

May 19, 2025

**ESMA Consultation Paper and Draft Guidelines on supplements
which introduce new types of securities to a base prospectus
AFPDB's answer**

The French Structured Investment Products Association (Association française des produits d'investissement de détail et de bourse – “AFPDB”) is the industry association representing issuers and manufacturers of structured products and securitized derivatives in France. The AFPDB purpose is to contribute to the development and promotion of structured products on the French and European markets by defining industry best practices and by maintaining an open and constant communication with policy makers, supervisory authorities, market participants, market operators, technology and service providers. www.afpdb.org

The French AFPDB welcomes the possibility to respond to ESMA's Consultation Paper and Draft Guidelines on supplements which introduce new types of securities to a base prospectus.

Though we support the objective of aligning EU-wide supervision and of avoiding national divergence, we have reservations towards the proposed Guidelines. In our opinion, they could entail detrimental consequences for issuers of non-equity securities, generally, and of structured products, more specifically. We note that these instruments are overwhelmingly issued in the context of issuance programs relying on the use of base prospectuses. For structured products issuance programs, which cover structured EMTNs but also other listed securitized derivatives such as warrants, the number of instruments issued is, every year in Europe, in the order of millions of ISINs. We would therefore urge to avoid any measure that could bring a disruption to well-functioning prospectus approval mechanisms.

In the area of structured solutions, the optional component that underly the products payoff rely is routinely fine-tuned shortly before the time of issuance (e.g. barrier levels). It is therefore absolutely essential to ensure that the regulatory framework does not impede the manufacturers' ability to adapt investment and hedging solutions to market conditions and investor needs.

This required flexibility concerns the granular calibration of specific payoff features within each established product type which was previously identified and duly described in the original base prospectus.

In light of the targeted adaptation need, we do not support the blurring of the two distinct concepts of “type of security”, one the one hand, as referred to in Art. 23 (4a) Prospectus Regulation (PR3) and the one of “product feature”, on the other hand, as mentioned in the consultation and draft guidelines.

We consider that within a specific type of security a wide gamut of variations may exist without crossing the product-type line.

To date such a flexibility is offered by the possibility to use base prospectuses as part of issuance programs, with occasional supplements, as needed. To our knowledge this current framework has served investors, issuers and markets well and we are not aware of any detriment to these users of these base-prospectuses that should warrant a review of the existing regulation. Furthermore, to the extent that the relevant investors have access to the appropriate information, as reviewed and validated by the applicable NCA (via the supplements), it should be possible to amend the various type of

securities via a supplement, without the need of preparing a new base prospectus (or drawdown prospectus, as the case may be).

Furthermore, we note that the Consultation refers to the objective of simplification and cost-reduction of the Listing Act, which we strongly support.

We also observe that the reference to the United States is often made as a benchmark for market efficiency and rule making. In this case, we note that the very process of incorporation by reference was originated in the US. We further note that, at present, the US SEC applies a flexible regime to well-known seasoned issuers (WKSIs). Under Rule 424(b), WKSIs may provide a wide range of information (plan of distribution; description of the securities registered other than an identification of the name or class) along with other information that is unknown or not reasonably available under Rule 409.

Finally, as regards investment structured products, that are essentially sold to retail investors, we believe it is useful to recall that investors routinely benefit from a variety of product disclosure documents (targeted post-PR3 prospectus summary, PRIIPS KIDs, brochures) that allow them to benefit of an easily accessible and intelligible information. We therefore believe that considerations concerning investor protection and the use of prospectus supplements or the length of base prospectuses ought to be put in the context of the existing well-developed and suitable information framework which currently serves investors.

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

AFPDB does not agree draft Guideline 1.

We do not believe that it is opportune to blur the two distinct concepts of "type of security", on the one hand, as referred to in Art. 23 (4a) Prospectus Regulation (PR3) and the one of "product feature", on the other hand, as mentioned in the consultation and draft guidelines.

Adding a new feature or marginally modifying an existing one does not generally mean changing from type of security altogether. perspective. Furthermore, in the context of structured products whose payoff and performance rely on embedded derivatives, this marginal feature adaptation is routinely made at a later stage in order to best adapt to prevailing market conditions and client needs to the extent that any regulatory impediment to this flexibility would negatively impact the manufacturers' ability to provide products that suit the various target markets.

Finally, we would advise ESMA to conduct an impact assessment concerning the side-effects that a strengthening of the supplement rules may have on the NCA ability to process prospectuses in the context of incorporation by reference. We strongly fear that a change in current practices may severely disrupt markets with the highest issuance volumes, ultimately penalising investors and/or resulting in yet more regulatory arbitrage among jurisdictions.

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

AFPDB does not agree, nor see the explicit need for draft Guideline 2 with the present situation.

We understand ESMA's concern to avoid an over-extended use of base prospectuses and the related inclusion of types of securities that have very marginal probabilities of being issued. However, as

expressed in our reply to question 1, we also believe issuers should be able to adapt to changing market conditions and related client investment and hedging needs.

To date, we consider that such abuses have not really materialized. And, unless new rigidity is added to the use of supplements – which could be the likely effect of an adoption of guideline 1 – we see no need to further specify what is already provided in the provisions of the PR3 Article 23 on supplements to base prospectuses.

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.

Issuers already strive to limit the product coverage of their base prospectus, as annually updated, to the products they do expect to issue during the validity period of the said base prospectus. However, as recalled in our reply to question 1, these issuers may need to adapt to prevailing market conditions and the related investment and hedging needs to their various target markets.

However, in the context of the current PR3 regulation, base prospectuses are already presented in a format that duly itemizes each instrument type, allowing investors to directly access the information on the specific type of the offering which is made to them.

Therefore, while we are mindful of the length of these base prospectuses (BPs)– whose function is precisely to avoid the submission to NCAs of an even longer succession of independent documents – we do not think that the mere length of BPs is the sole indicator to appreciate the intelligibility of base prospectuses. Also we note that, since PR3, the ability of investors to easily retrieve in BPs information that directly concerns the very security offering that relates to them has been enhanced by the new rules applying to their summaries. Indeed these summaries now focus on the said security offering.

Ultimately, we remain of the view that the best way to avoid this development remains the preservation of a reasonable and flexible approach to the use of supplements.

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.

AFPDB considers that the application of a sustainable use of proceeds to non-equity securities does not, per se, fundamentally affect the type of a security.

As stated in our reply to Q1, where we stressed the need for flexibility and adaptability, in consistence with the Listing Act objective of rule-simplification, we would advise against an inopportune strengthening of regulatory implementation in the area of sustainable products.

We do not consider that the oncoming Annex 21 leading to dedicated disclosure for product with ESG features does modify the analysis regarding what constitute a new type of security, as we do not believe that the inclusion of a sustainable feature (be it green or social) does change the nature of the security, which will still be a bond/structured product

Furthermore, at a time when ESG offerings have not recovered their pre-2022 levels, we would strongly advocate against any new rule interpretation that could further impede the issuance of ESG products for fear of falling outside of the scope of existing issuance programs.

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.

See our above answers, from Q1 to Q3.

In light of the pursued objectives of regulatory simplification and facilitation of access to capital markets, we would question the current approach which tends to add regulatory rigidity against no demonstrable benefit in investor protection.

We believe it is useful to keep in mind the US experience of issuance (registration) by incorporation. The US SEC does not to apply a rigid approach that would rely on a limitative list of instances. Instead, under Rule 424(b), well-known seasoned issuers (WKSIs) may provide a wide range of information, including new information on securities' features that unknown at the time of the initial base prospectus registration.

If examples are nevertheless to be provided, we would support a non-definitive list examples of amendments to a base prospectus which are permissible via a supplement.

While the introduction of fully new type of instrument should continue to require an update of the base prospectus or a draw-down prospectus, we consider, as the French AMAFI, that the following situations should not trigger such a requirement:

- 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)