

# LISTING ACT

## PROSPECTUS SUPPLEMENTS – ESMA’S CONSULTATION

### SAFRAN’s answer

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We, SAFRAN, welcome the opportunity to respond to ESMA's Consultation on the draft guidelines on supplements which introduce new securities to a base prospectus.

As an introductory comment, we fully understand the concern to prevent a new type of security for which the necessary information has not been included in the base prospectus from being introduced through a supplement to the base prospectus. We therefore welcome that the Listing Act Regulation (Regulation (EU) 2024/2809) has introduced to the Prospectus regulation (Regulation (EU) 2017/1129), or “PR”, a provision according to which a “*supplement to a base prospectus shall not be used to introduce a new type of security for which the necessary information has not been included in that base prospectus (...).*” (PR, new art. 23.4a)

We have however strong reservations about ESMA going beyond the text of the PR and stating that “*new types of security features*” would require the establishment of a base prospectus (Draft guideline 1). The PR does not prohibit the use of a supplement each time *new features* are added to securities that are governed by a base prospectus, but only when a *new type of security* is introduced.

For example, allowing a new type of pay-off in an already existing type of security, for example through a make-whole clause, is a new feature that an issuer should be able to introduce by means of a supplement to a base prospectus. It does not introduce a new type of security, which, according to art. 23.4a of the PR, requires the establishment of a base prospectus. We agree that including warrants in a base prospectus for vanilla debt would not be possible through a supplement. The same applies for differences in convertibility (consultation paper, par. 2). In this case, we agree that a new base prospectus or drawdown prospectus is required, not a supplement.

Harmonisation must go hand in hand with the objective of developing integrated capital markets (Savings and investments Union), improving the financing of the real economy and legislative and regulatory simplification (Omnibus package). To the extent that investors have all the required information and such information can be reviewed and commented upon by national competent authorities (hereafter, **NCA**s) (as is the case for supplements), it should be possible to amend the terms of existing types of securities through supplements without the need to prepare a new base prospectus or drawdown prospectus, which is a costly and time-consuming exercise for issuers and time-consuming for NCAs, without substantial benefit for investors.

Harmonisation must follow the objective of simplification. ESMA rightly points out in the consultation that the Listing Act seeks burden reduction. Since the use of supplements causes no major concern for the market, has not been misused and provides the market and investors with all the required

information, harmonisation should go in the sense of alignment on the more flexible practices of NCAs, not the more stringent. As some NCAs currently accept that supplements be used to include new features for existing types of securities (and not to introduce new types of securities), it would go against the Listing Act objectives of burden reduction and access to capital (*inter alia* whereas 1 – 6 and 18 of the Listing Act Regulation) to prohibit such common practice for no added benefit to the market. Alignment with the more flexible practices would be consistent with the strong support expressed in December 2024 by the Board of Supervisors of ESMA for simplification and burden reduction.

With regard to use-of-proceeds bonds, such as social, green (including EuGB) and sustainable bonds, and with regard to sustainability-linked bonds (SLBs), it would be excessively costly with no real benefit for the market if, in the future, issuers wishing to issue such bonds cannot do so through a supplement. For example, green bonds are regular bonds with a specific use of proceeds, i.e. designated to finance green-related projects or activities. Similarly, SLBs are structured as bonds with an additional performance feature — typically, a step-up or step-down mechanism linked to specific sustainability key performance indicators (KPIs). Despite this additional feature, the fundamental nature of SLBs remains unchanged: they are still debt instruments that require the issuer to repay the principal at maturity while paying periodic interest. This is only a new feature of a bond, not a “new type of security” (PR, art. 23.4a). In both cases, whether it is a green bond or a sustainability-linked bond, the modifications relate only to the targeted use of funds or the adjustment of certain payment features rather than altering the fundamental characteristics of a bond.

Prohibiting a supplement in such circumstances constitutes a barrier to the issuance of sustainable bonds, which already obliges issuers to prepare important documentation (e.g. framework, ITP opinion, without mentioning the strict constraints of EuGB). It is also contrary to the goal of the Green Deal and the Paris Agreement to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. This is particularly true, in a context where the SLBs are already reducing in number and amounts and the number of EuGB is already very limited.

We draw ESMA's attention to the fact that the publication of a base prospectus is more than ten times more expensive and significantly longer<sup>1</sup> than the publication of a supplement, which can mean missing market windows. The alternative of issuing a draw down prospectus or a new standalone base prospectus to incorporate such new features would be overly costly and time-consuming. Any restriction to current practice in this respect therefore has extremely significant consequences in terms of the economics of issuing programs. Any change must therefore be balanced and prudent and duly justified by the lack of correct information for investors in the current situation.

## **I. SECTION 3 – ESMA’S PROPOSALS**

### **3.2 THE PROPOSED GUIDELINES**

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<sup>1</sup> Seven to nine weeks on average for a base prospectus versus three to seven working days for a supplement

*Question 1 – Do you agree with draft Guideline 1 proposed by ESMA and ESMA’s reasoning? If not, please explain why.*

No, we do not agree with the draft Guideline 1 as it goes against the Listing Act goals of burden reduction and access to capital and it goes beyond the text of art. 23.4a of the Prospectus Regulation, as modified by the Regulation Listing Act. We believe this conflicts with the Listing Act's intent to reduce regulatory and administrative burdens and enhance the European market's efficiency and competitiveness.

New article 23.4a. of the PR provides that “A supplement to a base prospectus shall not be used to introduce a new type of security for which the necessary information has not been included in that base prospectus, (...)”.

However, the Guideline requires the establishment of a base prospectus not for a “new type of security”, as required by art. 23.4a. of the PR, but for “new types of security features”.

A new “feature” is not constitutive of a new type of security and we invite ESMA to remain within the legislative limits and accept that a supplement may be used to introduce new features, as long as the supplement does not introduce a new type of security.

For instance, considering the example of green bonds. A green bond is a “regular” bond with a different use of proceeds and a specific risk factor. The designation of proceeds for ESG-related projects can be considered as a new feature but it does not change the essential nature of the instruments, and such targeted use can be effectively communicated via a supplement without requiring the establishment of a new base prospectus. The supplement is reviewed and commented upon by the regulator and the final terms include a reference to the supplement, so the use of a supplement does not affect the quality and accessibility of the information provided to the market.

Likewise, adding a new type of early repayment such as a make-whole clause or a clean-up clause or new benchmarks or indexes by means of a supplement should remain possible. This does not change the security type as provided for in art. 23.4a of the Prospectus Regulation.

Furthermore, ESMA may wish to assess NCAs' workload against their staffing levels. Mandating regular updates of base prospectuses, rather than supplements, may create bottlenecks for some NCAs during specific timeframes or the temptation for issuers to arbitrate between NCAs on the basis of staffing levels, which is not virtuous.

*Question 2 – Do you agree with draft Guideline 2 proposed by ESMA and ESMA’s reasoning? If not, please explain why.*

We do not agree with the current draft Guideline 2, but a softened version of Guideline 2 could be adopted to specify the limited circumstances in which a supplement is to be considered as introducing a new type of security. It would allow some flexibility for issuers, in line with the Listing Act goals of burden reduction and access to capital, without affecting the quality of the information given to the market. Such a softened version of Guideline 2 could distinguish between new features for existing types of securities (which can be introduced through a supplement) and new types of securities (which cannot be introduced through a supplement).

ESMA's recommendation to issuers to consider the various types of securities they reasonably expect to use during the validity period of the base prospectus is not practicable. Securities issuances programs last over a period of one year. New factors might arise, for example resulting from market conditions or investors' appetite, that require an issuer to include new features in the base prospectus during that year.

Issuers need to be in a position to be opportunist and to react fast in a context of great volatility of the markets. For example, the introduction of an option for early redemption of bonds issued to finance an acquisition at the occasion of an annual update may be badly interpreted and seen by the market as the signal for an acquisition transaction to come. It is then easier to introduce it via a supplement when an acquisition has already been publicly announced. Considering that an "Issuer early redemption option" is already provided for in the base prospectus, this early redemption option for acquisition is just a declination of the former. It should then be possible to introduce it through a supplement.

It may be that on the annual update, the framework was not ready yet to be referred to in the base prospectus or that there were no green projects to finance at the time. The selection of ESG criteria and/or the calibration of targets may not be achieved in full at the date of the annual update. Considering that an SLB is a fixed or floating interest note with an interest rate variation or step up mechanism, it should be considered that it is only a declination of a general option in the base prospectus to adjust the interest rate or the repayment price on certain criteria.

For example, and in relation to par. 15 of the consultation document, the issuer may not know in advance whether it will issue *"green bonds, sustainability-linked bonds, guaranteed notes, equity linked notes"* etc. Nonetheless, it should have the option to add one of these features through a supplement if a market need appears before the next update of its base prospectus.

In this respect, the position that ESMA provides is stricter than the position of some NCAs. We strongly disagree with this change of policy which is contrary to the text of the PR and does not provide investors with better information, but will lead to a considerable increase in issuance costs and delays. This could, in turn, lead issuers to miss critical market opportunities within identified issuance windows, and, in the worst case scenario, to switch in practice to bank financing or to alternative listing venues with less rigid regulations.

Likewise, a new pay-off not provided for in the base prospectus does not constitute a "new type of security", as this is a new feature of a security, but not a new type of security.

Guideline 2 should be limited to cases where it is obvious that a new type of security is being introduced, such as including warrants in a base prospectus for vanilla debt or including convertibility options. However, we strongly disagree with the statement in par. 16 of the consultation document that sustainability-linked securities would be a new type of securities if the base prospectus already includes step-up mechanisms.

*Question 3 – 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.*

Issuers using base prospectuses generally already aim at ensuring they include the products they expect to issue during their annual base prospectus update, but they need to use supplements to be able to react to market conditions and have the flexibility to cover innovation.

Such base prospectuses may be long documents, as many different types of securities are described. However, we do not believe it would make them less comprehensible as the length of a prospectus is not a measure of its readability for investors.

Investors subscribing to different product types can find the related information in a single document and it allows the NCA to have a global view of the products intended to be offered during the annual review process. It also saves the burden & costs both for the issuers and the NCA of respectively drawing up and scrutinizing several prospectuses.

*Question 4 – 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.*

We do not consider “green bonds” and “sustainability-linked notes” as distinct securities from “regular” bonds or “regular” structured products.

As per our answer to questions 1 and 2 above, the specificities related to green aspects should not require the establishment of a new base prospectus, because they do not change the intrinsic nature, or type, of the securities, which is a bond or a structured product. Therefore, it should be possible to issue green bonds under a regular bonds issuance programs. Likewise for sustainability-linked bonds.

The application of a new annex of the delegated prospectus regulation, such as oncoming annex 21, cannot be a criterion for determining that a new type of security is included in a base prospectus as, without affecting the legal nature of the security, certain annexes are only applicable in connection with certain features of the securities.

The flexibility to use a supplement is particularly important for green bonds and sustainability-linked notes, where in the current volatile context market opportunities might be lost if issuers were obliged to await a lengthy base prospectus update and a new issuance process. Supplements can, in fact anticipate the base prospectus for the following issuance program, namely for issuers who did not initially incorporate such features in their base prospectus but later want to seize market opportunities before the annual review. In these instances, the regulator has all opportunities to require the issuer to include in the supplement a comprehensive framework that outlines the features envisaged, with no harm to the market.

*Question 5 – 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.*

We stress that:

- European harmonization should take place in the sense of alignment with the more flexible approaches among NCAs, in line with the Listing Act goals of burden reduction and access to capital, not with the stricter approaches of other NCAs;

- The letter of art. 23.4a of the PR as modified by the Regulation Listing Act should not be expanded to prohibit the use of supplements in situations where the PR clearly allows supplements to be used, and which have not raised any concerns from the market;
- Where additional information can be provided through a supplement without changing the type of securities, no base prospectus or draw down prospectus should be required;
- Relevant factors for the requirements of a new base prospectus or drawdown prospectus include entirely new type of securities (e.g. warrants versus bonds; equity type securities versus non equity type securities; );
- Irrelevant factors for the requirement of a new base prospectus include:
  - use of proceeds (example of green bonds, social bonds, EuGB);
  - provisions the general principle of which are already included (e.g. step-up, step-down, premium and early redemption);
  - new risk factors;
  - new pay-off;
  - use of another Annex to the PR (such as oncoming Annex 21)

*Question 6 – Can you provide an estimation of the costs/benefits of these proposed Guidelines?*

The establishment and publication of a base prospectus is approximately ten times more expensive and six times longer than the establishment and publication of a supplement. A drawdown prospectus is also much more expensive and takes much more time than a supplement. This could lead to missed time-sensitive market windows and unintended - yet substantial - losses for issuers, ultimately damaging the European market's efficiency, fluidity and competitiveness.

Furthermore, ESMA may wish to assess NCAs' workload against their staffing levels. Mandating regular updates of base prospectuses, rather than supplements, may create bottlenecks for some NCAs during specific timeframes or the temptation for issuers to arbitrate between NCAs on the basis of staffing levels, which is not virtuous.