LISTING ACT BASE PROSPECTUS SUPPLEMENTS

ESMA'S CONSULTATION

AMAFI's answer

AMAFI *is the trade association representing financial markets' participants of the sell-side industry located in France. It has a wide and diverse membership of more than 170 global and local institutions notably investment firms, credit institutions, broker-dealers, exchanges and private banks. They operate in all market segments, such as equities, bonds and derivatives including commodities derivatives. AMAFI represents and supports its members at national, European and international levels, from the drafting of the legislation to its implementation. Through our work*, we *seek to promote a regulatory framework that enables the development of sound, efficient and competitive capital markets for the benefit of investors, businesses and the economy in general.*

AMAFI welcomes the opportunity to respond to ESMA's Consultation on the draft guidelines on supplements which introduce new securities to a base prospectus. Our comments are set forth hereafter.

I. INTRODUCTORY COMMENTS

New Type of Securities Versus Additional Features

Firstly, we are fully aligned with the principle that a supplement should not be used to introduce a new type of security for which the necessary information has not been included in the base prospectus. Therefore, we support the recent amendment to the Prospectus Regulation (*Regulation (EU) 2017/1129*), or "PR", which explicitly states 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 (...)"* (*PR, new Article 23.4a*).

However, we express strong reservations regarding ESMA's interpretation that goes beyond the wording of the PR. In particular, draft Guideline 1 suggests that any "*new types of security features*" would require the establishment of a new base prospectus. This interpretation appears too restrictive. The PR prohibits the use of a supplement only when a *new type of security* is introduced—not when new *features* are added to an existing type of security already covered by the base prospectus.

For example, the introduction of a new type of pay-off mechanism—such as a make-whole clause—within an already existing security structure should be permissible via a supplement. This does not constitute a new type of security under Article 23.4a of the PR. Conversely, we agree that it would not be permissible to include warrants in a base prospectus originally limited to vanilla debt instruments via a supplement. The same applies to changes in convertibility, as noted in the consultation paper (*consultation paper, paragraph 2*). In such cases, AMAFI agrees that a new base or drawdown prospectus is required.

A Proportionate and Consistent Approach to Harmonisation

Harmonisation efforts should be consistent with the overarching objective of the Savings and Investments Union of developing integrated capital markets, improving the financing of the real economy and simplifying European law and regulation. Provided that investors have all required information and that this information can be reviewed and commented upon by NCAs – as is the case with supplements – issuers should be allowed to use supplements to add features to existing types of securities. Requiring a new base prospectus for such changes imposes significant costs and delays on issuers and regulators alike, with limited, if any, benefit to investors.

As ESMA rightly notes, the Listing Act aims to reduce regulatory burdens. The use of supplements has not raised major market concerns, nor has it been misused. It ensures adequate investor information and market transparency. Harmonisation should therefore align with the more flexible practices currently accepted by some NCAs — allowing supplements to include new features in existing security types — not with the stricter interpretations. Prohibiting such common practices, despite their proven reliability, would in particular run counter to the objectives of the Listing Act Regulation (*especially recitals 1–6 and 18*) and undermine access to capital. It would also contradict the strong support expressed by ESMA's Board of Supervisors in December 2024 for simplification and burden reduction.

The Specific Case of Use-of-proceeds Bonds

With regard to use-of-proceeds bonds, such as social, green (including EuGBs) 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 would not be able do so by adding the necessary information via 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 regular bonds and they are structured similarly as such 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, Article 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 the bond.

Prohibiting a supplement in such circumstances constitutes a barrier to the issuance of sustainable bonds, which already obliges issuers to prepare substantial documentation (e.g. a framework agreement, an independent third-party opinion, without mentioning the strict transparency

constraints of EuGBs). It is also contrary to the goal of the EU Green Deal and the Paris Agreement to make finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development. This would be particularly damaging in a context where SLBs are already reducing in number and amounts and the number of EuGBs is already very limited.

It is important to underline that publishing a base prospectus is more than ten times as expensive and substantially slower than publishing a supplement[1]. Issuers may miss favorable market windows as a result. Mandating a new base or drawdown prospectus to accommodate features that could otherwise be included via a supplement imposes unnecessary costs and delays.

Any modification to the current regime must therefore be balanced, prudent, and based on clear evidence of investor harm or insufficient information—evidence that is currently lacking.

II. ANSWERS TO THE QUESTIONS

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

No, AMAFI does 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 Article 23.4a of the Prospectus Regulation, as modified by the Regulation Listing Act. More largely this would also go against the efficiency and competitiveness of EU capital markets.

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 Article 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 AMAFI invites ESMA to remain within the legislative limits of the PR and accept that a supplement may be used to introduce new features, as long as this supplement does not introduce a new type of security.

Green bonds illustrate this. 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 instrument, 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 NCA, 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.

For example, where an issuer early redemption option is provided for in the base prospectus, the introduction of an option for early redemption of bonds issued to finance an acquisition at the occasion

[1] Seven to nine weeks in average for a base prospectus versus three to seven working days for a supplement

of an annual update may be badly interpreted and seen by the market as a signal for an uncoming acquisition transaction. It is then easier to introduce it via a supplement when an acquisition has already been publicly announced.

We strongly disagree with the statement in para. 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. Given that a sustainability-linked security is a fixed or floating interest note with an interest rate variation or step up mechanism, it should be considered as the application of a general option already provided in the base prospectus, namely the possibility to adjust the interest rate or the repayment price based on certain criteria.

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, which it should be possible to include into the programme by way of a supplement.

Furthermore, 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 Article 23.4a of the Prospectus Regulation.

Finally, 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, especially 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.

AMAFI does not agree with the current draft Guideline 2, and suggest adopting a softened version of Guideline 2 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 issuance programs last over a period of one year. In that time, new factors might arise, for example resulting from changed market conditions or investors' appetite, which require an issuer to include new features in the base prospectus during that year.

Issuers must be able to seize market windows opportunistically and react swiftly in a context of high market volatility. It may be that at the annual update, the ESG Bond 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 fully finalised at the time of the annual update.

For example, and in relation to para. 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 proposes in its consultation document is stricter than the position of some national competent authorities. We strongly disagree with this change of policy that is contrary to the text of the PR and does not provide investors with better information but will lead to a considerable increase of 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, lead them to resort to bank financing or to alternative listing venues with less rigid regulations.

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 para. 16 of the consultation document that sustainability-linked securities would be a new type of security 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.

No, we do not believe that Guideline 2 will lead to longer and less comprehensible prospectuses.

Longer prospectuses are not necessarily less comprehensible. However, as said in our response to question 2, 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.

It would be costly for issuers to adapt to the proposed Guidelines, which imply considerable changes to the current practice of market players and national competent authorities.

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 to draw up 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.

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 buying different security types can find the related information in a single document, and it allows NCAs to have a global view of the products intended to be offered at each the annual review process.

Given ESMA's willingness to make sure all the important information come to the attention of the investors, we would promote a formalism to highlight the changes made through the supplements (except those more standard regarding the publication of financial information) i.e. to specify in the

final Terms when the different supplements are listed, the purpose of each or adding the base prospectus in appendix of the supplements each time a supplement is published. Working on the way the information is made available (for example, consolidating the information on the issuer's internet website) may be a more efficient target rather than narrowing the flexibility that can be given to the issuers.

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.

AMAFI believes that a green, social or sustainability-linked feature in either a regular bond or a regular structured product should not be considered as rendering this bond or structured product distinct from a regular bond or a regular structured product, and that the sustainability-linked feature does not by itself change a non-structured security into a structured security.

As per our answers 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, i.e. a bond, including a structured product. Therefore, it should be possible to issue green bonds and sustainability-linked bonds under a regular bond issuance program.

Sustainability-linked notes are also currency linked or index linked notes. As mentioned in our response to Guideline 1, adding a new type of benchmark or index by means of a supplement should remain possible. This does not change the security type as provided for in Article 23.4a of the Prospectus Regulation.

The application of a new annex of the Delegated Prospectus Regulation, such as the 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 context of volatile markets, opportunities may be lost if issuers were obliged to await a lengthy base prospectus update and a new issuance process. Supplements can, indeed, introduce features that will be incorporated into the base prospectus for the next year program and in that sense anticipate the base prospectus for the following issuance program, namely for issuers who did not initially incorporate such features in their base prospectus but want to seize market opportunities before the annual review. In these instances, the NCA 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.

AMAFI stresses that:

- European harmonisation should aim for 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 Article 23.4a of the PR, as modified by the Regulation Listing Act should not be interpreted in an expansive manner to prohibit the use of supplements in situations where the PR clearly allows supplements to be used, and which have not raised any market concerns;
- Where additional information can be disclosed through a supplement without changing the type of securities, no base prospectus or drawdown prospectus should be required, particularly since the use of supplements has not raised any market concerns;
- Relevant factors for the requirements of a new base prospectus or drawdown prospectus include entirely new types 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, EuGBs);
    - 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 upcoming 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 that 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.