Consultation Paper

Draft Guidelines on supplements which introduce new securities to a base prospectus

Q1: Do you agree with draft Guideline 1 proposed by ESMA and ESMA's reasoning? If not, please explain why.

The objective to create a uniform understanding of the conditions under which a supplement is permissible and when a new prospectus is required is welcome. From a practical perspective, the proposed definition appears overly restrictive and, in part, inconsistent. A narrow interpretation of Article 23(4a) PR would, in many cases, prevent a quick adjustment of prospectuses by supplement and instead force the costly and time-consuming preparation of completely new prospectuses. This would be a contrast to the issuing practice, which created supplements precisely as a flexible instrument to efficiently reflect changes during the offering period without unnecessarily hindering the issuer in its issuing activities. If the basic structure of a product is clearly laid out in the base prospectus and that is not changed by a subsequent supplement is a flexibility that should be maintained.

We would like to highlight the following points:

- In paragraph 12, the draft guidelines list examples of cases in which a supplement should not be permitted. This includes the **introduction of a new fixed-to-floating interest payment clause** or a **new step-up/step-down of interest payments**. These examples seem **overly restrictive**. An adjustment of the interest rate structure does not necessarily constitute a fundamentally new type of security; it merely modifies the terms of the interest calculation. Minor or technical adjustments to the interest rate structure, such as a change from a fixed to a floating interest rate or the introduction of a step-up/step-down mechanism, can be clearly and comprehensibly explained in a supplement without requiring an entirely new prospectus. On the contrary, a supplement that clearly presents such interest rate changes promotes transparency, whereas issuing a new prospectus for a merely modified interest rate would be disproportionate. Furthermore, the prohibition of such changes in interest rate structure via supplement contradicts Guideline 2 (para. 16), which explicitly recognizes that limited adjustments to existing repayment or interest calculation formulas should be possible via supplement. It should consistently be permitted to adjust interest-related contractual clauses via supplement, if this does not result in a completely new risk profile for the security and the change is included in the prospectus in a way that is comprehensible to the investor.
- Also in para. 12, the draft guidelines stipulate that the **introduction of a new guarantee** may not be made via supplement. The subsequent inclusion of a guarantee for previously issued securities is exclusively advantageous from an investor's perspective, especially if the security was previously unsecured. The guarantor assumes an additional legal obligation, thereby strengthening the position of the investor. There is no apparent objective reason why such a step, which is beneficial to investor interests, should not be

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included in a supplement. While the introduction of a new guarantor requires additional information (e.g., regarding the guarantor's creditworthiness) in the prospectus, this information can be presented just as completely and verifiably in a supplement as in a new prospectus. A new guarantee can be considered a "material new factor" within the meaning of Article 23(1) PR and described accordingly. The fact that investors will be entitled to more extensive protection in the future does not justify the more complex publication of a new prospectus, especially since the latter would not provide investors with any additional insight but would be purely formal in nature. The same applies to changes to the scope of an existing guarantee: For example, it should be possible to subsequently expand or strengthen a guarantee already described in the prospectus, provided the additional information is clearly disclosed in the supplement. Overall, supplements containing changes that are beneficial to investors should always be allowed. A ban on supplementary disclosure in such cases would amount to mere formalism.

- The **prohibition on including a new type of underlying** by means of a supplement to an already approved base prospectus is not justified. This provision appears to be too narrowly worded. The inclusion of a further underlying by means of a supplement should be possible, provided that the base prospectus already contains information on a (different) underlying. Prospectuses for structured securities must contain certain minimum information on the underlying in accordance with Annex 17 CDR 2019/980. If the prospectus is drawn up in accordance with these requirements and therefore already contains information on at least one underlying, **the introduction of an additional underlying falls within the range of information already covered**. In concrete terms, it means that, if, for example, the prospectus already describes stock indices as underlyings, a further stock index or a comparable underlying can be added by means of a supplement without creating a completely new prospectus category. The required information (e.g., regarding the functionality, volatility, and historical performance of the new underlying) follows the same structure defined in Annex 17 that is already included in the prospectus. A supplement can easily provide this information. This understanding is based on the wording of Article 23(1) PR, which states that the supplement must refer to information that is *contained in the prospectus*. Such "information already contained" does not mean any information in the prospectus, but rather the (minimum) information specified in the annexes to the CDR 2019/980. In other words: If a change remains within the scope of the information already covered by the base prospectus, it can be made by supplement. Conversely, a supplement would be inadmissible if, for example, a base prospectus focused exclusively on bonds (without an underlying) is supplemented for the first time to include structured products with an underlying. In these cases, a new prospectus is required.

Finally, it should be clarified that the examples referred to (interest rate adjustment, guarantee, underlying asset, etc.) only concern new introductions, not the **correction of originally erroneous information**. If, for example, an interest rate formula or guarantee description originally contained in the prospectus is factually incorrect or incomplete, a supplement to correct it must remain possible.

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Q2: Do you agree with draft Guideline 2 proposed by ESMA and ESMA's reasoning? If not, please explain why

This guideline aims to ensure that a base prospectus covers, from the outset, all types of securities that the issuer expects to issue during its term of validity. A strict implementation of this requirement would entail **numerous practical disadvantages**. First of all, it would result in significantly more extensive and confusing prospectuses. An average investor might have difficulty discerning which security features are relevant and planned and which are mentioned merely for the sake of prospectus coverage.

Therefore, this guideline should instead be worded more openly. If supplements are permitted to a reasonable extent, **not every product variation needs to be preemptively included in the base prospectus**. The issuer can keep the prospectus leaner and supplement it only when necessary, which improves comprehensibility and clarity from an investor's perspective.

If ESMA adheres to the principle of describing all product types in advance, if possible, it should reconsider the (non-exhaustive) list of security types and case categories in paragraph 15. Such a broad list could mean that each of the listed products must necessarily be viewed as a separate security class and described independently in the base prospectus, which would effectively restrict the flexibility of supplements. In particular, the phrase "one of the many potential types of non-equity securities" appears problematic, as it suggests that almost every differentiation is a separate "security type." Such a catalogue of examples should be dispensed or at least clearly marking the examples as non-binding. Otherwise, there is a risk that issuers will be forced to include every category mentioned in the prospectus, regardless of its relevance.

A more balanced approach would be to require issuers to carefully plan the types of securities they expect to issue, while allowing them the flexibility to use supplements within legitimate limits, rather than including information "just in case" from the outset. In this way, it could be ensured that base prospectuses are comprehensive but not overloaded.

Q3: Do you believe draft Guideline 2 will lead to longer and less comprehensible prospectuses? If yes, please explain why and describe how you would solve this issue.

Yes, this guideline as drafted would lead to longer and less understandable prospectuses. If issuers are forced to cover every potential product type in the base prospectus, these documents would become bloated. In practice, this would likely result in prospectuses describing numerous structural features and categories of securities, many of which may never be issued. This would make it more difficult for investors to filter out the core of the securities being offered.

One possible solution could be to restructure the guidelines so that not every possible change needs to be included in the prospectus in advance. If the first guideline allowed a broader scope for supplements, the second guideline could be more moderate without abandoning the goal of uniform EU-wide supervision. Prospectuses would not have to cover every conceivable eventuality, which should significantly increase their comprehensibility. Instead of extending the prospectuses preventively, one should accept supplements as a tool to make targeted and selective additions.

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Q4: The explanatory text under draft Guideline 2 identifies 'green bonds' and 'sustainability-linked notes' as distinct securities for the purpose of these Guidelines. Do you agree with that, or do you think they are the same as 'regular' bonds or 'regular' structured products? To the extent you consider 'green bonds' and 'sustainability-linked notes' to be the same as 'regular' bonds or 'regular' structured products, please explain why. In particular, make clear why, for example, a currency-linked note, or index-linked note, should be treated differently to a 'sustainability-linked note' for the purpose of these Guidelines. Please also consider factors such as the oncoming Annex [21] in your response.

A classification of green bonds or sustainability-linked notes as separate types of securities within the meaning of Article 23 (4a) PR is not justified. Depending on their design, **both product types are structurally equivalent to conventional bond types or structured bonds**. They often differ only in additional contractual features such as agreements on the use of proceeds or interest linked to sustainability criteria.

For example, green bonds differ from conventional bonds primarily in the use of the proceeds for ecologically sustainable projects and in the issuer's corresponding reporting and transparency obligations. These differences do not affect the structure of the security itself. Under current law, issuers are already free to state in the prospectus that funds are intended for specific green projects; this does not make the security a separate class of security. Accordingly, a base prospectus covering such "ordinary" bonds should be able to include green bonds without requiring a separate prospectus solely because of the "green" label. Otherwise, economically identical products would be treated unequally based solely on a sustainability feature.

Sustainability-Linked Notes are a sub-type of structured bonds. Their only distinctive feature is their structure, which is linked to performance indicators: While payments in a traditional structured bond depend on an external reference value (stock index, exchange rate, commodity price), SLNs link interest or principal adjustments to an internal sustainability reference value (such as the issuer's CO_2 emissions quota or a specific ESG rating improvement). Structurally, this is merely a variation of the reference parameter and not a new type of financial instrument. Any differences in the prospectus information, such as the presentation of the specific ESG indicator and the resulting interest rate adjustment, do not justify different treatment or classification as a separate security under prospectus law.

From a prospectus law perspective, there is no objective reason to treat such bonds stricter than, for example, currency- or index-linked bonds, whose risk profiles are subject to external factors. **If these ESG characteristics do not change the fundamental repayment structure, they should not be considered new types of securities**. However, if the ESG component determines the structure and significantly influences the repayment terms, classification as a new type of security could be justified. Thus, the requirements of Annex 21 CDR 2019/980 do not establish a new class of security; rather, they should be understood as a supplementary disclosure standard. A different treatment would not be warranted by the risk profile of the products or by the purpose of investor protection.

Furthermore, a guideline that establishes GBs and SLNs as separate categories under prospectus law would risk slowing innovation in the sustainability segment and hindering transformation finance. Issuers could be reluctant to introduce sustainable features if this necessarily requires a new prospectus. It would be preferable to have some flexibility by clarifying that the sustainability

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features do not constitute a "new type of security." It would be imperative to avoid discriminating against green bonds beyond the EUGBS compared to GBs that meet the requirements of the EUGBS. In this regard, ESMA rightly points out the new regulatory requirements for ESG disclosures in prospectuses according to the draft Annex 21 CDR 2019/980. This contains a range of product-specific information that is often not yet known when setting up or updating an issuance program or the related base prospectus. However, according to Article 24 (1) CDR 2019/980, these are assigned to Category A and must therefore be included in the base prospectus. This particularly concerns points 2.1, 2.2, 2.3, 2.4, and 3.1 for GBs and 4.1.1 and 4.1.3 of Annex 21 for Sustainability-Linked Bonds. This information requires a very advanced stage of planning and documentation of the sustainability aspects of the respective bond and the GB-Framework. In contrast, according to Article 24 (4a) CDR 2019/980, all information from a GB factsheet of an EuGB is assigned to Category C. This gives EuGBs preferential treatment over other Green Bonds.

If the information required by Annex 21 CDR 2019/980 regarding sustainability aspects cannot yet be included in the base prospectus of a bond issuance program, it cannot be included in a supplement either. Nevertheless, EuGBs could be included in the base prospectus, and the supplementary information could simply be submitted as Category C information in the final terms. Such preferential treatment for EuGBs is incomprehensible. Consequently, it would mean that all non-EuGBs would have to be launched as standalone issues with their own prospectus, requiring separate approval. For GBs issued according to international standards, it should also be possible to document sustainability aspects in a supplement.

Q5: Is there another way to approach the subject of these Guidelines in your opinion? If yes, please explain what it is and provide arguments to support your suggested approach. Please also provide examples to illustrate the issue(s) you are solving and how your proposed approach facilitates that end.

The ESMA Guidelines should not overly restrict the options for updating prospectuses through supplements. Neither investors nor issuers benefit from having to prepare a new prospectus every time instead of a supplement. Investor protection requires, above all, that the prospectus be up-to-date, complete, and understandable at the time of the public offering. The question of how this timeliness is achieved (through initial completeness or through a supplement) is secondary to the protective purpose. The primary criterion for the admissibility of supplements should be that the prospectus, including the supplement, remains clear and understandable as a whole and contains all the required information. If this is ensured, there is no reason to reject a supplement.

Specifically, the first guideline should state that amendments by supplement **are permissible if the relevant information already meets the minimum requirements of an appendix included in the prospectus**. Only completely new information that was not included in the original prospectus would qualify as the introduction of a new type of security, consequently requiring a new prospectus. This distinction ensures that supplements are not misused to circumvent the prospectus requirement for truly innovative products. It also gives issuers the necessary flexibility to implement variations and further developments of their securities without excessive formal effort.

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It should also be clarified that **supplements with purely advantageous or clarifying changes are always possible**. These include, for example, the inclusion of a guarantee for the benefit of investors, the extension of a guarantee framework, the correction of errors, or the inclusion of additional risk warnings that provide investors with a clearer picture. In all these cases, the strict requirement for a new prospectus would create a deadlock – the supervisory authority would have to review a completely new document. A flexible and balanced approach would avoid such duplication.

An alternative could be the following tiered, risk-based approach:

1. Is the product category at least broadly defined in the base prospectus?

2. Do new features lead to a change in the risk structure?

3. Can the supplement be presented clearly and understandably within the overall context of the prospectus?

If this is the case, the admissibility of a supplement would generally be affirmed. This approach would allow for more flexible handling and would be better suited to distinguishing between abusive product extension and legitimate product specificity.

Q6: Can you provide an estimation of the costs/benefits of these proposed Guidelines?

In their current form, the guidelines are likely to result in considerable additional costs for issuers and additional review efforts for supervisory authorities with no discernible added value for investors. Each new prospectus entails legal consulting, preparation, and approval costs that significantly exceed the costs of a supplement. Typically, preparing a full prospectus is many times more expensive and time-consuming than preparing a supplement. Depending on the issuer and complexity, these costs can be in the five-figure range and tie up internal resources for weeks. Frequent issuers which have previously been able to act flexibly via supplements would be particularly affected.

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