuers that have already been listed continuously and for at least the last 18 months on a regulated market or an SME growth market, the obligation to publish a prospectus could be lifted for any subsequent offer to the public and/or admission to trading of securities fungible with existing securities already issued (with a prospectus) without impairing investors' protection?

- Yes
- **No** ✓
- Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

In the bond market, where base prospectuses are frequently used, a fungible issue can typically be documented easily and quickly by using the most recent base prospectus and preparing final terms (that need only to be filed, rather than approved, by a NCA). This means that removing an obligation to prepare a prospectus for secondary issues intended to be fungible with existing debt securities would not significantly reduce issuers' costs, but would reduce the Prospectus Regulation-compliant disclosure available to investors.

In terms of the simplified disclosure regime for secondary issuances in Article 14 more generally, there has been limited adoption of this in the bond market, despite it being available for bond issuers with equity securities that have been admitted to trading for at least 18 months. This is likely due to the requirement for a concise summary of the relevant information disclosed under MAR over the past 12 months and the fact that the regime is not perceived as granting many significant alleviations for issuers of debt securities. Such issuers are also familiar and comfortable with the "standard" disclosure regime. It is also not clear that the 18 months limitation serves any useful purpose. This said, there has been some adoption of the regime and those issuers who do use it find it useful.

22.1 If you responded "No" to question 22, do you think that the regime for secondary issuances could nevertheless be simplified? Please put an X in the box corresponding to your chosen option.

1. The obligation to draw up a prospectus should, for both the offer to the public and the admission to trading on a regulated market of securities fungible with existing securities which have been previously issued, be replaced with the obligation to publish a statement confirming compliance with continuous disclosure and financial reporting obligations.	
2. The obligation to draw up a prospectus should, for both the offer to the public and the admission to trading on a regulated market of securities fungible with existing securities which have been previously issued, be replaced with the obligation to publish an alternative admission or listing document (content to be defined at EU level). Such document should only be filed with the relevant national competent authority (i.e. neither subject to the scrutiny nor to the approval of the latter).	
3. The obligation to publish a prospectus should remain applicable (unless one of the existing exemptions apply) but only a prospectus significantly simplified and focusing on essential information should be required.	X
4. Other (please specify)	
5. Don't know/ no opinion / not relevant	

22.3 If you chose option 22.1(3), could you please indicate what the main simplifications should be?

Please explain your reasoning: *[4000 character(s) maximum]*

As a general matter, there is value for investors in drawing together the information they need to make an investment decision into a defined package.

However, as noted in Q14 above, the "registration document" disclosure requirements for bond issues could be simplified significantly through:

1. applying a general disclosure test for bonds that requires disclosure of information that is material to an assessment of the issuer's ability to meet its obligations under the bond to pay interest and repay principal (i.e. its credit);

2. granting more flexibility to the issuer to determine what information meets that test by removing the detailed disclosure requirements set out in the Level 2 annexes; and

3. permitting increased use of incorporation by reference, including "future" financial information (see Q17).

This approach could be applied in the context of the "primary" (standard) bond disclosure requirements, or in the context of the secondary issuance regime (either for fungible bond issues or for "primary" bond issues where the issuer has its equity securities listed on an EEA regulated market and therefore has made ongoing disclosures).

23. Since the application of the capital markets recovery package, have you seen the uptake in the use of the EU Recovery prospectus?

- Yes
- No
- Don’t know/ no opinion / **not relevant** ✓

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

This ICMA response is prepared from the perspective of the international bond markets. The EU Recovery prospectus is not available for bonds.

24. Do you think that the EU Recovery prospectus should (please put an X in the box corresponding to your chosen option for every point listed on the table):

	Yes	No	Don’t know / no opinion / not Relevant
a. Be extended on a permanent basis for secondary issuances of shares			X
b. Be introduced on a permanent basis for secondary issuances of all types of securities (both equity and non-equity securities)		X	
c. Be used as a simplified prospectus for all cases set out in Article 14(1)		X	
d. Other (please specify)			

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

From the perspective of the international bond markets, the maximum length limit of 30 sides of A4-sized paper applicable to the EU Recovery prospectus is likely to be unworkable, in particular for base prospectuses. As a general matter, length limits on prospectuses give rise to liability concerns for issuers and would not be welcomed by market participants. See further our response to Q15(a).

2.1.7. Liability regime

The obligation to publish a prospectus entails a civil liability regime for issuers. Infringements to the provisions of the Prospectus Regulation may lead to administrative sanctions and other administrative measures, in accordance with Article 38 of that Regulation and, depending on national law, criminal sanctions. The prospectus is sometimes referred to as a document that serves to shield from liability issues (i.e. the more information the better) rather than to support investors in taking informed investment decisions.

25. Do you think that the current punitive regime under the Prospectus Regulation is proportionate to the objectives sought by legislation as well as the type and size of entities potentially covered by that regime?

- **Yes** ✓
- No
- Don't know/ no opinion / not relevant

Please explain your reasoning, notably in terms of costs: [*2000 character(s) maximum*]

ICMA:

The current punitive regime under the Prospectus Regulation is generally considered to be proportionate to the objectives sought and the types and sizes of entities potentially covered by the regime.

ICMA is not aware that the current punitive regime, including the maximum amount of administrative pecuniary sanctions, prevents or negatively impacts issuers' decisions to list or offer their securities in the EU. However, please see our response to Q30 below in relation to removing potential criminal liability.

ICMA does not consider that special, more lenient, treatment should be introduced for SMEs given the higher risks associated with investing in SME securities. It is also important that the punitive regime is not unduly complicated, which could be the case if different punitive provisions applied to different types of entities.

26. (a) Do you believe that the current civil liability regime under the Prospectus Regulation is adequately calibrated?

- **Yes** ✓
- No
- Don't know/ no opinion / not relevant

30. (a) Do you think that the possibility of applying criminal sanctions in the case of non-compliance with any of the requirements specified in Article 38(1) of the Prospectus Regulation should be removed?

- **Yes** ✓
- No
- Don't know/ no opinion / not relevant

(b) If you responded positively to question 30(a), could you please specify for

which requirements.

Please explain your reasoning: *[4000 character(s) maximum]*

ICMA:

Whilst we are not aware that the possibility of criminal sanctions has caused any issuer to avoid offering or listing bonds, it would seem more proportionate to remove the possibility of applying such sanctions for violation of the Prospectus Regulation. The potential civil liability that issuers incur in the context of public offers and admission to trading of securities is significant and sufficient to focus the minds of senior managers.

2.1.8. Scrutiny and approval of the prospectus

Article 20 of the Prospectus Regulation lays down harmonised rules for the scrutiny and approval of the prospectus, with a view to fostering supervisory convergence throughout the EU. Article 20 also sets out the timelines for approving the prospectus, depending on the circumstances and type of document (e.g. prospectus for a first time offer of unlisted issuers, prospectus for issuers already listed or that have already offered securities to the public, EU Recovery prospectus, prospectus which includes a URD). 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 are further specified in Chapter V of Commission Delegated Regulation (EU) 2019/980.

31. a) Do you consider that there is alignment in the way national competent authorities assess the completeness, comprehensibility and consistency of the draft prospectuses that are submitted to them for approval?

- **Yes** ✓
- No
- Don't know/ no opinion / not relevant

32. (a) Do you consider the timelines for approval of the prospectus as prescribed in Article 20 of the Prospectus Regulation adequate?

- **Yes** ✓
- No
- Don't know/ no opinion / not relevant

33. (b) Should a minimum period of days between the publication of a prospectus and the end of an offer be set out also for offer of non-equity securities, in particular to favour more retail participation?

- Yes
- **No** ✓
- Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

Specifying a minimum time period between publication of the prospectus and the end of an offer of bonds in the Prospectus Regulation is not considered to be necessary. If a certain time period is required for retail investors to engage with a public offer of bonds, then it is in an issuer's commercial interest to provide this. Some retail bond offers already span a matter of weeks, rather than days.

A minimum time period in the Prospectus Regulation would also likely be counterproductive to any policy aim of encouraging more retail bond offers in the EU. The relatively low level of direct retail bond offers in the EU (outside of certain domestic markets such as Germany) is typically understood to be driven primarily by a lack of appetite from *bond issuers* to offer their bonds to retail investors as a result of commercial and regulatory considerations. Imposing an additional minimum time period is likely to be seen as another regulatory disincentive for issuers to offer their bonds directly to retail investors in the EU.

In addition, an offer of bonds is different in nature to an offer of shares. For structured products, the pricing of the bond can change during the offer period depending on the performance of the underlying, meaning a minimum period for publication of the prospectus and the end of the offer period would not be practicable. This is not applicable in the case of an offer of shares.

Determination of the "Home Member State"

The Prospectus Regulation, Article 2(m), sets out rules for the determination of the home Member State. As a general rule, for issuers established in the EU, the home Member State corresponds to the Member State where the issue has its registered office. However, different rules apply for non-equity securities with a denomination per unit above EUR 1 000 and for certain non-equity hybrid securities for which the 'Home Member State' means the Member State where the issuer has its registered office, or where the securities were or are to be admitted to trading on a regulated market or where the securities are offered to the public, at the choice of the issuer, the offeror or the person asking for admission to trading on a regulated market.

Equity issuers established in the EU are therefore currently not able to choose their home Member State, while non-equity issuers established in the EU are allowed to do so, subject to the conditions laid down in Article 2(m), point (iii), of the Prospectus Regulation.

34. (a) Should the dual regime for the determination of the home Member State for non-equity and equity securities featured in Article 2(m) of the Prospectus Regulation be amended?

- o Yes
- o **No** ✓
- o Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

The flexibility that issuers of non-equity securities currently have to choose a home Member State with appropriate experience and expertise of approving prospectuses for non-equity securities is welcome. Limiting this flexibility would run counter to the aims of the consultation.

2.1.9. The Universal Registration Document (URD)

Effective as of 2019, the co-legislators introduced a URD in the Prospectus Regulation, in line with the shelf registration principles already well-established in other financial markets, particularly in the US. A URD is a document that, after being approved for two consecutive years, is only to be filed each year (i.e. kept 'in the shelf') by *frequent issuers.* A URD contains information about company's organisation, business, financial position, earnings, etc., and facilitates the approval process of prospectuses of these issuers (e.g. approval time reduced by half) by national competent authorities. As a URD can be used for offers of both equity and non-equity securities, it is currently built on the more comprehensive registration document for equity securities.

The TESG in their Final Report highlighted that the URD regime, as currently designed, does not deliver on its objective, as only a very low number of issuers, and mostly in one Member State, have resorted to it.

35. In your view, what are the main reasons for the lack of use of the URD among issuers across the EU? Please put an X in the box corresponding to your chosen option(s).

(a) The time period necessary to benefit from the status of frequent issuer is too lengthy	
(b) The URD supervisory approval process is too lengthy	
(c) The costs of regularly updating, supplementing and filing the URD are not outweighed by its benefits	
(d) The URD content requirements are too burdensome	X
(e) The URD is not suitable for non-equity securities as it is built on the more comprehensive registration document for equity securities	X
(f) The URD language requirements are too burdensome	
(g) Other (please explain below)	X

Please explain your reasoning: *[4000 character(s) maximum]*

ICMA:

The limited usage of the URD outside of France seems to be driven by a combination of factors. These include:

(a) the availability of other options (e.g. the base prospectus, either in single or tripartite format) that work well for, and are familiar to, issuers outside of France; and

(b) the fact that the URD requirements are based on equity level disclosure requirements (Annex 1), which are more burdensome than the requirements for non-equity securities.

In France, the URD generally works well but improvements could be made (see Q38 and Q40 below). These improvements might also help to attract more issuers to use the URD from outside of France.

36. As the URD can only be used by companies already listed, should its content be aligned to the level of disclosures for secondary issuances (instead of primary issuances as currently) to increase its take up by both equity and non-equity issuers?

- Yes
- **No** ✓
- Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

It seems unlikely that applying the secondary (rather than primary) equity issuance disclosure regime would be make a significant difference to the level of uptake of the URD.

37. Should the approval of a URD be required only for the first year (with a filing every year after)?

- Yes
- **No** ✓
- Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

The current requirement for two consecutive years of approval before issuers are able to file the URD is considered to achieve the right balance between issuer burdens and investor protection. It gives the issuer the opportunity to become familiar with the URD preparation process and address comments raised during the course of the first year, whilst allowing the NCA the opportunity to review and approve changes made to address those comments. The previous French regime required three consecutive years of approval before filing was permitted.

38. Should a URD that has been approved or filed with the national competent authority be exempted from the scrutiny and approval process of the latterwhen it is used as a constituent part of a prospectus (i.e. the scrutiny andapproval

should be limited to the securities note and the summary)?

- o **Yes** ✓
- o No
- o Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

The requirement for scrutiny and approval of a URD at the time of an issuance could be removed in respect of a URD that has been approved or filed. Sufficient investor protection would be achieved via (a) the responsibility statement provided in the prospectus or base prospectus and (b) the ex-post reviews of the URD envisaged in Article 9(8) of the Prospectus Regulation. This approach would mean that filing (rather than approval) after two consecutive years of approval of the URD would have some meaningful benefit for issuers.

39. Should issuers be granted the possibility to draw up the URD only in English for passporting purposes, notwithstanding the specific language requirements of the relevant home Member State?

- o **Yes** ✓
- o No
- o Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

Additional flexibility for issuers to draw up the URD only in English for passporting purposes would be welcome, although it is not clear whether this would significantly increase the attractiveness of the URD or not. In France, URDs will still need to be available in French for local registration purposes.

40. How could the URD regime be further simplified to make it more attractive to issuers across the EU?

Please explain your reasoning: *[4000 character(s) maximum]*

ICMA:

In addition to removing the requirement for scrutiny and approval of an approved or filed URD at the time of issuance, the requirement for scrutiny and approval of a URD for passporting purposes under Article 9(2) of the Prospectus Regulation should also be removed. Sufficient investor protection would be achieved via (a) the responsibility statement provided in the prospectus or base prospectus used for an issuance and (b) the

ex-post reviews of the URD envisaged in Article 9(8) of the Prospectus Regulation.

The URD requirements should also be reviewed alongside Transparency Directive requirements and, where possible, aligned further.

2.1.10. Other possible areas for improvement

Supplements to the prospectus

Article 23 of the Prospectus Regulation lays down rules for the supplement to the prospectus. As part of the capital market recovery package, the new paragraphs (2a) and (3a) were introduced with a view to providing more clarity on the obligation for financial intermediary to contact investors when a supplement is published, to increase the time window to do so and also to increase the time window for investors to exercise their withdrawal rights, where applicable. These new rules are only temporary and due to expire on 31 December 2022.

41. (a) Has the temporary regime for supplements laid down in Articles 23(2a) and 23(3a) of the Prospectus Regulation provided additional clarity and flexibility to both financial intermediaries and investors and should it be made permanent?

- **Yes** ✓
- No
- Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

This has not been an area of focus for most ICMA members who operate primarily in the wholesale bond markets where withdrawal rights are not considered to arise pursuant to ESMA's clarification in 2018 (see further Q41(b) below). However, ICMA members active in retail markets note that the increased flexibility and clarity of the temporary regime in Articles 23(2a) and 23(3a) of the Prospectus Regulation is preferable to the previous regime.

(b) Would you propose additional improvements?

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

(A) Allowing supplements for securities note information in base prospectuses

It would be helpful if the Prospectus Regulation were to be clarified to allow supplements to be used to include additional, or amend existing, securities note information in a base prospectus (e.g. to add provisions allowing an issuer to issue green, social, sustainability or sustainability-linked bonds, a change of control provision or provisions related to index-linked securities to a base prospectus that did not previously include these provisions). Currently, there can be differing interpretations applied by NCAs meaning that clarity on this point would be useful.

(B) Allowing supplements for non-significant information

It would also be helpful if issuers could prepare supplements that include additional information, voluntarily, which is not "significant" within Article 23 of the Prospectus Regulation. This might include information which is not “significant” but may, nevertheless, either be deemed to be important for investors (such as securities codes or ambiguities in certain terms) or simply be revisions which may not be “significant” or “material” but which an issuer may wish to make.

(C) Withdrawal rights

ESMA provided helpful clarification in 2018 that withdrawal rights do not apply to prospectuses for the admission to trading of wholesale non-equity securities. It would be helpful if Article 23(2) of the Prospectus Regulation could be clarified to reflect clearly ESMA’s 2018 interpretation. Market participants continue to discuss and query the lack of clarity in the Level 1 text almost a decade after a change to the Prospectus Directive caused confusion on this point. A simple change to the drafting of Article 23 to reflect clearly ESMA’s 2018 interpretation would remedy an ongoing source of queries (and therefore inefficiency) for the wholesale bond markets.

Equivalence regime

Article 29 of the Prospectus Regulation enables third country issuers to offer securities to the public in the EU or seek admission to trading on an EU regulated market made under a prospectus drawn up in accordance with the laws of third country, subject to the approval of the national competent authority of the EU home Member State, and provided that (i) the information requirements imposed by those third country laws are equivalent to the requirements under the Prospectus Regulation and (ii) the competent authority of the home Member State has concluded cooperation arrangements with the relevant supervisory authorities of the third country issuer in accordance with Article 30.

The Commission is empowered to adopt Delegated Acts to establish general equivalence criteria, based on the requirements laid down in Article 6, 7, 8 and 13 (essentially disclosure requirements only). The current rules are considered not workable, including the rules to adopt general equivalence criteria.

42. (a) Do you believe that the equivalence regime set out in Article 29 of theProspectus Regulation, which is difficult to implement in its current version, should be amended to make it possible for the Commission to take equivalence decisions in order to allow third country issuers to access EU markets more easily with a prospectus drawn up in accordance with the law of a thirdcountry?

- **Yes** ✓
- No
- Don’t know/ no opinion / not relevant

(b) If you answered positively to question 42(a), how would you propose to amend Article 29 of the Prospectus Regulation?

Please explain your reasoning: *[4000 character(s) maximum]*

ICMA:

A more flexible approach to third country prospectuses would be sensible in the interests of efficient and effective cross-border capital markets, which provide investment opportunities for the EU's savers.

Equivalence should be determined at an EEA level without requiring any further steps to determine equivalence at a national level. No reciprocity should be required and the determination of equivalence should only be withdrawn, with notice, in the event of a subsequent material regime change, rather than being a temporary measure.

Other than publication in accordance with the Prospectus Regulation regime, notification to ESMA or a Home Member State NCA and, possibly, a requirement of a "wrap" to the prospectus to cover, e.g., disclosure relating to the admission to trading process, there should be no additional requirements for a prospectus prepared by a third country issuer if the third country's legislation has been deemed equivalent. Subsequent to notification in Member States, a notified prospectus should be able to be used for passporting purposes within the EEA in the same way as other prospectuses.

In terms of the equivalence determination itself, this would likely need to involve the exercise of discretion by the European Commission, perhaps acting on advice from ESMA, as to 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.

Other

43. Would you have any other suggestions on possible improvements to the current prospectus rules laid down in the Prospectus Regulation?

Please explain your reasoning: *[4000 character(s) maximum]*

ICMA:

Voluntary prospectus: Article 4 of the Prospectus Regulation limits the circumstances in which an issuer can draw up a prospectus voluntarily in accordance with the Prospectus Regulation to circumstances in which the offer of securities or admission to trading is outside the scope of, or exempt from, the Prospectus Regulation. This means that issuers of types of securities that fall outside the scope of the Prospectus Regulation (e.g. Member States' regional or local authorities' non-equity securities under Article 1(2)(b)) are no longer able to draw up voluntarily a Prospectus Regulation-compliant prospectus and certain national competent authorities will not accept such prospectuses for scrutiny and approval. This is considered unhelpful by some, because approval by a national competent authority holds value for some investors and so can help with marketing an issuer's bonds. It would therefore be helpful if Article 4, Voluntary prospectus, could be expanded to cover exemptions under Article 1(2) as well as Articles 1(3), 1(4), 1(5) and 3(2).

ABS disclosure requirements: We support the comments made in the response submitted in response to Q43 by AFME in relation to need for coordination between EU Securitisation Regulation transparency requirements and the Prospectus Regulation

requirements for website disclosure of transaction documents.

2.2. Market Abuse Regulation (Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse)

The Market Abuse Regulation ('MAR') entered into full application in 2016, it provides requirements for market participants to ensure the integrity of the financial markets.

In view of the periodic review of MAR, the European Commission, in March 2019, requested ESMA to provide a technical advice on the review of MAR on a number of topics (including the notion of inside information, the conditions for delaying the disclosure of inside information, insider lists, managers' transactions and sanctions). On 3 October 2019, ESMA publicly consulted the market on its preliminary view of the technical advice. The consultation ended on 29 November 2019 and received 97 responses. In September 2020, ESMA published its technical advice addressing all the topics on which the Commission asked advice on and identified several other provisions which were considered important to review in MAR ('ESMA TA'). According to ESMA,both the feedback to the consultation and NCAs experience indicate that, overall, the regime introduced by MAR works well. Accordingly, only a few targeted changes to the legislative framework have been recommended, sometimes to provide guidance at level 3(e.g. on inside information and delayed disclosure of inside information). However,according to the CMU HLF and the TESG reports, there are a number of MAR provisions and requirements that may sometimes act as a disincentive for companies to list and remain listed on regulated markets and/or MTFs. The cost of complying with these requirements is deemed high, especially for SMEs. The legal uncertainty arising from certain provisions is indicated as an additional source of costs. Finally, the sanctioning regime is considered not proportionate and a discouraging factor for going and remaining public.

While the market abuse regime is crucial to safeguard market integrity and investor confidence, the Commission aims to assess if there is room for some targeted amendments and alleviations in the requirements laid down by MAR, in order to ensure proportionality and reduce burdens.

2.2.1. Costs and burden stemming from MAR

44. (a) For each of the MAR provisions listed below, please indicate how burdensome the EU regulation is for listed companies (please rate each of them from 1 to 5, 1 standing for "not burdensome at all" and 5 for "very burdensome"):

	1	2	3	4	5	Don't know / no opinion / not relevant
Definition of "inside information"						
• For all companies					X	

• For issuers listed on SME growth markets						
Disclosure of inside information						
• For all companies						
• For issuers listed on SME growth markets						
Conditions to delay disclosure of inside information						
• For all companies						
• For issuers listed on SME growth markets						
Drawing up and maintaining insiders lists						
• For all companies					X	
• For issuers listed on SME growth markets						
Market sounding						
• For all companies					X	
• For issuers listed on SME growth markets						
Disclosure of managers' transactions						
• For all companies						
• For issuers listed on SME growth markets						
Enforcement						
• For all companies						
• For issuers listed on SME growth markets						
Other (please specify in the textbox below)						

(b) Please explain your reasoning and, if possible, provide supporting evidence, notably in terms of costs (one-off and ongoing costs) *[4000 character(s) maximum]*

ICMA:

Definition of "inside information" – Since MAR's definition of inside information is (notably compared to the US's scienter-based definition) relatively wide and open-ended (and compounded by MAR's scope extension to MTFs/OTFs as noted in the response to Q45), bond market participants often find themselves conservatively treating information 'as inside' when unable to conclude definitively whether it is either inside information or not inside information. This also impacts decision making as to whether information is subsequently 'no longer' inside information. The impact relates not just to issuers' ad hoc disclosure obligation, but also compounds the burdensome nature of the sounding regime.

Drawing up and maintaining insiders lists – The logistical burden of insider lists is one significant reason why many borrowers do not seek admission to an EEA trading platform. The key purpose of insider lists should be to evidence who was in possession of or had access to inside information at a specific moment in time. (And as a corollary, insider lists can also to an extent be helpful for issuers to manage the confidentiality of inside information flows.) However, a single official identity number (such as a passport number) is sufficient for any name disambiguation in this respect – requiring inclusion in insider lists of any and all identity numbers seems disproportionate. In terms of requiring inclusion of a person's every contact detail (phone numbers, e-mail addresses etc), it seems unlikely that insiders premeditating insider trading would use such contact details for that purpose. So there might be scope for the *ex ante* requirement to be more limited, with such details provided on demand to NCAs. Simplifying the insider list requirements accordingly would reduce administrative burdens whilst still supporting the objective of protection from insider trading.

Market sounding – Market sounding notably enables a borrower to check privately with a few meaningful investors whether the likely terms for a bond issuance transaction fits the borrower's corporate objectives, where this is not otherwise clear from existing information (e.g. secondary trading curves). This is particularly so for borrowers that are new or infrequent, either generally or in a particular currency/maturity segment (all the more so if there is sparse activity from other borrowers). If a borrower only discovered this after publicly launching the transaction and therefore had to cancel it, it would suffer a significant loss of goodwill from investors who would have wasted valuable resources preparing themselves for the new issue (due diligence, credit lines and liquidity arrangement, etc). This, in turn could prejudice investors' willingness to participate in future transactions, and in turn that borrower's future access to bond market funding.

Anecdotal reports indicate that the incidence of market sounding has substantially reduced since the introduction of MAR in 2016 as investors have reportedly increasingly refused to be sounded (at least in the investment grade context). Admittedly one NCA's initial finding 2018 was that "many firms were using" the MAR sounding regime – but it also acknowledged having "heard that [bull] market conditions were rendering market soundings less necessary" (in the investment grade context particularly). A concern thus arises to the extent systematic volatility consequently increases once current market sentiment turns from 'bullish' to 'bearish'.

2.2.2. Scope of application of MAR

According to Article 2(1)(b), MAR applies to financial instruments traded or admitted to trading on a multilateral trading facility (MTF) or for which a request for admission to trading on an MTF has been made. In the latter case, MAR would start to apply with respect to companies that have only submitted a request but are not yet trading on an MTF. Some stakeholders underline that, as securities are not yet traded at the moment of the submission of a request, investors cannot acquire them and hence the protections under MAR are not necessary.

45. In your opinion, if MAR requirements started applying only as of the moment of trading, would there be potential cases of market abuse between the submission of the request for admission to trading and the actual first day of trading?

- o Yes

- No
- **Don't know/ no opinion / not relevant** ✓

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

The challenge is rather that MAR's scope extension from regulated markets (under MAD) to MTFs and OTFs hugely increased the range of securities covered– but without reliable real-time identification to help stakeholders. This compounded MAR's relatively wide and open-ended inside information definition. So whether a transaction/issuer is in scope, and therefore whether related information amounts to inside information, is always up for debate with issuers whose primary listings are not in the EU but whose securities have been admitted to trading on an MTF/OTF by a third party, unknown to them.

There was no such problem under MAD, since the in-scope regulated markets were fewer in number and more formalised and slower (so more visible) in their admission process that preceded any trading (including publication of a prospectus that could only really be done by the relevant borrower). In contrast many MTFs and OTFs can apparently admit and/or otherwise allow trading of securities, including as yet non-existent securities on a 'grey' ('if and when issued') basis. Whilst this arguably helps more efficient trading (with its attendant benefits), there is consequently an important need for a definitive real-time ability to identify 'EEA platform' securities. This could perhaps be done by trading platforms reporting relevant ISINs directly to a central mechanism (perhaps the ESAP?) as and when they are admitted or first traded or otherwise publishing them in a manner that enables them to be efficiently collated by external software.

It is also worth noting that many midcap corporates seeking funding (say €70m) will choose to undertake unlisted bond funding to avoid being subject to MAR's burdens despite the lack of a listing capping investor demand (say at just €30m) – with the balance being made up by bank funding (which may not endure past the end of central bank quantitative easing). This would not have been the case had MAR scope not been extended to MTFs.

2.2.3. The definition of "inside information" and the conditions to delay itsdisclosure

Currently the notion of inside information makes no distinction between its application in the context, on the one hand, of market abuse and, on the other hand, of the obligation to publicly disclose inside information. However, inside information can undergo different levels of maturity and degree of precision through its lifecycle and therefore it might be argued that in certain situations inside information is mature enough to trigger a prohibition of market abuse but insufficiently mature to be disclosed to the public.

According to stakeholders, the current definition of inside information may raise problems, notably (i) for the issuer, the problem of identification of when the informationbecomes "inside information" and (ii) for the market, the risk of relying on published information which is not yet mature enough to make investment decisions.

ESMA, however, considers that the current definition of inside information "*strikes a good*

balance between being sufficiently comprehensive to cater for a variety of market abuse behaviours, and sufficiently prescriptive to enable market participants, in most cases, to identify when information becomes inside information" and recommended to leave the definition unchanged. ESMA however acknowledged that clarifications were sought by stakeholders both on the general interpretation of certain paragraphs of Article 7 of MAR (for instance, as regards intermediate steps, or the level of certainty needed to consider the information as precise), and on concrete scenarios. Therefore, ESMA stands ready to issue guidance on the definition of inside information under MAR.

46. (a) Do you consider that clarifications provided by ESMA in the form of guidance would be sufficient to provide the necessary clarifications around the notion of inside information?

- o Yes
- o **No** ✓
- o Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

Since MAR's definition of inside information is (notably compared to the US's scienter-based definition) relatively wide and open-ended (and compounded by MAR's scope extension to MTFs/OTFs as noted in the response to Q45), bond market participants often find themselves conservatively treating information 'as inside' when unable to conclude definitively whether it is either inside information or not inside information. This also impacts decision making as to whether information is subsequently 'no longer' inside information. The impact relates not just to issuers' ad hoc disclosure obligation, but also compounds the burdensome nature of the sounding regime. In this respect, it should be borne in mind that a set piece of information may be more likely to be characterised as inside information in an illiquid market than in a liquid market (since trades are likelier to be price moving at a lower threshold size).

(b) If you answered "No" to question 46(a), please indicate if you would support the following changes or clarifications to the current definition of "inside information" under MAR, by putting X in the box corresponding to your chosen option(s):

	I support	I don't support	Don't know/no opinion/ not relevant
a) MAR should distinguish between a definition of inside information for the purposes of market abuse prohibition and a notion of inside information triggering the disclosure obligation.			

b) The definition of inside information with a significant price effect should be refined to clarify that "significant price effect" shall mean "*information a rational investor would be likely to consider relevant for the long-term fundamental value of the issuer and use as part of the basis of his or her investment decisions*".			
c) It should be clarified that inside information relating to a multi-stage process need only be made public once the end stage is reached, unless a leakage has occurred.			
e) Other (please specify below)			

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

Regarding distinguishing between a definition for the market abuse prohibition and one for triggering the disclosure obligation, allowing issuers not to disclose some inside information will not impact insiders (that will still treat it like other inside information) and it is also difficult to comment without knowing what the distinction would be.

2.2.4. Disclosure of inside information for issuers of bonds only

The TESG underlines that plain vanilla bonds are less exposed to risks of market abuse due to the nature of the instrument and, as a consequence, argues that the disclosure of all inside information for debt issuers (either positive or negative) only would be burdensome and not justified.

49. Please specify whether you agree with the following statements (please put an X in the box corresponding to the chosen option for each requirement listed on the table):

Issuers that only issue plain vanilla bonds should…	**Yes**	**No**	**Don't know/no opinion/not relevant**
(a) have the same disclosure requirements as equity issuers		X	
(b) disclose only information that is likely to impair their ability to repay their debt	X		

Please explain and illustrate your reasoning, notably in terms of costs (one-off andongoing costs). *[4000 character(s) maximum]*

ICMA:

In terms of information about the issuer, the value of debt securities is not impacted by the profitability of the issuer – its solvency being the relevant financial consideration. (This is recognised under the Prospectus Regulation regime, with DR EU/2019/980 Annex 6, Item

3.1 requiring disclosure only of risks "that may affect the issuer's ability to fulfil its obligations under the securities".)

However, the proposal that issuers with plain vanilla bonds only should only be required to disclose information that is likely to impair their ability to repay their debt does not take into account that information relating to the bonds themselves also needs to be disclosed. For example, in the case of liability management transactions, an issuer exercising a call or a put window becoming available. Any definition of inside information therefore needs to include this second limb. The categories of bonds to which the narrower definition of inside information would apply, would also have to be very clearly defined – in other EU EU legislation e.g. PRIIPs there has been much debate in the market regarding its scope of application leading to a conservative approach being adopted in many cases.

For many issuers and in many cases, disclosing only information relating directly to an issuer's ability to repay their debt and information relating to the bonds will be appropriate and this is generally the starting point many debt only issuers use to frame their disclosure obligations. However, there are circumstances in which other factors are relevant and it is impossible to predict across a vast spectrum of issuers the type of corporate events which may be relevant even to holders of debt instruments. Narrowing the definition of inside information for debt only issuers potentially over-simplifies the interests of bondholders and could cause information gaps on which an issuer will be judged with the benefit of hindsight. Whilst new issuers often grapple with MAR (see next paragraph), established issuers will have internal policies in place to identify possible inside information and may not welcome change which could involve additional complexity and change established practices.

However, the burden of compliance with MAR is a key factor – or, for some prospective issuers, the key factor – when deciding whether to access the capital markets. It is not uncommon for private placement issuances of debt to be listed for tax or other regulatory reasons for debut issuers and therefore be caught by the scope of MAR. Where there are one or few investors with whom information can be easily shared on a bilateral basis, query whether it is necessary to subject such bonds to MAR as this is unduly burdensome and costly to issuers. It is worth noting in this respect that many midcap corporates seeking funding (say €70m) will choose to undertake unlisted bond funding to avoid being subject to MAR's burdens despite the lack of a listing capping investor demand (say at just €30m) – with the balance being made up by bank funding (which may not endure past the end of central bank quantitative easing).

2.2.6. Insider lists (Article 18)

While insider lists are supposed to assist NCAs in investigating cases of insider trading, stakeholders underline that the maintenance of insiders list require regular monitoring and adjustment and are particularly burdensome. As a result of the SME Listing Act, issuers whose financial instruments are admitted to trading on an SME growth market have been entitled to include in their lists only those persons who, due to the nature of their function or position within the issuer, have regular access to inside information. At the same time, Member States may opt out from such regime and require more information.

In light of the fact that national competent authorities consider the insider lists to be a key tool in market abuse investigations, in its final report on the review of the Market Abuse Regulation, ESMA did not suggest extensive alleviations to the insiders list rules, proposing only minor adaptations to the current regime.

The TESG however found the costs of the insiders list for smaller issuers too high and recommended to remove the obligation for issuers with a market capitalisation below EUR 1 billion to keep an insider list, and to further reduce and simplify the content of theinsider list for other issuers.

57(a) Please indicate whether you agree with the statements below:

The insider list regime should…	Yes	No	Don't know -No opinion
be simplified for all issuers to ensure that only the most essential information for identification purposes is included.	X		
be simplified further for issuers listed on SME growth markets			X
be repealed for issuers listed on SME growth markets			X
Other (please specify)			X

(b) Please explain your reasoning and provide supporting arguments/evidence, in particular in terms of savings/reduction in costs: [2000 character(s) maximum]

ICMA:

The logistical burden of insider lists is one significant reason why many borrowers do not seek admission to an EEA trading platform.

The key purpose of insider lists should be to evidence who was in possession of or had access to inside information at a specific moment in time. (And as a corollary, insider lists can also to an extent be helpful for issuers to manage the confidentiality of inside information flows.) However, a single official identity number (such as a passport number) is sufficient for any name disambiguation in this respect – requiring inclusion in insider lists of any and all identity numbers seems disproportionate.

In terms of requiring inclusion of a person's every contact detail (phone numbers, e-mail addresses etc), it seems unlikely that insiders premeditating insider trading would use such contact details for that purpose. So there might be scope for the ex ante requirement to be more limited, with such details provided on demand to NCAs.

Simplifying the insider list requirements accordingly would reduce administrative burdens whilst still supporting the objective of protection from insider trading.

2.2.7. Market sounding

Conducting market soundings may require disclosure to potential investors of inside information. However, market soundings are a highly valuable tool for the proper functioning of financial markets, and, as such, they should not be regarded as market abuse. The current regime requires the disclosing market participant, before engaging ina market sounding, to i) assesses whether that market sounding involves the disclosure ofinside

information; ii) inform the person to whom the disclosure is made of the possibility of receiving inside information and of all the consequential requirements; and
iii) maintain records of the disclosure.

In the context of the public consultation launched in 2017 for the preparation of the SME Listing Act, several stakeholders described the requirements for conducting market sounding as burdensome, particularly in connection with private placements. Due to concerns on the risk of unlawful dissemination of inside information, market sounding rules were then only alleviated for private placements of debt instruments. The TESG, in its final report, however proposed to extend the exemption from market sounding rules to private equity placements.

The public consultation carried out by ESMA in 2020 for the MAR review final report confirmed stakeholders' concerns on the complexity of the market sounding regime and their request to reduce the scope of the market sounding regime. Nonetheless, ESMA recommended to keep the current scope of the market sounding regime unchanged and rather look into ways to simplify the market sounding procedures (ESMA final report paragraphs 6.3.3 and ff.).

58(a) Do you consider that the ESMA's limited proposals to amend the market sounding procedure are sufficient, while providing a balanced solution to the need to simplify the burden and maintaining the market integrity?

- Yes
- **No** ✓
- Don't know/No opinion/not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

(b) If you answered no to question 58(a), how would you further amend the market sounding regime?

Issuers listed on SME growth markets	[*No ICMA response*]
Issuers listed on regulated markets	ICMA: The sounding regime should be reconfirmed as being safe harbour rather than being defined as a standalone obligation. Regarding the reasoning for the 'no' response to Q58 on the sufficiency of ESMA's limited market sounding proposals, ESMA acknowledged different readings of the regime's current enforceability (ICMA's response had raised this) and consequently proposed MAR be amended to clarify that MAR's Article 11 requirements are indeed obligatory (and not just a safe harbour), including provision for mandatory (rather than

	voluntary) national sanctioning powers. ESMA also proposed to amend the definition of market sounding to clarify that the regime applies not only where a transaction announcement follows the interactions concerned. It otherwise decided specific cases not be excluded from the regime's scope, noting negotiation/offering is already outside of definition following the recent SME listing package (Regulation EU/2019/2115). (Many considered this was the case even before that, with appropriate controls nonetheless still being applied where inside information is involved.) In terms of simplifying the regime's procedural provisions, ESMA proposed: (a) where no inside information is communicated, (i) that no prior consent be required from the market sounding recipient (MSR) to receive inside information, (ii) that no related prohibition/ confidentiality warnings need be given and (iii) that no further notice be required regarding information assessed as no longer being inside information – however these provisions might have already seemed to be intrinsically inapplicable; (b) where inside information is communicated, (i) that no further notice be required regarding information assessed as no longer being inside information where the transaction is publicly announced, (ii) that where recording facilities are not available, written minutes agreed and exchanged via email or other electronic means suffice without a more formal exchange of signatures and (iii) that follow-up discussions can be covered by the initial market sounding warnings – however these alleviations, whilst welcome per se, are not expected not have a major impact on the overall burdens arising from the regime; (c) in both cases, an ESMA power to amend its Guidelines on Persons Receiving Market Soundings (ESMA/2016/1477) to add recommendations specific to different MSRs (being "natural and legal persons, regulated and nonregulated entities, SMEs and large cap issuers"). ESMA's conclusions at least on the enforceability of the market sounding regime are disappointing (notwithstanding ESMA's proposed technical alleviations), to the extent they add additional administrative burdens and further disincentivise market sounding even where it is clear no inside

	information is involved – rather than "encourage" it, in line with ESMA's view of the regime's purpose. Anecdotal reports indicate that the incidence of market sounding has substantially reduced since the introduction of MAR in 2016 as investors have reportedly increasingly refused to be sounded (at least in the investment grade context). Admittedly one NCA's initial 2018 finding was that "many firms were using" the MAR sounding regime – but it also acknowledged having "heard that [bull] market conditions were rendering market soundings less necessary" (in the investment grade context particularly). A concern thus arises to the extent systematic volatility consequently increases once current market sentiment turns from 'bullish' to 'bearish'.
Issuers on other markets (MTFs)	ICMA: See our response related to regulated markets above, which applies equally in the context of MTFs (but see also the problems arising from MAR's scope extension to MTFs/OTFs as noted in the response to Q45).

2.4 Other possible areas for improvement

2.4.1 Transparency Directive (Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market)

Transparency of publicly traded companies' activities is essential for the proper functioning of capital markets. Investors need reliable and timely information about the business performance and assets of the companies they invest in and about their ownership.

The Transparency Directive (Directive 2004/109/EC) requires issuers of securities traded on EU regulated markets to make their activities transparent, by regularly publishing certain information. The information to be published includes: (i) yearly and half-yearly financial reports; (ii) major changes in the holding of voting rights; (iii) ad hoc inside information which could affect the price of securities. This information must be released in a manner that benefits all investors equally across the EU.

The Transparency Directive was amended in 2013 by Directive 2013/50/EU to reduce the administrative burdens on smaller issuers, particularly by abolishing the requirement to publish quarterly financial reports, and make the transparency system more efficient, in particular as regards the publication of information on voting rights held through derivatives.

The Commission has recently adopted a harmonised electronic format for annual financial reports developed by ESMA (the European Single Electronic Format, ESEF). The ESEF has been applicable since 1 January 2021, except for 23 Member States who opted for a 1-year postponement. It makes reporting easier and facilitates accessibility, analysis and comparability of reports.

The Commission published in April 2021 a fitness check report accompanying the Commission report to the European Parliament and the Council on – inter alia – the operation of the 2013 amendment to the Transparency Directive. These reports indicate an overall good effectiveness of the corporate reporting framework, while highlighting areas for potential improvement, for instance in relation to supervision and enforcement.

82(a) Do you consider that there is potential to simplify the Transparency Directive's rules on disclosures of annual and half-yearly financial reports and on the ongoing transparency requirements for major changes in the holders of voting rights, keeping in mind the need to facilitate accessibility, analysis and comparability of issuers' information and to maintain a high level of investor protection on these markets?

- Yes
- **No** ✓
- Don't know/ no opinion / not relevant

83. Would you have any other suggestion to improve the current rules laid down in

the Transparency Directive?

Please explain your reasoning: [*4000 character(s) maximum*]

ICMA:

Overall, there are no significant issues with the Transparency Directive (TD) from the perspective of the international bond markets, although the lack of alignment between the Home Member State definitions in the TD and Prospectus Regulation can give rise to some confusion in practice.

Some market participants note that it would be more straightforward to interpret and apply the TD regime if the rules were set out in a Regulation, rather than a minimum harmonisation directive, particularly because local implementation of the TD is in a number of different languages. However, other market participants do not consider that the minimum harmonisation nature of the TD causes significant issues in practice and note that this type of change would be unlikely to make a practical difference to the policy objectives of encouraging companies to access public markets. Therefore changes to the TD (including a change to the Directive format), may not be considered to be a priority in terms of focusing official sector (and market) resources in the most effective way to achieve the overarching policy goals of the Listing Act and the broader CMU initiative.

The EU's prospectus and transparency regimes are not aligned in certain areas, because the Prospectus Regulation was reformed in 2017 and the TD has not been updated to reflect those changes. The main example of this misalignment is the situation for issuers of "wholesale" low denomination bonds admitted to a "qualified investors only" segment of a regulated market. Under the Prospectus Regulation, issuers of these bonds benefit from the "wholesale" disclosure regime and do not need to prepare a prospectus summary. However, such issuers do not benefit from the same alleviations that an issuer of "wholesale" bonds with a high denomination would have under the TD because the TD has not been updated to reflect the new "wholesale" regime for low denomination bonds admitted to a "qualified investors only" segment of a regulated market, which was introduced under the Prospectus Regulation.

The equivalence rules under Article 23 (which allow a competent authority of the home Member State to make equivalence determinations) do not work well in practice.

2.4.3 Listing Directive (Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities)

The Listing Directive (Directive 2001/34/EC) concerns securities for which admission to official listing is requested and those admitted, irrespective of the legal nature of their issuer. The Listing Directive aims to coordinate the rules with regard to (i) admitting securities to official stock-exchange listing and (ii) the information to be published on those securities in order to provide equivalent protection for investors at EU level.

The Prospectus Directive and the Transparency Directive further consolidated rules harmonising the conditions for the provision of information regarding requests for the admission of securities to official stock-exchange listing and the information on securities

admitted to trading. Therefore, those directives amended the Listing Directive removing overlapping requirements (i.e. deleting Articles 3, 4, 20 to 41, 65 to 104 and 108 of the Listing Directive). Furthermore, MiFID replaced the notion of 'admission to the official listing' with 'admission to trading on a regulated market'.The Listing Directive is a minimum harmonisation directive. It allows EU Member States to put in place additional requirements for admission of securities to officiallisting, provided that (i) such additional conditions apply to all issuers; and (ii) they have been published before the application for admission of such securities.

92.(a) Do you consider that the Listing Directive, in its current form, achieves its objectives and does not need to be amended?

- **Yes** ✓
- No
- Don't know/ no opinion / not relevant

Please explain your reasoning: *[2000 character(s) maximum]*

ICMA:

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. This is because 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 unintended consequences if it is amended or repealed.