19 May 2025

ESMA consultation: Draft Guidelines on supplements introducing new securities to a base prospectus

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ICMA response

EXECUTIVE SUMMARY

(1) Instrument 'type' should not be equated with mere 'features' in testing whether a supplement is acceptable.

(2) Doing so would add significantly to the restrictiveness of the Prospectus Regulation regime, inconsistently with EU policy direction (and historic ICMA suggestions).

(3) Highlighting the existing ability to front-load base prospectuses with information does not alleviate this.

(4) Neither 'use of proceeds' bonds nor sustainability-linked bonds should be seen as new 'types' of instrument.

(5) Supplements should be acceptable unless they involve certain securities note annexes or building blocks that were not previously relevant to the base prospectus in question.

ICMA welcomes the opportunity to respond, mainly from the perspective of the international mainstream bond markets, on ESMA's consultation paper *Draft Guidelines on supplements introducing new securities to a base prospectus* (ESMA32-1953674026-5808). (ICMA is also commenting in passing with regard to structured debt products.)

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

ICMA disagrees with Guideline 1.

Firstly, a focus on the Article 23(1) supplement trigger seems inappropriate when dealing with a base prospectus and the menu of securities which may be issued. Article 23(1) was not drafted with programme base prospectuses in mind and, instead, speaks more to scenarios when existing

"information" in the prospectus, rather than existing "instruments", changes.[1] (And the mandatory nature of supplements in that specific context is without prejudice to voluntary supplements in other contexts.)

Secondly, it would be confusing and misguided to equate an instrument 'type' with a mere 'feature' of an instrument. For example, the consultation references coupon steps (cited in #12 of the draft guidelines) – a feature which just involves paying more.

By focusing on the text of Article 23(1) and by conflating instrument "features" with "type" of security in this way, Guideline 1 would effectively replace:

(a) some slight current EU-level divergence in NCAs application of Recital 36 (since July 2019)[2] and then Article 23(4a) (since December 2024)[3] – which does not cause market access issues as suggested in #5 of the consultation, bearing in mind stakeholder familiarity with NCA approaches/expertise and some flexibility in choice of NCA for bonds with denominations of €1,000 or more (which is generally the case);

with

(b) a blanket EU-level prohibition on any instrument adjustments, however minor (even where beneficial to investors, such as a make-whole feature or change of control 'put') – which would be inconsistent with the EU's 'flexible capital' / 'market access' and 'burden reduction' policy direction, bearing in mind there is no countervailing investor comprehensibility risk arising from supplements (and in many cases supplements may actually be easier for investors to understand, given their incrementally additive nature, than a fully restated base prospectus).

Such a prohibition would be the opposite of what ICMA has previously suggested in its February 2022 response to the Commission (see Q41(b) at p.36), March 2018 response to ESMA (see Q27 at p.24) and June 2013 response to ESMA (see Annex 3 #7-10 at pp.10-11).

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

Guideline 2 effectively merely highlights the existing ability to front-load base prospectuses with information – but this is only to the extent that issuers can anticipate the information in question. Whilst issuers already endeavour to anticipate what they are likely to want to issue (and include an element of 'just in case' information), circumstances change such that the ability to add through a supplement is important (and issuers will not want to incur the cost, or take the time required, to include mechanics that they don't anticipate to be even remotely necessary at the point of programme update). So, it does not materially mitigate the impact of Guideline 1 – contrary to what ESMA envisages in #6 of the consultation.

[1] Article 23(1): *"Every significant new factor, material mistake or material inaccuracy relating to the information included in a prospectus which may affect the assessment of the securities and which arises or is noted between the time when the prospectus is approved and the closing of the offer period or the time when trading on a regulated market begins, whichever occurs later, shall be mentioned in a supplement to the prospectus without undue delay. […]."*

[2] Recital 36: *"Neither the final terms nor a supplement should be used to include a type of securities not already described in the base prospectus."*

[3] Article 23(4a): *"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, unless doing so is necessary to comply with capital requirements under Union law or national law transposing Union law."*

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.

Guideline 2 won't *per se* impact the length of base prospectuses, as it is merely reflecting the existing ability to front-load base prospectuses with information – as noted in the response to Q2. Any potential impact in terms of longer and less comprehensible prospectuses would likely rather stem (albeit indirectly) from the restrictive effect of the new approach in Guideline 1 noted in the response to Q1 (the issuers concerned having concluded they had no choice but to incur the cost, and take the time, to include even more 'just in case' information than previously).

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.

'Use of proceeds' bonds (UoPBs) generally (not just green bonds) and sustainability-linked bonds (SLBs) have the same capital and income risk as 'regular' bonds, including in terms of SLBs' coupon steps. They should not therefore be seen as new 'types' of instrument. This would be consistent with the point in #3(b) in the response to Q1, regarding consistency with the EU's 'flexible capital' / 'market access' and 'burden reduction' policy direction and supplements often being more easily comprehensible for investors than restated base prospectuses. Adoption of the proposed new Annex 21 does not impact this analysis, since the instrument features remain unchanged.

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.

New annex test – Within the confines of the current Level 1 framework, a more objective and consistent (and thus easier) way for regulators to test whether an instrument is of a new 'type' would be whether a supplement, involves the following additional securities note annexes or building blocks that *were not previously relevant* to the "mainstream" base prospectus in question (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 the revised numbering used in ESMA's October 2024 draft revised DR EU/2019/980.)

Structured debt products – Similarly concerning a base prospectus that already envisages structured debt products under Annex 15 (underlying assets), testing whether an instrument is of a new 'type'

would look to whether a supplement involves any additional sub-section of Annex 15 that *was not previously relevant* to the base prospectus in question (the sub-sections reference an underlying *"security"*, *"reference entity or reference obligation"*, *"index"*, *"interest rate"* and *"not fall[ing] within the […] above"* and also a "*basket*").

Combined registration document / securities note supplements seeming more complex – It is worth noting that supplements making changes to terms and conditions may also be used to amend registration document information (i.e. an issuer would expect to combine both types of information in one supplement for efficiency purposes rather than needing to produce two separate supplements). This may explain why some "product supplements" may seem complex (as noted by ESMA in paragraph 5 of the consultation paper).

Distinct supplement regime at Level 1 in due course – To the extent ESMA's main concern with the use of supplements for new 'types' of instrument relates to NCA review burdens, ESMA may wish in due course (when the Level 1 framework is next reviewed) to consider seeking a distinct supplement regime for new 'types' of instrument that would grant NCAs a longer review period than for regular supplements.

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

No response.

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