

MAYER | BROWN

CAPITAL MARKETS KNOW-HOW SERIES

PRODUCT SUPPLEMENTS

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OVERVIEW

1. What are Product Supplements?
2. Art. 23 Prospectus Regulation and ESMA Guidelines
3. Practical Use Cases and Documentation Aspects



01

WHAT ARE PRODUCT SUPPLEMENTS?

PRODUCT SUPPLEMENT - TERMINOLOGY

- **Term:** means a supplement pursuant to Art. 23 (1) Prospectus Regulation („**PR**“) in relation to matters concerning those parts of a prospectus that relate to the product information in the „Securities Note“
- **Form:**
  - Single supplement in respect of a prospectus / base prospectus
  - Combined supplement in respect of several (base) prospectuses
  - A supplement to a securities note of a tripartite (base) prospectus only is not possible, only to a prospectus comprising a summary/registration document/securities note or a base prospectus comprising registration document and securities note



PRODUCT SUPPLEMENT - USE CASES

- Significant new factor, material mistake, or material inaccuracy in respect of a product that is subject to a current (or continuing) public offer (**Product Correction Supplement or Product Change Supplement**).

  Examples:

  - Missing or inconsistent disclosures in the product description
  - Material new regulatory developments impacting the product or its terms
  - Material changes to the product not foreseen in the terms of the product

- New product developments in respect of products described in a base prospectus that shall be offered in the future due to product innovation (**New Product Supplement**).

  Examples:

  - Additions to existing product pay-outs / new product pay-outs
  - Specific changes to terms relating to the underlyings already included in the prospectus
  - Add-on elements, like ESG-wrappers etc.





02

ART. 23 PR AND ESMA GUIDELINES



ART. 23 PROSPECTUS REGULATION

- **The rule**: a supplement to a base prospectus must not introduce **a new type of security** *(eine neue Art von Wertpapieren)* for which the necessary information was not included in the base prospectus (Art. 23 (4a) PR, inserted by the Listing Act), save where needed to meet capital requirements.
- **The mandate**: Art. 23 (8) PR required ESMA to specify, by 5 June 2026, when a supplement introduces a new type of security.
- **The problem**: long-standing NCA divergence in the past in respect of New Product Supplements; New Product Supplements (future-orientated supplements) have been generally prohibited by certain NCAs; the very same supplement could have been approved in one Member State while another required a new base prospectus (Recital 54 Listing Act).
- **The aim**: ensure investor protection, foster regulatory convergence across the EU, but also reduce the burden on issuers given the high costs of prospectus approvals.



ESMA'S FINAL REPORT OF 9 SEPTEMBER 2026

- Follows market consultation contained in the Consultation Paper („**CP**") of 18 February 2025
- ESMA notes a strong interest in the market with 39 responses to the CP
- Key takeaway from the consultation: „*...overarching request for clear criteria concerning this subject...*"
- Market consultation resulted in a new approach in relation to what is a **new type of security** *(eine neue Art von Wertpapieren)* (see next slides)
- "*A significant benefit of the final Guidelines is that their straightforwardness and ease of application are likely to reduce the risk of divergence.*"
- New Guidelines aim to align with the political goals of the Listing Act, i.e. burden reduction and access to capital

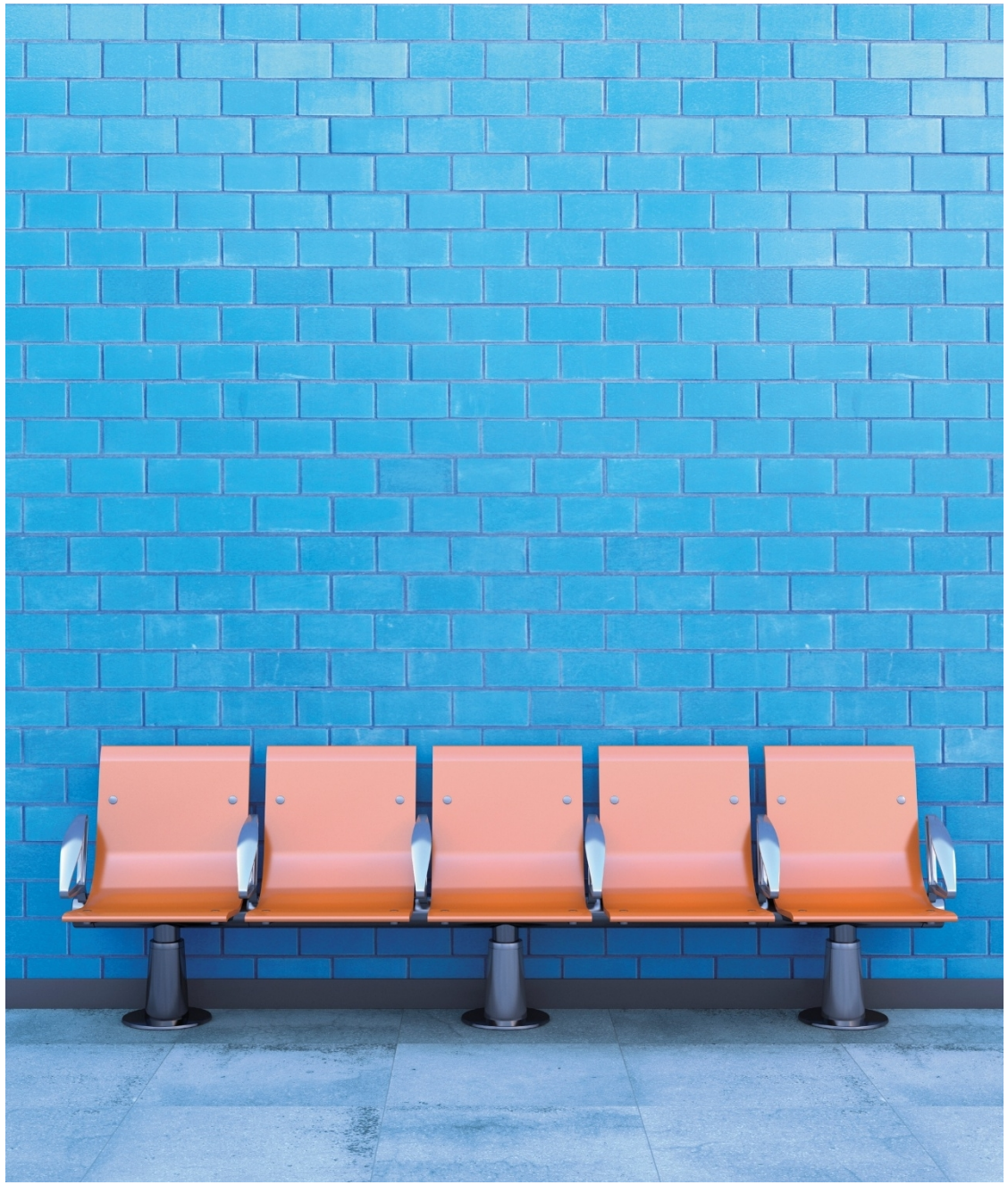
ESMA GUIDELINES ON NEW PRODUCT SUPPLEMENTS: GUIDELINE 1: THE ANNEX-BASED APPROACH

If a supplement involves disclosure from any of these securities note annexes / building blocks of CDR 2019/980 that did not apply to the securities in the base prospectus, it introduces a new "type" of security and a new base prospectus is required.

Annex 14	Annex 17	Annex 18	Annex 19	Annex 21
Standard Notes	**Payment or delivery obligations linked to an underlying asset**	**Underlying share**	**Asset-backed securities**	**Guarantees**

General principle: A supplement can be used when a base prospectus generally provides for certain type of product. The measure of "generally provided for" is set at the level of a class of product and not granular features.





GUIDELINE 1: THE ANNEX-BASED APPROACH – PRACTICAL CONSEQUENCES

✓ A base prospectus prepared under Annex 14 or Annex 14 and 17 can each be supplemented by additional information subject to Annex 14 or, resp., Annex 14 and 17 disclosure requirements (New Product Supplement).

→ **Permitted New Product Supplement**

✗ A base prospectus prepared only under one or more specific Annexes cannot be supplemented to add new product related elements that require information pursuant to any of Annex 17, 18, 19 or 21 disclosures not included in the base prospectus approval (New Type of Product Supplement).

→ **Prohibited New Type of Product Supplement**

GUIDELINE 2: THE UNDERLYING TEST

- A supplement may add an underlying only if the same type of underlying is already in the base prospectus (Annex 14 Item 3.1.7(a) ("*a statement setting out the type of underlying*")/ Annex 17 Item 2.2.2).
- **Type of underlying:** Equity; non-equity; reference entity/obligation; index; interest rate; commodity; crypto-asset; basket of underlyings…, other.
- **Note:** Most of the information on the underlying is Category C
- E.g. new proprietary indices can be included via supplement if "index" underlyings are generally covered.



GUIDELINE 3 AND 4: ABS AND ESG INFORMATION

ABS

No supplement to introduce disclosure in relation to:

- A new obligor/guaranteeing entity (Item 2.2.11(a))
- New equity disclosure (Item 2.2.16)
- A new reference asset or underlying (Item 3.6(a)/(c))

ESG

- No addition of SLB / sustainability-linked disclosure if not already included in the base prospectus.
- ESG use-of-proceeds securities (incl. green bonds) and structured securities advertised with an ESG component can be included via supplement (exemption for the general Annex-based approach).
- Also applies to EU Follow-on and EU Growth base prospectuses.





03

PRACTICAL USE CASES AND DOCUMENTATION ASPECTS

GUIDELINE 1 AND 2: EXAMPLES FOR ANNEX 14 PROSPECTUSES

- Add a new interest payout (for example a new fixed-to-floating structure)
- Add new currency related aspects
- Add new termination rights for a termination at par
- Add seniority/ranking related aspects;
  - Subsequent addition of new subordinated structures possible?
- Add new requirements for regulatory capital notes
- Add new regulatory related aspects to an already described product



GUIDELINE 1 AND 2: EXAMPLES FOR ANNEX 14/ANNEX 17 PROSPECTUSES

- Add a new element to an existing interest/principal
- Add a new feature to an existing payout, for example an autocall feature
- Add a completely new principal payout
  - Are there potential limitations on the number of new payouts?
- Add new termination rights for a termination below par
- Add new terms for a type of underlying already provided for in the base prospectus (Guideline 2); for example add a new or more specific market disruption or adjustment clause



GUIDELINE 1: GUARANTEES

- Details of an existing guarantee may be amended by supplement.
- A new guarantee and, accordingly, a new guarantor may be added to the securities note part of a prospectus only via incorporation by reference of an approved guarantor disclosure in any other prospectus.
- Exchange of existing guarantor by way of supplement?
- No approval of a new guarantor disclosure through a supplement.





PRODUCT SUPPLEMENTS AND DOCUMENTATION CONSEQUENCES FOR PROGRAMME DOCUMENTATION

- Extension of product scope in line with programme set-up?
- Check for procedural requirements on supplements in Dealer Agreement; notification requirements or prior dealer review might apply
- Check if Agency Agreement needs to be amended, e.g. if T&Cs are part of the Agency Agreement
- Legal Opinion updates?
- Other issues to be considered?

WITHDRAWAL RIGHT ASPECTS

- Nature of the withdrawal rights pursuant to Art. 23 (2) PR
- Conditions for withdrawal rights under Art. 23 (2) PR:
  - Supplements to prospectuses relating to products subject to a retail public offer
- If a withdrawal right under Art. 23 (2) PR exists: Prominent statement in respect of content and conditions of withdrawal rights required in the Supplement
- Consequences for Product Correction supplements and Product Change Supplements
  - Option pursuant to Art. 23 (4) PR and restriction to the products subject to the Product Correction/Change Supplement possible and advisable
- Consequences for New Product Supplements
  - CSSF requests statement that Supplement does not relate to products subject to an ongoing public offer
  - In our view, **no** withdrawal rights should apply, subject to civil law courts views on consumer protection laws. A protection of investors is not needed in these cases as no current subscribing investor can ever be affected by the New Product Supplement.
  - Accordingly, no statement relating to the withdrawal right should be required (currently under consideration by NCAs)



PRACTICAL CONSIDERATION FOR YOUR BASE PROSPECTUSES

The Annex-based test is easier to apply but relevant product type has to sit in the base prospectus from the outset. No front loading with various specific underlyings (e.g. various index descriptions) required.

1 Audit current base prospectuses

Map each base prospectus against the annexes it uses (Annexes 14, 17, 18, 19, 21) and the types of underlying it covers.

2 Optionality at update

Include annex categories and types of underlying potentially needed during the validity of the base prospectus. **Frontload** prospectuses with relevant types of products; overloading can now be avoided (increasing comprehensibility).

3 ESG pipeline

Sustainability-linked notes must be in the base prospectus from the start. Green and other use-of-proceeds bonds (incl. EuGBs) can still be added by supplement.

4 New guarantors

Plan for possible new guarantors: an approved, valid guarantor disclosure must exist to be incorporated by reference.

5 Streamline base prospectuses

New supplement regime allows for more flexibility during the validity of the base prospectus. Remove products that are unlikely to be issued, thereby improving disclosure. Keep relevant product types only.

6 Timing and NCA practice

Guidelines apply two months after publication in all EU languages.

The team consists of experienced lawyers as well as young, ambitious and inquisitive talents. This also makes it clear to the clients how important it is to the partners to provide well founded training for the up-and-coming talent. In addition, all team members are incredibly friendly, so working together is a lot of fun, even beyond the technical side.

THE LEGAL 500 DEUTSCHLAND (Client)



THANK YOU!



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