
Consultation Paper Response

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

19/05/2025

AFME notes that this response is generally provided from a structured products perspectives. We otherwise support the response from the International Capital Markets Association (ICMA) in relation to debt securities.

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

In AFME's members view, ESMA has taken a narrow interpretation of the existing level 1 text by conflating certain new features of a security with what constitutes a new security entirely. We therefore do not agree with the approach taken in Draft Guideline 1 of the CP.

AFME would strongly urge ESMA to use the securities note annexes / building blocks as the trigger for a new product for which a supplement to a base prospectus is not appropriate. So wherever a new issuance would require the issuer to comply with a new securities note annex / building block then a supplement to the base prospectus would not be suitable for this but rather the issuer would need to either update the base prospectus entirely, publish a drawdown prospectus or publish a standalone prospectus in order to issue the notes (and have them listed on a regulated market). The purpose of this is that institutional investors are able to read a full base prospectus and a supplement thereafter, understanding what is relevant to them. The approach suggested by ESMA would certainly decrease flexibility for issuers in practice.

As stated above, we believe that ESMA has gone too far in their approach and confused certain new features of a security (for which a supplement should be permitted) with something that would constitute a new security entirely. For example, in paragraph 12 of the CP we agree that (ii) a new guarantee (which might involve a fundamental change to the entity / parent company, more disclosure on creditworthiness would be required) would be considered a new security, and credit generally has been considered as a differentiator, but limb (iii) a new step-up/step-down interest payment provision, in our view would certainly go towards a new feature. A step-up / step-down feature in relation to a vanilla bond is a feature of the terms and conditions of the bond but should not constitute a new security or product as it doesn't affect the credit of the issuer / issuance i.e. there is no change in underlying / non-asset backed feature etc, no need for a new securities note annex beyond the standard non-equity securities note. Similarly, we agree with the suggestion in paragraph 16 of the consultation paper that, for example, the addition of a new currency as an underlying in a base prospectus that generally provides for the issuance of currency-linked notes would not amount to a prohibited "product supplement". The base prospectus provides the general contractual provisions applicable to issuances of that type of security and the supplement makes changes relating to a security which the issuer is already permitted to issue (i.e. it would amount to the addition of a new *feature*, not a new *type* of security).

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Further, a blanket EU-level prohibition would be inconsistent with the EU's 'flexible capital' / 'market access' and 'burden reduction' policy direction (and would, in our view, have a negative effect on investor comprehensibility as supplements may often be easier for investors to digest than a fully restated base prospectus).

From a Structured Products standpoint, we support flexible guidance, see our suggestions in response to Q5 below.

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

Firstly, we note that Guideline 2 merely states the existing ability to front-load the information in the base prospectuses, but this would only make sense if the issuer is able to adequately anticipate the relevant information. Therefore, we do not believe that this would sufficiently (if at all) mitigate the impact of Guideline 1.

AFME believes that ESMA has also gone too far by suggesting that issuers can mitigate the need for a supplement by front-loading general information on all types of non-equity securities an issuer reasonably expects to issue at the time the base is approved. This may be less appropriate in some scenarios than in others:

Wholesale vanilla debt:

Whilst AFME believes that there is no direct causal link between the length of a prospectus and its comprehensibility to an investor – a long prospectus may not necessarily be any less comprehensible than a short prospectus and vice versa, we note that many of the changes put forward by the Listing Act are designed to shorten and streamline the prospectus. Draft Guideline 2, in our view, appears to be contrary to this as issuers would need to front load and add in numerous risk factors that aren't currently in the base prospectus but may become relevant and necessary in the future (despite it not being certain that they will be). This would have the effect of making the documents less targeted and less comprehensible to investors, and raises potential liability concerns.

Nevertheless, we do not believe that there should be restrictions on optionality for incorporating information that the issuer deems most appropriate.

Members would not want to risk increasing the risk of issuance frequency, which would likely lead to errors and inconsistencies in terms amongst documents.

Structured Products:

In relation to Structured Products, providing general information on all types of non-equity securities issuers reasonably expect to issue during the 12-month validity of the base prospectus is unrealistic at the date of program. It is highly unlikely that issuers will be able to describe or would even be aware of future products that could meet all future demands. This is unfeasible, not well calibrated towards meeting market needs, and will not encourage retail investor participation. If a narrow application of the guidelines is upheld, this will undoubtedly have a negative impact on market practice.

In our view, new reference information in relation to an existing security type, as opposed to a new security type, should be permitted by way of supplement. For example, if the supplement just adds a pay-out structure, a supplement should be allowed to the extent that the security is of a type already contemplated in the prospectus (i.e. the pay-out structure is a new *feature* but not a new *type* of security) and only limited changes to risk factors regarding the securities are required (see our response to Q5 below).

For the avoidance of doubt, in the context of a base prospectus permitting the issuance of proprietary or other index-linked securities, an issuer should be able to provide the detailed disclosure on a specific proprietary or other index by way of supplement (it is providing additional *information* about existing types of security).

The above point in relation to index-linked securities is particularly important given the upcoming changes to the EU Benchmarks Regulation from 1 January 2026. According to revisions to the EU Benchmarks Regulation, administrators of non-significant benchmarks (such as proprietary indices) that do not provide any benchmarks in scope of the revised regime, will be removed from ESMA's Article 36 benchmarks register after 30 September 2026¹. As a result, benchmarks provided by such administrators will not benefit from the reduced disclosure permitted for administrators in ESMA's Article 36 benchmarks register under Annex 15 (*securities giving rise to payment or delivery obligations linked to an underlying asset*), Item 2.2.2 of ESMA's [October 2024 draft revised DR EU/2019/980](#).

Inclusion of detailed index disclosures for every potential index upfront in the base prospectus would not be possible from a foreseeability perspective. As at the date the base prospectus is approved the form for every potential index may not be known. Inclusion of such disclosure in the base prospectus would also significantly impact the length of the prospectus. It is important that it is possible to include this information in a supplement and early indications from competent authorities have been positive in this regard.

Issuers urgently require clarity as to how index descriptions for benchmarks falling out of scope of the revised EU Benchmarks Regulation can be incorporated effectively into prospectuses. An alternative approach to the use of a supplement, could be for such index disclosure to be approved under a separate index review process whereby competent authorities could review an index description on a standalone basis and approve it for the purposes of a particular programme or for wider prospectus regulation use, such that it could be incorporated by reference into the prospectus.

AFME would urge ESMA to take a flexible approach to allowing issuers to continue to create prospectuses / programmes that provide adequate flexibility for issuance of an appropriately wide menu of products under a single (base) prospectus and to permit issuers to supplement such base prospectuses on an incremental basis in the event of any changes to instrument types already referenced in the prospectus. There appears to be some slight discrepancies between EU jurisdictions with respect to what kinds of products are permitted to be issued under a single prospectus (and added by way of supplement), and regulatory responses can sometimes differ from what one might expect from the letter of the regulations. This may lead to unhelpful requests for a new programme in some jurisdictions, while in others the same product might be issued under an existing prospectus.

Any reduction in flexibility would likely lead to a much larger number of standalone prospectuses which would be inconsistent with the EU's "flexible capital"/"market access" and "burden reduction" policy direction as well as potentially compromising product comparability. Any increase in standalone prospectuses would also lead to significantly increased time, effort and costs, which would be an unnecessary burden on market

¹ See revised A.51(4c) and Recital 28 of the EU Benchmarks Regulation.

participants and policymakers. In line with the EU's 'flexible capital' / 'market access' and 'burden reduction' policy direction, the most flexible jurisdiction approach should be promoted.

In the context of structured products being sold to retail investors in the Union, it is also worth noting that in addition to the prospectus, retail investors must also be provided with a key information document (which must be reviewed regularly and revised where the review indicates that changes need to be made) in accordance with the provisions of the EU PRIIPs Regulation (Regulation (EU) No 1286/2014). This should ensure that retail investors have all key information in an easily digestible form in good time before any transaction is concluded and in the event of changes to the information in the key information document.

Green bonds and sustainability-linked notes:

ESMA distinguishes 'green bonds' and 'sustainability-linked notes' for the purposes of these guidelines. In our view, we do not view these types of bonds as distinct from 'regular' bonds. The 'use of proceeds' characteristics of a bond, whether it be green, social or sustainable, does not impact the credit quality of the securities and so should be permitted by way of supplement. The only differentiator for these issuances is disclosure relating to use of proceeds. Social (and sustainable) use of proceeds bonds should be treated in the same way as green use of proceeds bonds.

Similarly, in relation to sustainability linked bonds, step-up / step-down features will generally not impact on the credit quality of the issuer / issuance, particularly as these bonds usually include a simple economic / pricing / structuring features which do not impact the credit of the issuer/issuance.

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.

Since Guideline 2 merely characterises an existing ability, we do not think that it will *per se* have a material effect on prospectus length, and otherwise refer you to our response to question 2.

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.

AFME members note that reference has been made to 'Green' bonds in the guidelines, however more consideration should be given to the features of 'Social' bonds. Although some product features are listed, the list should not be exhaustive as this would decrease the flexibility of issuers of 'Social' bonds in practice. AFME would argue that these type of bonds fit under the broad category of vanilla instruments. We again point to the US where the SEC opts for a more generic reasoning, rather than a definitive list of criteria, so that the materiality test is principle-based.

In addition, use of proceeds bonds generally (i.e., not only referring to green bonds) and sustainability-linked bonds (SLBs) have the same capital and income risk as their more traditional counterparts and therefore should not be deemed new 'types' of instrument.

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.

As noted in our response to Question 1, the test of whether an instrument is a new type of instrument should include the question of whether a supplement would involve additional securities note annexes or building blocks that were not previously relevant to the applicable base prospectus (i.e. under Annex 13 (non-equity securities)):

- Annex 10 – regarding units issued by collective investment undertakings of the closed-end type;
- Annex 12 – depository receipts issued over shares;
- Annex 15 – payment or delivery obligations linked to an underlying asset;
- Annex 16 – underlying share;
- Annex 17 – asset-backed securities; and
- Annex 19 – guarantees.

(Annex numbering is that used in ESMA's [October 2024 draft revised DR EU/2019/980](#)).

In the context of Annex 15 (*payment or delivery obligations linked to an underlying asset*) typically applicable in the context of structured products, a number of different types of underlying are contemplated which can be grouped as follows:

- a) Security
- b) Reference Entity or Reference Obligation (or pool of underlying Reference Entities/Reference Obligations)
- c) Index
- d) Interest rate
- e) Basket of underlyings; and
- f) "Other" underlying (that does not fall within (a) to (e) above).

AFME members consider that adding a new underlying falling in any of (a) to (f) above that is not already contemplated by the prospectus could be considered to be the introduction of a new type of security for which a supplement is not permitted. By contrast, to the extent that the prospectus already permits the issuance of securities where the underlyings fall in any of (a) to (f) above, an issuer should be able to issue another security with a different feature or payout (but the same underlying "type") by using a supplement.

Where an underlying prospectus already permits the issuance of securities falling in the "Other" bucket (e.g. FX linked or commodity-linked), similarly an issuer should be able to issue another security with a different payout or feature falling in the "Other" bucket by way of supplement as opposed to requiring a new draw-down prospectus. This would make sense given that from a capital and income risk perspective, the security is of the same type as those already contemplated in the prospectus (i.e. linked to an underlying in bucket (f) above "Other" underlying). Very often, the base prospectus will have contemplated that the issuer may also issue securities with "Other" underlyings.

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

AFME would like to remind ESMA about the magnitude of disruption to issuers of debt securities and structured products which, as you know, routinely utilise the base prospectus in their issuance programs. The

guidelines, as outlined above, are overly restrictive and would likely force issuers to produce unnecessary new documentation which would increase associated transaction costs and timelines. If ESMA is concerned that competent authorities are required to review a supplement in a short time frame, ESMA could consider, as an alternative, enabling the pre-filing of supplements that exceed a specified length. This would enable engagement with the competent authority in relation to the acceptability of the supplement's content in advance of the official commencement of the supplement review period.

We urge ESMA to refrain from posing significant challenges to the market by attempting to drive convergence amongst national competent authorities at the expense of the EU's 'flexible capital' / 'market access' and 'burden reduction' policy direction. Requiring issuers to draw up new prospectuses as opposed to being able to utilise a supplement will, as ESMA notes, have very significant cost and time implications for issuers, competent authorities and also investors who would need much more time to review a new prospectus as opposed to a new supplement.

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