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Ref.: ESMA Consultation (ESMA32-1953674026-5808) of 18 February 2025 regarding Draft Guidelines on supplements which introduce new securities to a base prospectus

Here: EUSIPA response

16 MAY 2025

EUSIPA welcomes the opportunity to respond to ESMA's consultation paper Draft Guidelines on supplements introducing new securities to a base prospectus.

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

EUSIPA disagrees with draft Guideline 1.

In summary, EUSIPA believes that the reasoning in support of draft Guideline 1:

- does not sufficiently distinguish between *security features* on the one hand and *types of securities* on the other hand;
- does not sufficiently distinguish between mandatory supplements where there is *an obligation* to prepare a supplement and supplements prepared on a *voluntary basis*;
- should not be linking the assessment of whether the supplement introduces a new type of securities to the aspect of materiality; and
- is *inconsistent* with ESMA's reasoning in support of draft Guideline 2.

Further, EUSIPA believes that draft Guideline 1 is too strict when measured against the additional Listing Act goals of burden reduction and access to capital as alluded to by ESMA in paragraph 6 of the CP.

<u>New type of securities vs. new security features</u>

Recital 36 of the PR states that supplements should not be used to include a *type* of security not already described in a base prospectus. Also the provisions in Article 23(4) of the PR and the mandate to ESMA in Article 23(8) of the PR make reference to a new type of security. Similarly, Recital 54 of the Listing Act also makes reference to a new type of security. The relevant legislative provisions do not in any instance make reference to *security features*.

We note that the definition of 'product supplement' in section 2.3 of the draft Guidelines only makes reference to a new type of securities, which is consistent with the cited legislative provisions.

Mandatory supplement vs. voluntary supplements

ESMA is of the view that the provisions in the first paragraph Article 23(1) of the PR stipulate an *obligation* for the issuer to file for approval of a supplement in certain scenarios. This is also the case pursuant to the provisions in Article 18 of the CDR. However, this is without prejudice to the right to prepare and file for approval of a supplement in other circumstances. We also note that the introduction of the second paragraph of Article 23(1) of the PR states: "*Such a* supplement shall be approved within…" [our formatting], indicating at level 1 that other supplements are indeed possible.

Substance vs. materiality

If the assessment of whether a supplement includes a new type of securities is linked to a question of materiality as contemplated by parts of the reasoning in support of draft Guideline 1, this risks causing potentially significant investor protection issues and potentially severely restricts issuers' ability to take remedial action in the event of an error or inaccuracy.

As currently drafted, the reasoning implies that any *security feature* not described in the base prospectus is not considered material for the purposes of the provisions in Article 23(1). The obligation to prepare and file for approval a supplement rectifying a security feature-linked *error* or *inaccuracy* in the base prospectus or, as the case may be, the final terms, should not be impaired. For example, if a security related feature is mistakenly entered erroneously or left blank, and such error or inaccuracy is material, the use of a supplement must be available.

It would be to the detriment of investors and issuers if any and all errors or inaccuracies related to a security feature in the documentation, are automatically deemed non-material for the purposes of the supplement regime (mandatory situations as well as prohibition against product supplement) regardless of whether the error is material or not in the context of the assessment of the securities. While important, the materiality aspect should not be used as a tool for assessing other aspects, such as whether the supplement introduces a new type of security.

Inconsistencies between Guidelines 1 and 2

EUSIPA notes that draft Guideline 2 and ESMA's supporting reasoning does not require that each and every detail of *any security feature* must be disclosed in the base prospectus. Instead, draft Guideline 2 states (our marks): "This should be done by including disclosure such as *the risk factors* associated with the *relevant type* of

securities as well as the *overarching* terms and conditions that are applicable and by *identifying the type of securities* which the issuer will issue in the overview of the programme.".

This is supported by the reasoning in paragraph 14 of the CP which makes reference to all *types of securities*. Paragraph 15 continues to explain the reasoning (our marks): "...the base prospectus submitted for approval should *at least generally* provide for such possibilities when it is approved by including disclosure such as the *risk factors* associated with the relevant *type of securities* as well as the *overarching* terms and conditions that are applicable."

Finally, paragraph 16 of the CP states [our formatting]: "If an issuer sought to add a new currency as an underlying in a base prospectus that generally provides for the issuance of currency-linked notes, the supplement in that case should *not* be treated as a "product supplement". That is because 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. Similarly, making limited *adjustments to existing redemption formulae or formulae for calculating interest* or *limited changes to risk factors* should *also be permissible by supplement* with respect to securities that are already described in the base prospectus."

In EUSIPA's view, ESMA's reasoning in support of Guideline 2 appears much better aligned with the relevant legislative provisions and the objectives behind the policy directions behind the Capital Markets Union initiative, than the draft Guideline 1 and the reasoning in support of Guideline 1.

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

In EUSIPA's view, draft Guideline 2 and most of ESMA's reasoning in support of Guideline 2, appear to be aligned with the relevant legislative provisions and the objectives behind the policy directions behind the Capital Markets Union initiative.

However, as regards the discussion concerning the use of different underlyings towards the end of paragraph 16 of the CP, EUSIPA stresses the importance of not introducing limitations on the eligibility of individual underlyings where the base prospectus contains disclosure such as the risk factors associated with the relevant type of securities as well as the overarching terms and conditions that are applicable and by identifying the type of securities which the issuer will issue. EUSIPA believes that the position reflected in ESMA's response to Q12.2 (Type of underlying) in ESMA's Questions and Answers on the Prospectus Regulation (ESMA/2019/ESMA31-62-1258), is sufficiently granular in this regard when taken together with draft Guideline 2 itself.

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

EUSIPA is under the impression that Guideline 1 will entail such risks of longer and less comprehensible prospectuses. If draft Guideline 1 is implemented as currently drafted, it is difficult to envisage any practical scope to still apply draft Guideline 2 and ESMA's reasoning in support thereof.

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.

The use of the proceeds can be specified in final terms and changes to risk factors and the description of securities should be possible via supplement. In case of "use of proceeds bonds" the incorporation of such information into a base prospectus does not lead to the incorporation of a new type of security as "use of proceeds" bonds have the same capital and risk profile as more traditional bonds. Similarly, the introduction of EU Green Bonds (which also qualify as use of proceeds bonds) to a base prospectus does not qualify as a new type of securities.

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.

EUSIPA recognizes the mandated development of Guidelines and the content of Recital 36 of the PR. However, EUSIPA believes that it would be a better approach to codify the existing possibilities to prepare and file for approval of supplements on a voluntary basis if and when level 1 can be revisited. The need for separate approval processes in relation

to voluntary supplements generally and/or specifically product supplements could be considered in such context.

In the meantime, EUSIPA believes that the restrictions and inflexibility potentially created by the final Guidelines should be kept at a minimum. Flexible and not overly stringent boundaries that allow for a case-by-case decision, are in our view essential. As noted in paragraph 4 of the CP, it has significant cost, time, and fairness implications as requiring an issuer to prepare a base prospectus instead of a supplement. In EUSIPA's view the better policy direction is to relieve affected issuers of any such unfairness but not by rolling out the same negative implications for all issuers.

For these reasons EUSIPA considers that the categorization of different types of securities as currently reflected in the securities note annexes and building blocks to the Commission Delegated Regulation 2019/980 as well as being envisaged in ESMA's October 2024 draft proposal for a revised delegated regulation amending the current delegated regulation. Where a product supplement would cause a type of security already existing in the base prospectus to trigger one or more annexes or building blocks to become applicable, such migration could be a justification for it being considered as a new type of security.

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

No response.

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