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**WK 12974/2022 INIT**

**LIMITE**

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## **MEETING DOCUMENT**

From:	Presidency
To:	Working Party on Financial Services and the Banking Union (Sustainable Finance) Financial Services Attachés
N° Cion doc.:	ST 10027/21 - COM(2021) 391 final
Subject:	Council Working Party 6 October 2022 - European Green Bonds - Presidency Cover Note

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WK 12974/2022 INIT

**LIMITE**

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# CWP 6 October 2022 (European Green Bonds)

## Presidency Cover Note

In the first political trilogue on 12 July 2022 the Council presidency and the rapporteur Paul Tang presented the negotiating mandates of their respective institutions. Following the exchange of positions, the Commission Services were invited to submit four non-papers to further inform deliberations in the next political trilogue.

The purpose of this note is to seek the positions of the Member States. The Member States are invited to emphasize their red lines and indicate room for flexibility.

The Council Secretariat circulated the Commission Services non-papers on 20 September 2022 (WK 12303 2022 INIT (on civil liability), WK 12305 2022 INIT (on the interplay with other SF legislation related to disclosure), WK 12306 2022 INIT (on the use of proceeds in the EuGB) and WK 12307 2022 INIT (on the treatment of securitisation in the EuGB standard)).

### 1. Civil liability

The initial Commission proposal of Article 12 lays down the civil liability requirements. Article 12 only applies to those EuGB issuers that publish the prospectus in accordance with the Prospectus Regulation. However, the Council' mandate introduced two additional paragraphs 3 and 4 in that Article (lines 129a and 129b). The additional provisions require EuGB issuers that do not publish a prospectus to make a statement in the legal documentation that the bond is issued in accordance with the EuGB Regulation. In addition, issuers must undertake the bond complies in all material respects with the requirements of Title II of the EuGB Regulation.

The EP, on the other hand, introduces a new Article 12a (line 129c), where civil liability is attached to the issuers or their administrative, management or supervisory bodies in relation to the taxonomy-aligned allocation of proceeds provided for in Articles 4 to 7. In addition, another EP amendment makes the inclusion of a factsheet in the Prospectus mandatory (line 129).

The Commission Services non-paper does not see merit in the amendments made by the EP, with costs exceeding potential benefits. At the same time, it raises concerns about possible legal consequences of the Council text. The Presidency would be interested in knowing MSs' positions regarding this issue.

***Question 1:** Would MSs accept the EP 's new Article 12a? If so, would further changes be needed? What national implementation measures would be necessary in each MS if the new Article 12a is accepted?*

***Question 2:** Do MSs think that the inclusion of the factsheet in the Prospectus should be a mandatory?*

## 2. The interplay with other SF legislation related to disclosure

The Commission Services non-paper addresses the EP amendments aimed at tackling greenwashing and raising EuGB's level of ambition by introducing more stringent and broader disclosure requirements. The amendments are analysed against the backdrop of legislative acts and initiatives, most notably SFDR, CSRD, the Taxonomy Regulation and CSDDD proposal.

Firstly, the non-paper concludes that, within the EU sustainable finance framework, the EP's amendments are largely duplicative. On the occasions where there is not a complete overlap, the non-paper argues, the regulated entities would be faced with substantial difficulties when navigating through different pieces of legislation to find with what provisions to comply.

Secondly, the non-paper argues against the broadening of the scope as proposed by the EP to include two additional categories of issuers: those issuing green bonds without using the EuGB standard and those issuing sustainability-linked bonds. The paper mentions a possible undermining of the EU market for green issuances and of the EU's leading position on the global market.

Overall, the conclusions of the non-paper seem to mirror the stance taken by the majority of Member States when discussing the EP proposal in the June working party and submitted in their written comments.

**Question 3:** *In general, do you agree with the non-paper's conclusions, or not?*

*More specifically, do you agree that:*

*A) the proposed changes to requirements listed as duplicative (lines 100f, 23a, 100j-100n, 100g, 100h, 634 and 644) are not necessary and create confusion, and*

*B) it is not desirable to further expand on the scope to other green bonds and sustainability-linked bonds (lines 100g, 100h, 634, 644)?*

**Question 4:** *Are there any EP amendments concerning disclosure requirements and scope that you welcome and would like to keep in the proposal?*

**Question 5:** *Similarly to the previous question, what elements would you find least problematic, should the EP insist on keeping some of its proposed text?*

**Question 6:** *In case you agree with the EP's goal to introduce more transparency and accountability, but disagree on the means the EP proposes to achieve them, is there an alternative proposal you would have to some of the provisions?*

### 3. The use of proceeds in the EuGB

On grandfathering: As the Taxonomy screening criteria may evolve over time, the Commission proposes five years of grandfathering. Bonds using the gradual approach may continue to allocate for five years from the change of the screening criteria, while for portfolio approach the five years grandfathering requires non-compliant assets to be removed from the portfolio. The Council's mandate proposes full grandfathering, meaning that the period would be extended from five years to unlimited. In other words, any change of Taxonomy criteria after the bond issuance would not affect the use of proceeds. The Commission non-paper does not identify any serious consequence of unlimited grandfathering as most of non-financial companies usually fully allocate proceeds a couple years after the issuance. EuGB issuances making use of the portfolio approach would, however, be affected as all loans could remain in the portfolio even if not being "green" under Taxonomy screening criteria. The grandfathering under the EP mandate is to be extended to 10 years only for debts, with non-financial assets remaining under the five years grandfathering. Proceeds that have already been allocated do not have to be reallocated even after expired grandfathering.

On financial assets: The Commission initial proposal of Title II contains two possible uses of proceeds: the gradual approach as a general rule, and the portfolio approach for financial assets. Under Article 4(1), the Commission proposes four purposes for fund allocation: fixed asset, capital expenditures (CapEx), operational expenditures (Opex) and financial assets. For financial assets, the proposal requires their full allocation before the maturity. The EP report introduces a three-year time limit for creating financial assets after the bond issuance in case of the gradual approach. The Commission Services non-paper explains that the EP proposal would require issuers to have green loans on the balance sheet or generate new green loans to match the amount of bond within three years.

On CapEx: Regarding capital expenditures, issuers must adopt a CapEx Plan explaining how Taxonomy criteria will be met in the project. The limit for CapEx proposed by the Commission is five years or 10 years (for specific activities). On top of that, the EP would like to amend CapEx in several ways. The EP maintains the duration of CapEx Plans of five plus five years but reduces it to two years with no extension for activities classified as "transitional" under the Taxonomy Regulation. The EP also proposes requiring a yearly external review (rather than only one external review, at full allocation, as provided for in the Commission proposal), and deeming the bond as non-compliant if two consecutive yearly targets are missed. The EP proposes using the definition of CapEx from the Taxonomy Regulation and mandating the Commission to create a list of activities eligible for 10 years CapEx. The Commission Services non-paper cautions that new requirements related to CapEx may render the EuGB difficult to use for issuers wishing to finance new Taxonomy-aligned investments, and especially difficult in the case of transitional economic activities, such as manufacturing, steel, cement, etc.

*Question 7: Would MSs support the three years limit for creating financial assets after bond issuance as proposed by the EP?*

*Question 8: Would MSs agree to link the definition of CapEx to the Taxonomy Regulation and mandating the Commission to create a list of activities eligible for extended (10 years) CapEx Plan?*

*Question 9: The CapEx plan is proposed to be limited to five + two years in general, and to only two years with no extension for transitional economic activities by the EP. The CapEx plan is also proposed to be subject to yearly external review by the EP. The Commission did not support these two amendments. Would the EP approach be acceptable for MSs?*

*Question 10: Would MSs agree to the EP extension of grandfathering to 10 years only for financial assets and keeping five years grandfathering for non-financial assets?*

*Question 11: The Council's full grandfathering for non-financial companies was recognized, however, the Commission Services non-paper identifies certain negative impacts for the portfolio approach. Would MSs prefer to maintain the Council's mandate, or would they be willing to show flexibility?*

#### 4. The treatment of securitisation in the EuGB standard

The Council's mandate and the initial Commission proposal do not lay down any specific requirements as regards the treatment of securitisation.

The Commission Explanatory Memorandum to the proposal clarifies that the framework is also intended to be usable for issuers of securitisations, the securities of which are issued by special purpose vehicles. The memorandum also suggests a possible reexamination of the issue once the then foreseen Report by the EBA on sustainable securitisation is published. The EBA published its Report on 2 March 2022.<sup>1</sup>

The EP inserted a placeholder (line 94c) which reads as follows: "Where a European green bond is used for securitisation purposes, the requirements of Article 6 shall apply to the entity from which the issuance economically originates."

Since the securitisation value chain comprises two actors (a bank as the originator and a securitisation special purpose entity (SSPE) as a the EuGB issuer), the greenness (or Taxonomy alignment) might be attributed either to existing assets underpinning the securitisation or to the future investments funded by the EuGB proceeds. There might also be different transparency modalities. The Commission Services propose the following five Options:

Option 1: Use of proceeds by SSPE (the approach taken by the Council's mandate and the Commission initial proposal)

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<sup>1</sup> <https://www.eba.europa.eu/eba-recommends-adjustments-proposed-eu-green-bond-standard-regards-securitisation-transactions>

Option 2: Future use of proceeds by the originator with additional transparency requirements (as recommended by the EBA report)

Option 3: Double green (use of proceeds by the SSPE with the future use of proceeds by the originator (Option 1 and Option 2))

Option 4a: Future use of proceeds by the originator (Option 2) transitioning into the use of proceeds by SSPE (Option 1)

Option 4b: Future use of proceeds by the originator (Option 2) transitioning into double green (Option 3)

The Commission Services maintain they stand ready to propose a legal draft once an option had been chosen.

**Question 12:** *What would be the MSs order of preference in terms of the five Options above?*

**Question 13:** *Would there be any option(s) the MSs would prefer to discard from the outset?*