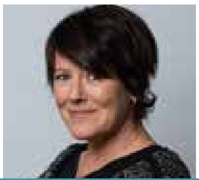
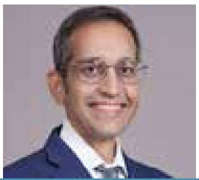
Primary Markets



by **Ruari Ewing, Charlotte Bellamy, Katie Kelly and Mushtaq Kapasi**

European Commission consultation on the Listing Act

On 11 February 2022, ICMA responded to the European Commission's targeted consultation on the Listing Act: making public capital markets more attractive for EU companies and facilitating access to capital for SMEs.

The targeted consultation formed part of a European Commission initiative aimed at making the listing of both equity and non-equity securities on EU public markets more attractive for companies, in particular small and medium-sized enterprises (SMEs). The goal is to make it easier for EU issuers to finance their activity and to grow, innovate and create jobs, while preserving a high level of investor protection and market integrity.

This initiative is in line with the objectives of the European Commission's Capital Markets Union Action Plan of September 2020. Specifically, in Action 2 of the Action Plan, the Commission announced that it will assess whether the rules governing companies' listing on public markets need to be further simplified.

The consultation posed a wide range of questions relating to the state of public capital markets in the EU and the associated regulatory regimes, namely the EU's Prospectus Regulation (PR), Market Abuse Regulation (MAR), MiFID, Transparency Directive and Listing Directive.

The key points from ICMA's response are as follows.

(1) The EU's primary bond markets currently function efficiently, particularly in the wholesale space. The regulatory environment for listing wholesale bonds in the EU is considered to be reasonably well-calibrated, although is perceived to place more emphasis on investor protection than ensuring access to finance for bond issuers.

(2) Given the well-functioning nature of wholesale primary bond markets currently, many ICMA members would welcome only necessary adjustments to the PR. However, some more ambitious proposals to increase flexibility for bond issuers could also be considered. In any event, the base prospectus format, wholesale disclosure regime and flexibility for bond issuers to choose their home Member State under the PR work well and must be retained. Similarly, the public offer exemptions and application to securities to be admitted to a regulated market (but not MTFs) provide important flexibility.

(3) In relation to MAR, the broad scope (namely its application to securities listed on regulated markets, MTFs and OTFs), the definition of "inside information", obligations relating to insider lists and the market soundings regime are considered problematic or disproportionate.

(4) Changes to the listing-related requirements under MiFID, Transparency Directive and Listing Directive are, on balance, not considered to be necessary at this time.

(5) There is scope to develop a pan-EU retail bond market, but regulation is only one factor among various other commercial and market drivers. Constructing an appropriate regulatory regime would require a holistic consideration of various regulatory tools and incentives. The situation is similar for SME issuer access to public bond markets, where investors tend to need more (rather than less) information about the issuer. While challenges exist in both the retail and SME contexts, they should be considered separately given retail investors are less likely to be able to assess and bear the increased risks associated with investing in SME bonds.

The consultation period closed on 25 February. The next step is for the European Commission to consider the responses it received and adopt legislative proposals. This is planned for the third quarter of 2022.

ICMA plans to continue to engage with the European Commission and other relevant policy makers on behalf of its members on this important EU initiative for the international bond markets. As ever, an overarching concern is avoiding unnecessary barriers to cross-border bond issuance. This will be a particular focus as the EU's and UK's regulatory regimes develop and diverge post-Brexit, as seen in the context of the UK prospectus regime reforms discussed below.

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UK Prospectus Regulation review outcome

Introduction

HM Treasury published the outcome of its review of the UK Prospectus Regulation on 1 March 2022. Whilst it is still too early to say what the precise implications will be for bond markets, ICMA was pleased to see that some of the key suggestions it made in its response to the consultation will be taken forward.

The background to the review of the UK Prospectus Regulation is the UK Listing Review, chaired by Lord Hill, which was launched in November 2020 as part of a plan to strengthen the UK's position as a leading global financial centre. Both the UK Listings Review and the consequential HM Treasury consultation on the UK Prospectus Regulation had a strong equity focus. However, the adjustments to the UK Prospectus Regulation will undoubtedly impact bond market participants.

What will change?

The current UK Prospectus Regulation is a close mirror image of the EU Prospectus Regulation, on-shored, with relatively minor amendments, at the end of the Brexit implementation period at the end of 2020. Under the European Union (Withdrawal) Act 2018, the UK Prospectus Regulation and related detailed rules that derive from EU law have a status equivalent to statute and can only be amended via an Act of Parliament.

HM Treasury intends to repeal the UK Prospectus Regulation and related detailed rules entirely and replace them with a new regime comprised of (i) high level fundamental laws that will sit in statute and (ii) powers for the FCA to make detailed regulations. Going forward, the FCA will therefore be able to amend the detailed rules quickly, either to correct errors or to deal with changed circumstances, without requiring primary legislation. This is consistent with the UK Government's broader direction to return responsibility for designing and implementing financial services regulatory requirements to the regulators, following the Future Regulatory Framework Review.

The precise impact of the changes for bond market participants will depend in large part on how the FCA exercises the significant powers that will be granted to it under the UK's new prospectus regime. These powers will include specifying if and when a prospectus is required, what a prospectus should contain, whether it needs to be reviewed and approved prior to publication and other detailed rules currently contained within the UK prospectus regime. It is anticipated that the FCA will consult upon the exercise of these expanded powers in due course.

In addition to the grant of significant new powers to the FCA, a key feature of HM Treasury's proposals is a structural change that will separate the regulation of public offers of securities on the one hand from the regulation of admissions of securities to trading on the other hand (reflecting the UK's approach to prospectuses before the first EU Prospectus Directive). While this is a striking change in terms of the structure of the UK's prospectus regime, this is not expected to give rise to any new barriers to bond issuers' ability to offer bonds on a pan-European or global basis.

Related to this point, ICMA was pleased to see that HM Treasury intends to set the threshold for the exemption to the UK public offer regime based on minimum denominations at £50,000, and not £100,000. This was a key concern for international bond market participants, noting that bonds with the commonly-used €100,000 minimum denomination would meet the current EU Prospectus Regulation threshold but would not meet a UK regulatory threshold if it were to be set at £100,000. ICMA had emphasised this point in its engagement with HM Treasury; and is pleased to see this concern addressed.

A key area of focus for many of ICMA's members are prospectus content requirements. These requirements have a significant practical impact for bond issuers, underwriters and other market participants. As previously mentioned, the FCA will have the power to specify rules related to prospectus content going forward, and so it is still too early to determine precise implications in this area. However, the overarching test for what must be disclosed (known as the "necessary information" test) will be set out in statute. HM Treasury has indicated that it will make certain adjustments to the current test. There are two changes which will be of particular interest to ICMA members.

First, the UK Government intends to remove minimum denomination as a factor in the "necessary information test" on the basis that this is considered to create an artificial incentive to issue high-denomination securities. Currently, the EU and UK regimes provide for lighter disclosure requirements and an exemption from the obligation to prepare a prospectus summary where a bond has a minimum denomination of €100,000. This lighter ("wholesale") disclosure regime and exemption from the prospectus summary are considered to be helpful for international bond issuers. The removal of the minimum denomination factor from the statutory "necessary information" test is not considered to be concerning in and of itself because the test is still expected to state that the "necessary information" will differ depending on the "type of securities" (thereby allowing for a differentiation between retail and wholesale bonds). As highlighted in ICMA's response to HM Treasury's consultation, it will be important that the FCA considers carefully and consults market participants on how best to implement a disclosure regime that does not introduce unnecessary or disproportionate costs for issuers of wholesale bonds.

The second change that will be of interest to ICMA members is that a modified necessary information test will apply to debt securities which focuses on the issuer or guarantor's *creditworthiness*, rather than *prospects*. ICMA has long argued that this would be a useful change to the regulatory regime for bond prospectuses; and is pleased to see that HM Treasury will take this forward. It will be interesting to see how the FCA intends to reflect this change when it comes to consider detailed prospectus content requirements. ICMA has previously noted that the annexes to the UK Prospectus Regulation Delegated Regulation (to the extent they are retained by the FCA) would need to be revised, either by deleting the extraneous requirements or preferably by including a general provision stating that the disclosure items in the annexes are needed only to the extent they are necessary to meet the "necessary information" test.

In other areas, HM Treasury is proposing to:

- develop a new regime of regulatory deference for offers into the UK of securities listed on certain designated overseas stock markets, which will permit offers into the UK using an overseas offering document without FCA review and approval;
- include offers of securities which are or will be admitted to trading on certain MTFs to the list of public offer exemptions;
- develop a mechanism by which MTF admission documents will be treated as a type of prospectus, whilst not changing the current system in which MTF operators establish admission criteria and rules subject to FCA rules and oversight; and
- raise the threshold for liability that applies to certain categories of forward-looking information in prospectuses.

None of these changes appear to be problematic, and indeed the regulatory deference and forward-looking information changes are likely to be welcome.

When will it change?

The timing for the implementation of these changes is not yet clear. HM Treasury states that the UK Government will introduce legislation "when parliamentary time allows". The full suite of reforms will take full effect after the FCA has consulted on, and is ready to implement, new rules under its expanded responsibilities.

Conclusion

It is still too early to draw conclusions as to whether the reform of the UK Prospectus Regulation will deliver "far-reaching and permanent benefits in terms of reducing regulation and encouraging efficient capital raising" that were mentioned in Lord Hill's review. Much will depend on how the FCA chooses to exercise its expanded powers. At the moment, the direction of travel appears to be broadly welcome: a more flexible regime with some of the features outlined by HM Treasury (such as an effective regulatory deference mechanism) may well be positive.

ICMA plans to continue engaging with HM Treasury, the FCA and members on these important reforms for primary bond markets, focusing in particular on the need to avoid new and unnecessary barriers or increased disclosure requirements for international wholesale bond issuance.

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The UK's new consumer duty

On 11 February, ICMA submitted its response to UK Financial Conduct Authority (FCA) consultation CP21/36: *A New Consumer Duty: Feedback to CP21/13 and Further Consultation*.

Vanilla retail bond context: The response welcomed the FCA's general intention to exclude vanilla bonds from the scope of the new consumer duty (with *inter alia* elements of both the PRIIPs and MiFID product governance regimes), as some investor protection measures (notably the PRIIPs and MiFID product governance regimes) do not properly address "flow" securities markets and have diminished borrowers' appetite to offer bonds to retail investors. But the "non-complex financial instrument" exclusion seems likely to be of only marginal relevance in this respect, notably given its limitation to bonds that are "regularly traded" (a narrow, subjective and unpredictable concept as defined) and on a UK exchange (when bonds tend to trade OTC and be listed on a range of stock exchanges of repute internationally) – as well as only being issued by "real economy" borrowers (excluding financial and even seemingly official borrowers). The exclusion should be consequently widened.

Institutional bond context: The response also welcomed the FCA's general intention to exclude institutional/wholesale bond markets from the scope of the new consumer duty, as these have been reliably providing trillions in financing to Europe's economy over the years and care needs to be taken not to disrupt them. But the "non-retail financial instrument" exclusion does not seem to achieve this, notably given its limitation to bonds with a denomination of GBP100k or more (or equivalent) when USD/EUR institutional issuance (largely in USD/EUR100k denominations – ie around GBP70-80k) represents over 79%/91% of overall issuance in number/volume terms. The minimum denomination requirement should be calibrated to GBP50k and (consistently with the Prospectus Regime) also be alternative to the professional "eligible investor" requirement. (In this respect, ICMA will be reviewing closely the FCA's recent PRIIPs consultation conclusions, to which ICMA had previously responded as noted in the Fourth Quarter 2021 edition of this Quarterly Report.)

Other aspects: The response also distinctly noted that pre-existing bonds should be grandfathered in terms of ongoing obligations (to avoid retrospective regulation) and that the proposed nine-month implementation period seems very short given what is involved (and also is materially shorter than the one-to-three year timelines cited in prior industry feedback).

ICMA will continue to engage on this topic in the context of its overall focus on retail access to bond markets.

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European Commission ESAP proposal

On 20 March 2022, ICMA submitted feedback on the European Commission proposals of 25 November 2021 for a European single access point (ESAP) for public information. This follows ICMA's prior detailed input noted in the Second Quarter 2021 edition of this Quarterly Report.

The feedback noted:

(1) it was not possible to comment definitively or in detail, as much depends on logistical and subsidiary specifics that are still to follow;

(2) allowing for information to be in a "data extractable format" (including a PDF with computer-recognisable characters) and not just in a "machine-readable format" (involving content structuring/standardisation that could be inappropriate in many cases) is welcome;

(3) that it may be worth revisiting in due course the current conclusion that the ESAP be only an information repository (given significant reported stakeholder support for the ESAP allowing direct upload of information and being a publication channel);

(4) prominent and robust responsibility terms should apply to any e-translation functionality of the ESAP;

(5) that in terms of submitted information needing to be kept available for at least ten years (subject to any specific sectoral rules), prospectus information would be expected to remain available until the maturity of the securities concerned (which could often exceed ten years);

(6) the novelty of a qualified electronic seal, the Commission's concluding of an annual cost of €600 in this respect (including also an LEI) and seals needing to be accessible to multiple staff within submitting entities;

(7) that sectoral regime considerations be taken into account when defining relevant search criteria, as these are likely to vary materially between sectoral regimes.

ICMA will continue to engage with this topic as it evolves.

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Hong Kong SFC bookbuilding and placing conduct code: industry implementation

Following the Hong Kong Securities and Futures Commission (SFC) October 2021 consultation conclusions on a new Code of Conduct for capital market transactions (reported in the First Quarter 2022 edition of this Quarterly Report), ICMA has been engaging with members and other market participants (both underwriters and investors) – as well as the SFC – to consider potential practical approaches to compliance in locally-led and internationally-led DCM issuance transactions.

ICMA acknowledges that in bond offerings where all the underwriters are in-scope entities, acting either as a capital market intermediary (CMI) or as an overall coordinator CMI (OC), the relevant requirements under the Code will apply to those underwriters. The Code would most likely apply to all CMIs in bond offerings involving Hong Kong or China-based issuers where the underwriter syndicate managers are based in Hong Kong and a substantial portion of the bookbuilding and placing activities would take place in Hong Kong. The scope of the Code in such bond offerings is generally clear to ICMA members.

ICMA's focus particularly concerns scenarios with global and Asian bond offerings led by a mix of in-scope and out-of-scope underwriters, where different degrees of bookbuilding and placing activities are conducted in Hong Kong.

ICMA's focus will also cover some important situations where, even though the Code clearly applies to a bond offering, there may be practical ambiguities or challenges in compliance. The overall aim is to establish suggested industry practices that comply with the Code, that are feasible in the typical timelines of DCM bookbuilding, and that preserve Hong Kong's competitiveness as a DCM execution hub.

In this respect, ICMA is currently considering issues related to various scenarios and aspects of the Code as listed below.

Scenarios with CMIs that are both in scope and out of scope for the Code:

- Transactions with mixed underwriter syndicates, where some OCs or CMIs must comply with the Code and others are outside of Hong Kong and not subject to the Code: (a) appointment of issuer; (b) code provisions that require syndicate cooperation and information sharing; (c) intra-syndicate disclosure requirements; (d) order book updates.
- Transactions involving a non-syndicate CMI in Hong Kong that is affiliated with an out-of-scope syndicate CMI or OC.
- Transactions led by syndicate teams outside Hong Kong, but that involve DCM origination teams based in Hong Kong.
- Private banks (both in Hong Kong and outside of Hong Kong) and related compliance with relevant Code provisions.

Situations for in-scope transactions:

- Multiple orders from the same investor, and identification of duplicate orders.
- Associated investor identification procedures.
- Underlying investor disclosure.
- Preferential and guaranteed allocations, and related disclosure procedures.
- Order book updates.
- Risk management transactions, and related communications to issuers.
- Price discovery, inflated orders, and treatment of proprietary and associated orders.
- Record keeping procedures (eg advice to issuers, indications of interest, rebate payments, allocation rationale).

Other issues:

- Equity-linked debt and Stock Exchange of Hong Kong requirements related to issuers.

ICMA will continue this engagement with a view to helping market participants ready themselves for the Code coming into effect from 5 August 2022.

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Singapore due diligence requirements

On 15 February 2022, ICMA submitted its response to a Monetary Authority of Singapore (MAS) consultation P020-2021: *Introduction of Due Diligence Requirements for Corporate Finance Advisers*.

The ICMA response noted that banks and transactions must often comply with applicable regulation in many jurisdictions and that materially onerous inconsistencies in individual jurisdictions may hamper local issuer, underwriter and investor participation in cross-border financings. In this respect the proposed Singapore requirements are inconsistently granular and prescriptive compared to international established regulation and best practice. Furthermore any local regulatory changes consequent to IOSCO's work on conflicts of interest and associated conduct risks during the debt capital raising process (last covered in the 2020 Fourth Quarter edition of this Quarterly Report) should be delivered in a globally consistent manner.

The response also noted that due diligence has been a long-standing practice in the context of public offerings of both debt and equity securities where parties face civil liability for material misstatements and omissions made in the context of the offering disclosure. The appropriate level of bond underwriter duties in relation to issuer disclosure has been the subject of decades' worth of statute and case law. Issuers are the ones primarily responsible for making proper disclosure in relation to their bond issues. Underwriters, however, may well find themselves being pursued whenever an issuer becomes insolvent and are acutely conscious of the dynamics surrounding due diligence defences in such cases. In this respect, due diligence is impacted by the varying facts and circumstances of each case (including, *inter alia,* the nature and timing of an offering, respective roles of underwriters, whether the offeror is a new equity issuer seeking an IPO or an existing listed issuer and whether the securities being offered are equity or debt). The response cited in this respect the ICMA Primary Market Handbook's ICMA Recommendation 3.3 and related item 3.4 that since January 2000 have provided guidance to market participants on the nature and extent of due diligence for bond offerings.

ICMA will continue to monitor this topic as it evolves.

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ICMA Primary Market Handbook updates

In January 2022, ICMA published the following updates to the ICMA Primary Market Handbook:

- amended item 7.3A, Pricing references for new Sterling bonds, in Chapter 7, Pricing;
- amended Appendix A1, Agreement Among Managers (Versions 1 and 2);
- amended Appendix A5, Day count fraction: ICMA Actual/Actual; and
- amended paragraph 18 in Appendix A12, Pre-sounding, bookbuilding and allocations.

The purpose of the amendments was:

- in the case of amended item 7.3A, to reflect ICMA's 10 September 2021 Notice, Pricing references for new sterling Eurobonds, regarding certain gilts generally considered inappropriate as credit benchmarks;
- in the case of amended Appendix A1, (i) to include further provisions related to UK requirements for contractual recognition of bail-in powers in advance of certain post-Brexit transitional relief that ended in March 2022 and (ii) to include a provision related to Hong Kong rules on contractual recognition of resolution stay powers;
- in the case of amended Appendix A5, (i) to update a cross-reference to the 2006 ISDA Interest Rate Derivatives Definitions to refer to the 2021 ISDA Interest Rate Derivatives Definitions and (ii) to clarify the drafting of the day count fraction; and

- in the case of amended paragraph 18 in Appendix A12, to acknowledge that in certain circumstances returned bonds might be re-allocated at the re-offer price.

ICMA also published further updates to the ICMA Primary Market Handbook in March 2022:

- amended Appendix A5, Day count fraction: ICMA Actual/Actual;
- amended Appendix A7, ECP documentation for Investment Grade issuers; and
- amended Appendix A8, Final terms and pricing supplement.

The purpose of the amendments to Appendix A5, Day count fraction: ICMA Actual/Actual, was to clarify that the ICMA Actual/Actual day count fraction is not specifically envisaged to operate in the context of adjusted interest periods.

The purpose of the amendments to Appendix A7, ECP documentation for Investment Grade issuers, was: (i) to cater for ECP to be issued referencing GBP-SONIA, USD-SOFR, EUR-EuroSTR or EURIBOR by reference to the 2021 ISDA Interest Rate Derivatives Definitions; (ii) to update certain regulatory language following the end of the Brexit transition period; and (iii) to clarify or delete obsolete provisions in the Global Note related to payments.

The purpose of the amendments to Appendix A8, Final terms and pricing supplement, was: (i) to cater for the issuance of floating rate notes referencing the 2021 ISDA Interest Rate Derivatives Definitions; (ii) to remove references to LIBOR; and (iii) to update certain regulatory language following the end of the Brexit transition period.

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Common data dictionary for primary bond markets

The digital transformation of primary bond markets continues to accelerate. An ever-growing number of vendor solutions are coming to the market, targeting different areas of the bond issuance process. According to ICMA's latest version of the primary markets technology directory, there are over 45 solutions for debt issuance, more than doubling compared to 2018.

A key focus for market participants is the risk of fragmentation resulting from the rapid growth of technology solutions. While some providers compete in particular areas such as bookbuilding or investors' order submissions, none of the solutions covers the entire front-to-end process, encompassing roadshow data management, drafting of legal documentation, communication, bookbuilding and pricing, to transmitting deal information electronically for settlement processes, amongst others. Connecting with different solutions as seamlessly as possible is therefore critical.

To support straight-through-processing (STP) and interoperability in primary bond markets, ICMA presented a proposal for a common data dictionary at a roundtable in December 2021. The proposal responds to the feedback received from banks, investors, issuers, market infrastructures, law firms and vendor firms at a previous roundtable. Stakeholders were broadly in agreement on the benefits of STP and the need for common data standards which can be used by each stakeholder and provide for choice and interoperability. Importantly, the aim is not to standardise the issuance process.

In the absence of a taxonomy, the key information of a new issue is defined and labelled inconsistently, according to different guidelines and vendor specifications. For example, variations of currency include "notional", "nominal", "denomination" or "issuance" currency. Some terms such as payment can relate to issuance, interest or redemption. As a result, market participants are required to map or translate individually between vendor solutions and internal systems.

ICMA's common data dictionary proposal aims to provide a framework which builds on existing standards and initiatives and which market participants can use to integrate new solutions and further automation. An initial proposal is to focus on bond term sheets. A dedicated working group will be established under ICMA's FinTech Advisory Committee to develop the common data dictionary, define use cases and scope, and discuss implementation formats.

Members who would like to become involved are welcome to get in touch.

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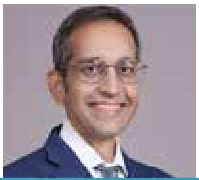
Primary Markets



by **Ruari Ewing, Charlotte Bellamy, Katie Kelly and Mushtaq Kapasi**

EU Listing Act consultation

The European Commission published in November a targeted consultation on various aspects of EU legislation relating to listing, including the EU Prospectus Regulation, Market Abuse Regulation (MAR), MiFID II, Transparency Directive and Listing Directive.

Alongside this, the European Commission also published a general public consultation document containing certain high-level questions that are also included in the targeted consultation. The European Commission advises stakeholders to reply to only one of the two versions (either the targeted consultation or the general public consultation) to avoid unnecessary duplications.

The overarching objectives of these consultations are to make public markets more attractive for EU companies and to facilitate access to capital for SMEs. This is one initiative under the EU's 2020 Capital Markets Union Action Plan (Action 2).

Following informal engagement with the European Commission prior to the publication of the targeted consultation, ICMA is now looking carefully at the wide-ranging questions in the targeted consultation and preparing a response in time for the deadline of 11 February 2022.

In relation to the EU Prospectus Regulation, the overall message in ICMA's response is likely to be that the EU Prospectus Regulation works well from the perspective of the wholesale international bond markets, and there are limited areas that need fixing. To the extent that changes are made to the regime in order to address concerns in other parts of the EU's capital markets, this should be done in a way that does not impose unnecessary additional or disproportionate costs for users of the wholesale international bond markets. ICMA members do, however, have some suggestions for how the EU Prospectus Regulation could function even more effectively for the international bond market. These include targeted amendments to make the incorporation by reference and prospectus supplement regimes more efficient.

Regarding the MAR aspects, ICMA's response is expected to repeat prior ICMA positions around scope, the definition of inside information and the soundings regime (with a few potential additional nuances relating to mid-cap issuers).

ICMA is also considering the European Commission's questions related to the Transparency Directive and other areas of the targeted consultation paper.

Separately, as highlighted in the feature article on the Capital Markets Union Package in this Quarterly Report, ICMA is considering submitting feedback on the European Commission's proposal for a European Single Access Point by the 7 March 2022 deadline for comments. ICMA is also considering a response to the UK FCA further consultation on a new Consumer Duty, with a 15 February deadline, with a likely focus on the apparent policy intention to exclude mainstream bond issuance.

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ICSDs' new syndicated closing model

On 21 April 2021, the two International Central Securities Depositories (ICSDs), Euroclear and Clearstream, announced that implementation would go ahead of a new model for the delivery vs payment (DvP) closing of syndicated bond issuance settling within the two ICSDs. On 21 October, the ICSDs announced the scheduling of such implementation for 14 March 2022 (recommending that this launch date be considered when deals are being prepared in an attempt to limit, to the extent possible, the number of closings during this launch period).

On 20 October 2021, ICMA published a paper on the new model. The paper aims: (i) to very briefly describe the new model (in contrast to the current model that it will replace); and (ii) to suggest how transaction documentation can be consequently modified for a vanilla Reg S bond involving an underwriting syndicate and their issuer client.

"Closing" is when, following pricing and allocation of a bond offering, the issuer exchanges its bond obligation for the cash proceeds of the offering on a DvP basis.

Broadly speaking, the current model involves closing occurring on the ICSDs' "doorstep", with the issuer's bond obligation being initially delivered by the issuer's agent to the ICSDs' common depository/common service provider (CD/CSP) in exchange for an ICSD commitment to pay (CtP) – ahead of initial credit (within the ICSD systems) to a member of the underwriting syndicate (the settlement bank) and then DvP settlement with investors.

The CtP is based on cash reservations and/or credit lines within the ICSD systems, with the intra-day liquidity/collateral requirements involved becoming an increasingly material fetter on clearing efficiency and liquidity as syndicated bond issuance transactions continue to grow in number and size. The new closing model proposes to address this, abolishing the CtP by effectively moving the closing into the ICSDs' books.

Broadly speaking, the new model involves the borrower's bond obligation still being initially delivered by the issuer's agent to the ICSDs' CD/CSP, but free of payment and for initial credit (within the ICSD systems) to a "commissionaire" account. This account is in the name of the settlement bank, but over which the issuer has third party rights (under the Belgian or Luxembourg Civil Codes). Closing then occurs in the consequent DvP settlement with investors, and the cash proceeds are remitted by the ICSDs from the commissionaire account to the issuer's order (as instructed to the underwriting syndicate).

In terms of suggested modifications to transaction documentation, the ICMA paper suggests drafting for use in subscription agreements, issuer instructions to their agents, underwriter instructions to CDs/CSPs, issuer payment instructions to settlement banks and signing and closing memoranda. The paper notes that, in the context of issuances under programmes, such modifications can be given effect at drawdown level and do not need programmes to be updated.

ICMA will continue to assist the market as it prepares for the transition to the new model.

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ESAs' PRIIPs consultation

On 16 December 2021, ICMA submitted its response to the ESAs' call for evidence on the European Commission mandate regarding the PRIIPs Regulation. Much of the response reiterated prior ICMA positions.

Focus mainly on scope: ICMA's response was from the perspective the mainstream primary international bond (Eurobond) markets. In this respect, ICMA's PRIIPs focus has mainly been on PRIIPs regime scope rather than KID content/production – as threshold concerns relating to KID purpose and related liability[1] have meant that KIDs are not generally produced in the mainstream bond context. (ICMA is only aware of one KID seemingly have been produced in the margins of the mainstream Eurobond context since the PRIIPs Regulation came into effect in January 2018.)

Official issuers: The response noted that any extension of PRIIPs scope to issuers with certain EEA-related official status and non-profit entities with certain EEA official recognition (as defined in Prospectus Regulation Articles 1.2(b)/(d)/(e)) would likely, as for other areas of the bond markets, curtail retail supply – and it is unclear how this would benefit retail investors.

Product scope: The response noted that product scope of the PRIIPs Regulation is not entirely clear, compounded by extraneous and inconsistent official public statements.[2] This could be clarified by identifying granular product features that would not of themselves render a product "packaged" under PRIIPs – as the ESAs attempted to do with their 2019 Supervisory Statement (see further below) and as the UK FCA proposed in its recent Consultation Paper CP21/23 that ICMA responded to (as reported at page 31 of the Fourth Quarter 2020 edition of this Quarterly Report). However, such a granular approach to regulatory guidance can give rise to

1. See #12-#15 in ICMA's September 2018 response to a UK FCA Call for Input on PRIIPs.

2. See #3-#4 in ICMA's September 2018 response.

extended complex debate about individual granular features. It can also be more challenging in terms of future-proofing for new product structures – eg regarding sustainability-linked bonds that were only just coming into existence at the time the 2019 Supervisory Statement was finalised and that are not included among its list of coupon step-up events (issuer ratings downgrade, change of control event, tax or regulatory event). It is therefore challenging to be able to determine an exhaustive, definitive list of granular features that should not render a product "packaged" under PRIIPs. In this respect, ICMA has previously proposed an alternative, conceptual, approach to product scope guidance.[3] The most effective approach would be to amend the definition of a PRIIP in the PRIIPs Regulation itself – with the response suggesting the specific wording in this respect.

ESAs' 2019 Supervisory Statement: The response noted that the 2019 Supervisory Statement was a helpful step in the right direction to reassure the markets that vanilla bonds are indeed out of scope of the PRIIPs Regulation. However, differing views and so uncertainty have endured in the market as to what may be interpreted as "packaged" or not, with significant ongoing reluctance to make vanilla bonds directly available to EEA retail investors. In this respect, the impact in the mainstream bond space of the guidance contained in the 2019 Supervisory Statement has been limited by the Statement's unavoidably informal, non-binding nature: it potentially addresses liability to regulatory enforcement under administrative law (to the extent followed in practice by EEA national regulators) but has no scope to address liability to investors under civil law.

The limited substantive scope of the 2019 Supervisory Statement has also been a factor. As it is challenging to determine an exhaustive, definitive list of features that should not render a product "packaged" under PRIIPs, it is difficult to comment exhaustively on potential omissions from the substantive scope of the 2019 Supervisory Statement. The response however cited three specific examples of product features falling outside the 2019 Supervisory Statement despite involving no "intercession" (as contemplated under Recital 6 of the PRIIPs Regulation):

- bonds with make-whole provisions, as the 2019 Supervisory Statement notes only that NPV make-whole bonds (which are the common/market standard form) with a discount rate calculation mechanism known in advance (the meaning of which may depend on the particular drafting of a make-whole clause and the level of discretion drafted into it) "could be considered as a separate case";[4]
- sustainability-linked bonds (as noted under "product scope" above); and
- coupon caps and non-zero floors.

Retail scope: The response noted that, broadly speaking, stakeholders are currently comfortable that, combined with some appropriate legending, the avoidance by issuer-controlled parties of retail-specific marketing and of direct retail access facilitation (such as admission to a direct retail trading platform) should not be reasonably seen as "making available" – bearing in mind also that the absence of a KID amounts to a statutory prohibition on retail sales by anyone of in-scope products. That said, it would be helpful for the retail scope of the Regulation to be explicitly aligned with the approach to exemptions under the Prospectus Regulation (such as those related to minimum denominations and to offers addressed solely to qualified investors).

Taxonomy of PRIIPs: The response noted that a classification of products that could then link to standardised, generic market-wide product information sounds superficially attractive. However, this might face the same challenges as those encountered in attempting to define the general product scope of PRIIPs. As ICMA's current focus is on clarifying mainstream bonds as being outside the product scope of the PRIIPs Regulation, it seems pointless to expend effort attempting to elaborate a taxonomy of product grouping/buckets within this space.

Standardised KID disclosures: The response agreed that the current degree of standardisation of the KID is detrimental to the proper understanding and comparison of certain types of PRIIPs. It is only meaningful to compare like with like. (Cars and motorbikes are both motor vehicles, but of limited comparability nonetheless.) Whilst this is intuitive, it may be a question to be answered by a consumer testing exercise (comparing understanding rates for less standardised KIDs and/or KIDs for narrower, more comparable product groups).

Next steps: The ESAs' issued the call for evidence further to a European Commission request for advice regarding its preparation of legislative proposals implementing aspects of the Commission's retail investment strategy. (ICMA responded to the Commission's consultation on a retail investment strategy for Europe, as reported at pages 29-31 of the Fourth Quarter 2020 edition of this Quarterly Report.) However, the above aspects that ICMA responded to were included in the call for evidence at the ESAs' own initiative, to further advise the Commission beyond its formal mandate. It is consequently unclear how much Commission interest there may be regarding such aspects. ICMA will

3. See #7 in ICMA's September 2018 response.

4. The European Commission acknowledged, in the context of its Capital Markets Recovery Package proposal, the absence of a clear rule that a make-whole clause does not of itself make simple corporate bonds into PRIIPs.

continue to engage on this topic, including by seeking to participate in a stakeholder event the ESAs plan to hold in the first quarter of 2022, ahead of the ESAs' 30 April 2022 deadline to deliver their advice to the Commission.

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Primary Market Handbook updates

In November 2021, ICMA published several updates to the ICMA Primary Market Handbook in order to update regulatory references and standard language to reflect the EU and UK regulatory regimes following the end of the post-Brexit transition period on 31 December 2020.

This followed the publication of draft updated standard language on ICMA's website in December 2020.

More specifically, ICMA published in the ICMA Primary Market Handbook and an associated Circular to ICMA members and Handbook holders and subscribers:

- amended item 2.11, Documentation content, in Chapter 2, Programme establishments and updates;
- amended item 3.5, Updating of programme offer document, amended Recommendation 3.7, Pre-sounding, and amended Recommendation 3.10, EEA MiFID II/UK MiFIR target market, in Chapter 3, Prior to transaction announcement;
- amended item 8.4, Confirmation content, in Chapter 8, Confirmation to Managers;
- amended Appendix A4, Credit ratings in programme offer documents;
- amended Appendix A5a, Deal announcements;
- amended Appendix A12a, Product governance (MiFID II) language;
- new Appendix A12b, Product governance (UK) language;
- amended Appendix A13, Selling restrictions and legends (EEA PRIIPs Regulation, EEA Prospectus Regulation);
- new Appendix A13b, Selling restrictions and legends (UK);
- amended Appendix A15, Stabilisation materials;
- amended Appendix A16, Sub-€100,000 denomination bonds under the EEA Prospectus Regulation and retail cascade legends;
- new Appendix A16a, Sub-€100,000 denomination bonds under the UK Prospectus Regulation and FSMA and retail cascade legends; and
- amended Appendix B2, Glossary.

Post-Brexit amendments to Appendix A7, ECP documentation for Investment Grade issuers, and Appendix A8, Final terms and pricing supplement, are pending and will be published in due course alongside other updates to those Appendices.

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F Primary markets technology directory

Digitisation of debt issuance continued apace in 2021. ICMA's latest review of its primary market technology directory, conducted in Q4, saw the addition of more than 10 platforms or applications for the issuance of debt instruments. This brings the total number of solutions to over 45, up from 35 in Q4 2020 and more than doubling compared to 2018 when the directory was first launched.

The directory seeks to provide greater transparency in a rapidly expanding competitive marketplace by comparing the key features and capabilities of technology solutions available to automate all or part of the process of issuing debt securities. The scope includes bonds, but also other types of debt instruments such as commercial paper, loans and Schuldscheine. It highlights whether the various solutions are aimed at underwriters, investors, issuers or others, at what stage of the issuance process they can be utilised, supported issuance methods as well as connectivity options.

Since the last review in 2020, new technology offerings have targeted in particular bond syndication, seeking to enhance deal-related data management and communication between underwriters and issuers, but also investors. New platforms have emerged to streamline end-to-end issuance workflows, but also to support the issuance, trading and settlement of digital securities based on distributed ledger technology. Amongst others, the directory includes a growing number of auction platforms aimed at both public sector and corporate issuers.

The directory is available to ICMA members, contributing non-member providers as well as regulators through ICMA's website.

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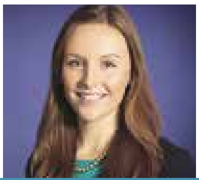
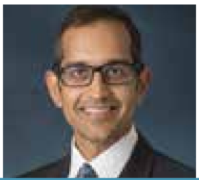
Primary Markets



by **Ruari Ewing, Charlotte Bellamy, Katie Kelly and Mushtaq Kapasi**

The UK prospectus and listings regimes

Following the end of the post-Brexit transition period and the publication of Lord Hill's UK Listings Review, HM Treasury and the FCA have consulted on a wide range of proposals to reform the UK prospectus and listings regimes. In line with the strategy for UK financial services outlined by the Chancellor of the Exchequer in July, the core focus and drive for change seems to be to ensure that the UK's regime is flexible, agile and appropriately calibrated. There appears to be a strong focus on the UK's equity capital markets and listing of shares on the London Stock Exchange. In some ways, this is not surprising given wholesale bond markets are currently functioning efficiently under the current regulatory regime. However, any changes that are made to the UK prospectus and listing regime driven by the needs of the equity capital markets need to be either neutral or positive for the debt capital markets. This message underpins ICMA's responses to the various recent consultations.

UK Prospectus Regulation consultation

In its consultation on the UK Prospectus Regulation, which closed on 24 September, HM Treasury took forward many of the recommendations made in Lord Hill's UK Listings Review. This included a proposed structural change to the UK Prospectus Regulation that would separate the prospectus regime for admission to trading from the prospectus regime for public offers. For the (largely wholesale) international bond market, the proposed new admission to trading regime will be very important. A striking change is the degree of discretion that will be given to the FCA to set rules for this regime, rather than having very detailed requirements set out in primary legislation as is currently the case. The shift away from prescriptive primary legislation and towards FCA rule-making is intended to create a more flexible, agile regime, and is anticipated to be a general trend in the UK's post-Brexit financial services regulation following HM Treasury's Future Regulatory Framework Review and the strategy announced by the Chancellor of the Exchequer in July.

ICMA's response to the consultation highlighted ICMA members' overarching concern to ensure that the currently well-functioning and efficient pan-European primary wholesale bond market is not disrupted or subjected to unnecessary additional or disproportionate costs. Whilst HM Treasury's proposed approach does not give rise to these concerns immediately, much will depend on the precise approach taken with respect to two aspects: first, the exemptions from the public offer regime; and second, the approach taken in relation to "wholesale" disclosure for bonds admitted to trading on UK markets.

In relation to the exemptions from the public offer regime, bond issuers will wish to continue to issue wholesale bonds on a pan-European basis with minimal (or no) additional burdens. As such, it is important that HM Treasury and the FCA consider how any changes to the UK prospectus regime are likely to impact upon issuers that currently rely either on exemptions under the EU Prospectus Regulation or exemptions under the UK Prospectus Regulation. In the bond market, the most heavily used exemption under both the EU and UK Prospectus Regulations is currently the €100,000 minimum denomination exemption. The implications of re-stating the UK threshold in sterling for pan-European bond offerings will therefore require careful consideration.

The future of the "wholesale" disclosure regime would be for the FCA to decide under HM Treasury's proposed new approach. In particular, the FCA would have discretion to decide whether the current approach of allowing wholesale disclosure (including an exemption from the requirement to prepare a prospectus summary) for bonds with a minimum denomination of €100,000 will be retained or not. This is an important issue for bond market participants and an area that ICMA will wish to discuss with the FCA in due course.

ICMA also flagged certain other improvements that could be made to the current regime that would make it work even more efficiently for international bond markets. These include refinements to the "necessary information" test, the definition of "public offer", the rules relating to supplements and withdrawal rights, as well as an ability to incorporate by reference "future" financial information.

The next step is for HM Treasury to consider the responses it received to the consultation before taking forward any changes to the UK Prospectus Regulation. ICMA will continue to monitor developments, engage with the HM Treasury team and keep members informed.

FCA Primary Markets Effectiveness Review

Alongside the review of the UK Prospectus Regulation by HM Treasury, the FCA published a Primary Markets Effectiveness Review in July. The Review was primarily focused on issues related to equity capital markets, but included a discussion of the purpose of the UK listing regime. Whilst this section of the consultation paper was also focused primarily on equity capital markets, the UK listing regime is generally relevant for bonds as well as shares and there were some questions in the consultation paper that related to debt securities.

ICMA's response noted that ICMA is not aware of particular concerns or issues with the current structure of the UK listing framework for debt and debt-like securities that impact upon issuers' choice of listing venue between London and elsewhere. In line with the general message underpinning all of ICMA's recent responses in this area, ICMA noted that any changes made to the UK listing framework would need to be either neutral or positive for debt market participants. In particular, it will be important to ensure the continued availability of the quoted Eurobond exemption from UK withholding tax and the ability for UK and overseas investors to be able to continue to invest in London-listed bonds within the terms of their investment mandates. With these points in mind, ICMA suggested that the FCA explore whether it could streamline the way it regulates admission to listing with the way it regulates admission to trading on a UK regulated market. While the *process* of admitting new bond issues and further bond issues to both the FCA and the London Stock Exchange is generally not considered to be burdensome, the bifurcation of the admission to listing and admission to trading on a UK regulated market and the two different sets of rules could benefit from streamlining in order to make the overall regime more straightforward to understand and apply for debt capital markets participants.

FCA consultation on climate-related disclosures and prospectus requirements for use of proceeds bonds

As reported in the Sustainable Finance section of this Quarterly Report, ICMA also responded to the FCA's CP 21/18 on enhancing climate-related disclosures by standard listed companies and seeking views on ESG topics in capital markets. Of relevance to the UK listing and prospectus regime were the questions in the consultation paper related to the possible extension of a "comply or explain" Listing Rule on TCFD disclosures and a question on whether the UK authorities should consider introducing specific requirements for use of proceeds bond frameworks and their sustainability characteristics in the UK prospectus regime.

The ICMA response acknowledged the importance of TCFD disclosures generally but agreed with the FCA that there are some specific considerations in terms of the extension of the rule to debt issuers. In particular, it is not clear whether the extension of the TCFD-aligned disclosure rule to issuers of standard listed debt (and debt-like) securities would result in a significant increase in the availability of such disclosures because (a) following the extension of the requirements to issuers of standard listed equity and other initiatives, the types of issuers that would be impacted primarily are unlikely to be entities to whom TCFD disclosures are easily applicable and (b) it would be relatively straightforward for debt issuers to choose alternative listing venues should the Listing Rules become more onerous than such alternatives.

On the question of whether changes to the UK Prospectus Regulation are required for use-of-proceeds (UoP) bonds, such changes are not considered to be necessary on the basis that disclosure for UoP bonds that are subject to the UK Prospectus Regulation already follows a relatively consistent approach. Also, absent an appropriately developed and regulated regime for UoP bond framework verification, issuers and underwriters may not feel comfortable with certain disclosure requirements (eg related to UoP bond frameworks) meaning that mandatory disclosure requirements under the UK Prospectus Regulation could be a disincentive to issuing UoP bonds, or at least admitting them to trading on the London Stock Exchange's Main Market. The ICMA response suggested that it may be appropriate to re-visit the question of prospectus requirements for UoP bonds when an appropriate regulatory regime for framework verification is established. Alternatively, a simple requirement for issuers to state in their UoP bond prospectuses whether they intend to comply with a particular market-based standard for such instruments (such as the Green Bond Principles, Social Bond Principles or Sustainability Bond Guidelines) or not and, if so, to specify that market-based standard in the prospectus could be a pragmatic approach.

Power to block listings on national security grounds

ICMA also responded to a HM Treasury consultation on a power to block listings on national security grounds in August. The response agreed that HM Government's intention to exclude debt securities from the scope of the blocking power is sensible. This approach seems to be an appropriate reflection of the balance between the risk of harm arising and the importance of ensuring open financial markets with minimal barriers to entry.

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A retail investment strategy for Europe: Commission consultation response

On 3 August, ICMA filed its response to the European Commission consultation on a retail investment strategy for Europe. As the response used the required but restrictive multiple choice response form, the content of ICMA's response has been extracted into a shorter and more reader-friendly format that has been published on the ICMA website.

ICMA's response effectively reiterated prior ICMA positions in the international bond context, which were cross-referenced throughout.

The response generally noted EU regulation has been one incentive behind the reduced availability of international bonds to direct retail investor participation (initially with the introduction of the prospectus regime and then the convoluted retail summary requirements introduced in its 2010 review, and notably recently with the PRIIPs and MiFID II product governance regimes). But as many corporate borrowers have now got used to seeking funding away from EEA retail investors, regulatory alleviations may not necessarily drive a significant resurgence of European retail bond markets. The EU's substantive retail policy focus seems anyway to be more on shares, funds/UCITS and structured products.

The response addressed several specific areas:

(a) *Machine readability:* Any regulation should be flexible in terms of technical formats and not indirectly force standardisation or simplistic (and potentially misleading) labelling.

(b) *Advertising:* MiFID product governance rules do not regulate marketing communications (as suggested by a question on stricter rule enforcement), with advertisements however covered by the Prospectus Regulation.

(c) *Sufficiency of existing disclosure:* Bond offers are already subject to a requirement for a prospectus (including a summary) with the necessary information material to an investment decision.

(d) *Comparability:* Comparison of different products is only meaningful to the extent products have comparable features (and may otherwise be misleading).

(e) *Disclosure language:* Any local language translations should be the responsibility of any entity selling/ distributing a product within a particular EEA Member State rather than the product "manufacturer" (bearing in mind bonds trade independently of their issuer, manufacturer responsibility for translation seems more likely to incentivise fragmentation of product availability within Europe).

(f) *Short-form disclosure / PRIIPs KID: concept, length and cost:* A short document like the PRIIPs KID seems highly unlikely (whatever length cap is imposed) to be able to disclose the necessary information material to an investment decision (which was suggested in an ESMA speech) and so risks being intrinsically misleading (KIDs were initially designed for the UCITS fund context, where such disclosure arguably relates more to an investment mandate than to specific investment exposures as for bonds). The purpose of short-form disclosure should rather be (like the prospectus summary) as an initial reference ahead of further consideration, either directly or with an advisor (bearing in mind most retail investors do not read long-form disclosure or misunderstand short-form disclosure), in which case length cap similar to what is currently required under PRIIPs might well be workable (though any specific number of words would still likely be relatively arbitrary). Simplifying the KID by limiting it to purely factual information would also reduce the risk of it being misleading. From a vanilla bond issuer perspective, the challenge is not so much the logistical cost of producing a KID but rather the risk of it being misleading.

(g) *PRIIPs product scope:* Despite ESMA's helpful step in the right direction to reassure the markets that vanilla bonds are indeed out of scope, differing views as to what may be interpreted as "packaged" have continued (and so uncertainty on PRIIPs product scope), with significant ongoing reluctance to make vanilla bonds directly available to EEA retail investors.

(h) *KID availability:* It may be prudent to await the outcome of the EU's PRIIPs review before including PRIIPs information within the European single access point (ESAP).

(i) *Improvement of target market determination (MiFID product governance):* The issue is rather that MiFID product governance should not apply to commoditised funding products such as Eurobonds, which are not "designed" as a "service" for investor "clients" (being rather a decades-old "product" for corporate and other borrowers to seek market financing).

(j) *Investor categorisation:* If seeking to increase direct market access for retail investors that have some distinct knowledge and means, then it may be simpler (to avoid a significant and potentially disincentivising repapering consequence that might accompany the creation of an entirely new category) to adjust (subject to appropriate grandfathering) the existing threshold tests for professional status on request (including by way of recognised third party certification).

(k) *Inducements:* If an inducement ban prohibited issuers of bonds from retaining underwriting banks from marketing their bonds even where no investor advisory service is being provided, that could have a materially adverse impact on the availability of bonds to European investors (and on the ability of real economy borrowers to fund themselves). Where no advisory or portfolio management services are being provided, characterising underwriter remuneration as banned inducements would also be unnecessary from an investor protection perspective.

The response concluded that, whilst such a consultation that seeks stakeholder views on the *status quo* can be helpful, many stakeholders may rather have stronger views on future changes – with consultation on the Commission's actual policy proposals best serving the aim of involving stakeholders in the EU decision-making process. (And consulting on legislative drafting intended to give effect to ultimate policy conclusions could also be technically very valuable.)

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UK Wholesale Markets Review: retail aspects

On 24 September, ICMA responded *inter alia* to the retail questions 103-105 of the UK HMT's Wholesale Markets Review consultation (see the Secondary Markets section of this edition regarding the wholesale questions).

In terms of how companies harness retail investment whilst ensuring investor protection, the response noted regulation as one significant incentive behind the reduced availability of international bonds to direct retail investor participation (initially with the European prospectus regime, but notably then with the PRIIPs and MiFID II product governance regimes). Implementing certain regulatory alleviations might help improve direct retail access over time, but many corporate borrowers have got used to seeking funding away from European retail investors. So administrative burden alleviations may not necessarily cause mass retail bond markets to return. (It is possible that equity markets may have been less affected due to regulatory restrictions having a lower relative impact in the context of equity market dynamics.)

In terms of how companies take advantage of the globalisation of information to reach investors, the response noted retail offerings are very much subject to local regulatory requirements in investor jurisdictions – with compliance being more of a consideration in reaching retail investors than "informational reach".

In terms of any role for UK authorities to play in facilitating retail access to capital markets (while continuing to offer high standards of investor protection), the response noted ICMA is able to provide technical input if desired but that wider market drivers seemed challenging. Ultimately UK authorities may wish to focus on how functional retail participation might operate, and then work to facilitate such participation. ICMA will continue its public engagement on retail access to bond markets to help public authorities understand the technical considerations involved.

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UK PRIIPs consultation response

On 30 September, ICMA responded to the UK FCA's Consultation Paper CP21/23: *PRIIPs: Proposed Scope Rules and Amendments to Regulatory Technical Standards*.

The response welcomed formal, binding comfort on the scope of PRIIPs via the creation of a new FCA *Product Disclosure* sourcebook, "DISC".

In terms of "product" scope rules, the response welcomed as fundamental the FCA's recognition in paragraph 2.16(a) of the consultation that "To be a PRIP, a debt security must come between the retail investor and an ultimate investment asset which is not purchased by the investor". However, the FCA's proposed list of "neutral features" (that would not make a product a PRIIP) is inconsistent and should be amended to include several notable product features that do not involve a debt security "coming between" a retail investor and an ultimate investment asset (voluntary call options, non-NPV par calls, floating rate coupon steps, event-driven coupon steps including sustainability-linked bonds, and caps and non-zero floors). In passing, the response cited a historic "conceptual" alternative to the "granular" approach to product scope clarification proposed by the FCA (as set out in ICMA September 2018 response to an FCA July 2018 Call for Input on PRIIPs).

In terms of guidance on when a packed product is not being *"made available"* to retail investors, the response noted this should align more closely to minimum denomination and qualified investor exemptions under the UK prospectus regime (which was the subject of a distinct consultation as reported in this edition under the UK prospectus and listings regimes) and should be alternative (rather than cumulative) in the same way that they are under the UK prospectus regime. It should also be clear that third parties illegally selling PRIIPs to retail without a KID does not constitute "making available" by manufacturers.

The response did not address aspects of the consultation relating to KID content, in the absence of indication that historic threshold conceptual concerns relating to the KID (also set out in ICMA's September 2018 response) are likely to be addressed.

ICMA will continue to engage with the UK FCA as it continues its work on reviewing the UK PRIIPs regime.

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(h) record-keeping requirements should be proportionate;

(i) a longer implementation timeline, phased implementation and an interim review should be considered.

The response also notes (i) the importance of proactive SFC supervision, (ii) that underwriters undertake various services for multiple issuer clients (who may be competitors in their own areas) with internal controls to manage any potential conflicts of interest, (iii) that it may be unrealistic to expect issuer hedging needs will never impact benchmarks used in pricing bond issuances, (iv) that senior management should not be required to be involved in granular transactional decisions to the extent relevant policies and procedures are in place and (v) that there should be further consultation on the legal text of the code additions (ie once the final policy aspects have been confirmed).

Relevant parts from the ICMA Primary Market Handbook are referenced throughout the response.

ICMA will continue seeking to engage with the SFC as this workstream progresses.

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CMRP implementation: MiFID II/R product governance

On 26 February, the EU's Capital Market Recovery Package (CMRP) was published in the *Official Journal of the EU* as Directive (EU) 2021/338. Regarding the alleviation of the scope of the MiFID product governance regime, there were no significant differences with the trilogue outcome reported at page 41 of the 2021 First Quarter edition of this Quarterly Report. In terms of national transposition, EU Member States are due to adopt and publish these CMRP provisions by 28 November 2021 and apply them by 28 February 2022.

Then on 21 May, ICMA responded to a consultation by the Swedish Ministry of Finance, regarding Swedish transposition of the CMRP's alleviation of the scope of the MiFID product governance regime. The response noted that the proposed Swedish implementation seemed narrower than the EU-level legislative text in one sense (that bonds with no embedded derivative at all would remain subject to the product governance regime) as well as wider in another sense (that bonds with other embedded derivatives in addition to a makewhole clause would no longer be subject to the product governance regime), with potential implications arising from local variations of implementation. Distinctly by a 7 May Decree, Germany also implemented the alleviation on a narrow basis.

However, ICMA has subsequently learnt that, notwithstanding the drafting of the EU-level text, the actual intention of the EU co-legislators relating to the trilogue outcome was that only bonds with a makewhole clause (but no other embedded derivatives) be exempted from the MiFID product governance regime. In this respect, some of the apparently narrower national implementations may simply be making consequent corrections to the formal EU legal text.

The market practice implications of all this remain to be seen. However, since the conceptually flawed nature of the PG regime is at the moment significantly mitigated through the "ICMA1"and "ICMA2" approaches to compliance (as noted in ICMA's May 2015 response to the European Commission's MiFID review consultation and reported at pages 37-38 of the 2020 Third Quarter edition of this Quarterly Report), it seems unlikely that bond underwriters (as MiFID manufacturers) will be willing to expend resources implementing "lighter" internal compliance policies and procedures for just bonds with a makewhole clause but no other embedded derivatives (rather than a wider universe also including simpler bonds with embedded derivatives at all).

Additionally, in this respect, regarding the CMRP's alternative alleviation to the scope of the MiFID product governance regime (covering financial instruments marketed or distributed exclusively to eligible counterparties), initial industry perception has been this may be of limited use given it would seemingly involve a material investor base limitation and a significant logistical repapering burden.

Consequently, it seems likely that prior market practices will continue unchanged by the CMRP. In any case, ICMA will continue to engage with relevant authorities, including through the Commission's current consultation on an EU strategy for retail investors, to try to ensure that the EU's formal review of MiFID addresses the product governance regime's conceptual flaw by removing commoditised funding products such as Eurobonds from its scope of application.

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S ESG disclosure for new bond issues

Disclosure of environmental, social and governance (ESG) related information by investee companies is an increasingly important topic for market participants and policy makers alike. ICMA's Legal & Documentation Committee and its ESG Working Group have been discussing issues relating to ESG disclosure for new international, unsecured bonds issued in EMEA and distributed outside of the US under Regulation S. These discussions have included considerations related to disclosure for sustainable products such as green and social bonds and sustainability-linked bonds, as well as for "vanilla" bonds with no sustainability element.

Market practice for disclosing how an issuer will use the proceeds of a green, social or sustainability bond has developed over several years in line with the Green Bond Principles, Social Bond Principles and Sustainability Bond Guidelines. The precise way and extent to which such disclosure is included in an issuer's base prospectus is evolving as an increasing number of issuers are choosing to include an option to issue green or social bonds under their debt issuance programmes. Similarly, the market for sustainability-linked bonds is developing and market participants are focusing closely on how the terms of such bonds are drafted.

More generally, ICMA's underwriter community has noted the importance of ensuring that any ESG-related information that could affect the credit of the issuer (ie its ability to pay back the principal amount and pay interest in the meantime) is disclosed in the issuer's bond prospectus – regardless of whether it relates to a sustainable product or not. An issuer's credit will be affected by the financial and competitive position and outlook of the issuer and its industry over the lifetime of the bond (or, in the case of a programme, the bonds to be issued under the programme). Issuers may need to consider, among other things, any of its other financings that are related to ESG KPIs and metrics such as sustainability-linked loans, because increased financing costs on this type of instrument could impact its overall financial position and be relevant to a credit assessment of the issuer. In addition, where ESG information is an integral part of the issuer's principal activities, this is required to be disclosed under the EEA and UK Prospectus Regulations.

Outside of a bond prospectus context, many companies are already subject to periodic non-financial or sustainability reporting requirements; or choose to make such periodic disclosures voluntarily. They also often have one or more ESG ratings. Regulatory requirements for periodic reporting of climate and other ESG-related information are set to increase in the EU, the UK and the US following:

- the European Commission's proposal for a Corporate Sustainability Reporting Directive published in April;
- the UK Government consultation on requiring mandatory climate-related financial disclosures (to which the ICMA Corporate Issuer Forum responded in May – see the article below);
- the UK FCA's open consultation on enhancing climate-related disclosures by standard listed companies (see further the box below); and
- the US SEC's recent consultation on climate-related disclosures (to which ICMA responded on 15 June).

In addition, IOSCO recently published a *Report on Sustainability-related Issuer Disclosures* elaborating IOSCO's vision for an International Sustainability Standards Board (ISSB) under the International Financial Reporting Standards Foundation and describing the role the ISSB could play in setting a common global baseline of sustainability-related corporate reporting standards.

The current view of the ICMA Legal & Documentation Committee and its ESG Working Group is that ESG information disclosed in periodic sustainability reports and ESG ratings does not need to be replicated in an issuer's bond prospectus unless the information is relevant to the bonds to be issued (ie it impacts the credit of the issuer or is relevant to the use of proceeds, the terms of the bond or integral to the issuer's principal activities).

Among other things, this will help to ensure that prospectuses do not become cluttered with information that is not necessary for an investment decision in the bonds; and avoid a needless increase in bond issuers' costs. It also reflects the higher liability that attaches to prospectus disclosure compared with other forms of disclosure in many jurisdictions and the cautionary note sounded by several policy makers such as IOSCO, the European Commission and the SEC in relation to the current reliability of ESG disclosures. Specifically in relation to ESG ratings, ESMA stated in the *ESMA Report on Trends, Risks and Vulnerabilities No. 2 of 2020* that "differences in the definition, scope and methodology used by ESG rating providers cause confusion among investors" and "Investment misallocation is likely to take place, either unintentionally through the composition of ESG-rating based indices, or intentionally from greenwashing and product mis-selling". The FCA's Director of Strategy highlighted in a speech in November 2020 that: (a) ESG rating providers rely on public information and so their outputs are subject to data gaps; (b) ESG rating providers have very different methodologies leading to wide variation in ESG ratings for any given company; and (c) there may be a concern if firms use ratings mechanistically without a detailed understanding of the methodologies the providers apply and careful consideration of whether they are fit for purpose. In addition, a recent FCA consultation paper discusses challenges and potential harms arising from the roles played by ESG rating providers and sets out possible policy actions in this area.

In terms of marketing materials for new bond issues, it is possible for ESG (and indeed other) information to be included in marketing materials but not in the prospectus where such information is not required under the general prospectus disclosure test in the EEA or UK Prospectus Regulation. This means that the issuer and underwriters might conclude that it is appropriate to include in marketing materials certain additional information that is not necessary for an investment decision (and so is not included in the prospectus) but provides more background, context or detail on the information contained in the prospectus. However, as is the case with any review of marketing materials against prospectus disclosure, a judgment call will need to be made in relation to the overall "consistency" of the marketing materials with the prospectus. Related to this, a key concern for market participants is the need to minimise the risk of greenwashing that could arise if the information conveyed in marketing materials is more extensive than the disclosure that is included in the prospectus and is not checked to the standard required for prospectus disclosure. In order to minimise this risk, it is considered advisable to avoid including in marketing materials considerable additional ESG-related disclosure that is not included in the prospectus because it is not necessary for an investment decision, in particular where the information is difficult to substantiate.

ICMA members will continue to discuss the issues outlined in this article and related matters against a rapidly evolving backdrop of regulatory and other ESG-related developments.

UK FCA consultation CP21/18

On 22 June, the UK FCA launched a consultation on: (a) enhancing climate-related disclosures by standard listed companies and (b) ESG topics in capital markets.

This is an important consultation for ICMA's primary market community because it seeks views on a number of issues that could directly impact new international bond issues listed in London (or offered publicly in the UK) as well as UK market participants generally. This includes questions on (a) whether and how to implement TCFD-aligned disclosure rules for issuers of standard listed debt and debt-like securities; and (b) whether specific requirements for use-of-proceeds bond frameworks and their sustainability characteristics should be introduced to the UK prospectus regime.

ICMA's primary market community will be considering this consultation carefully in cooperation with other ICMA groups in advance of the deadline on 10 September 2021.

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S Consultation on mandatory TCFD-aligned disclosure

ICMA recently responded to the UK Government's Department for Business, Energy & Industrial Strategy (BEIS) *Consultation on Requiring Mandatory Climate-Related Financial Disclosures by Publicly Quoted Companies, Large Private Companies and Limited Liability Partnerships* (the Consultation) on behalf of the ICMA Corporate Issuer Forum (CIF).

The proposals in the Consultation build on the expectation set out in the UK Government's 2019 Green Finance Strategy, that all listed companies and large asset owners should disclose in line with the Task Force on Climate-related Financial Disclosure (TCFD) recommendations by 2022. The BEIS is looking to shore up existing disclosure channels under the UK Companies Act to include the new TCFD-aligned climate-related financial disclosures.

ICMA made the following observations in the Consultation response:

- With respect to reporting at a group level on a consolidated basis, it would be worth engaging further with large companies with global reach to determine whether any exemptions (or possibly "best efforts" qualifications) are required.
- It seems sensible to build upon the existing Companies Act disclosure and expand on it in the Strategic Report. The response further noted that incorporation by reference into a prospectus is a consequence we would seek to avoid given the forward-looking and somewhat variable nature of climate-related financial information.
- It seems appropriate and proportionate for this new disclosure requirement to align generally with the four TCFD pillars rather than the 11 detailed TCFD recommendations, which would allow for evolution of the 11 recommendations and to prevent inconsistency with the current legislative requirements in the Strategic Report.
- Those who can conduct scenario analysis should be strongly encouraged to do so, but with a view to ultimately ensuring that all companies get to a point where they must conduct scenario analysis mandatorily.

Elsewhere, the proposals in the Consultation represent no great departure from Companies Act requirements for CIF members.

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ICMA primary market standard language

Updated versions of the following ICMA primary market standard language have recently been circulated to ICMA's Primary Market Documentation Group and published for ICMA members and ICMA Primary Market Handbook subscribers on the Other ICMA primary documentation webpage:

(i) ICMA language dealing with the UK FCA's restriction on the retail distribution of CoCos; and

(ii) ICMA language for new issue announcements and trading screens contained in Appendix A12a of the ICMA Primary Market Handbook (Product Governance (MiFID II) language).

In both cases, the language has been updated to cater for the end of the post-Brexit transition period. Certain other changes were made to the ICMA language dealing with the UK FCA's restriction on the retail distribution of CoCos in order to streamline it.

ICMA is very grateful to the teams at Linklaters, Allen & Overy and Clifford Chance, the ICMA Legal & Documentation Committee, and certain other law firms for their work on these updated forms of language.

ICMA is planning to update the ICMA Primary Market Handbook to include the post-Brexit materials that were circulated informally in December 2020 in due course.

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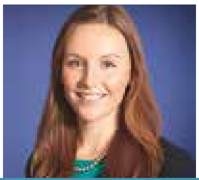
Primary Markets


by **Ruari Ewing, Charlotte Bellamy and Katie Kelly**

EEA and UK Prospectus Regulation developments

The EEA Prospectus Regulation changes proposed as part of the Capital Markets Recovery Package (also known as the "quick fixes") have now been published in the *Official Journal* as Regulation (EU) 2021/337 and have entered into force.

The central pillar of the changes is the introduction of a new EU Recovery Prospectus, which is designed to facilitate certain secondary equity issues. The EU Recovery Prospectus is not available for issuance of debt securities.

Certain other targeted amendments have also been made to the EEA Prospectus Regulation, including: (i) changes to the obligations on financial intermediaries to inform investors of certain information related to prospectus supplements and the associated period for withdrawal rights; and (ii) an increase in the threshold for the exemption from the obligation to publish a prospectus for offers of non-equity securities issued in a continued or repeated manner by a credit institution.

These changes are not expected to have a significant impact for ICMA members operating in the wholesale debt space.

One aspect that is likely to be of interest to ICMA members is the inclusion of a recital related to ESG disclosure. While this will have no immediate, operative effect, the recital states that information on ESG matters by companies has become increasingly relevant for investors and the Commission should, in the context of its next review of the EEA Prospectus Regulation (which is due by 21 July 2022), assess whether it is appropriate to integrate sustainability-related information in the EEA Prospectus Regulation. Issues relating to current market practice for ESG disclosure in prospectuses is a live topic of discussion among ICMA primary market members.

Although it did not form part of the European Commission's original proposal, Regulation (EU) 2021/337 also included an amendment to the EEA Transparency Directive giving Member States the option to postpone, by one year, the requirement for listed companies to prepare annual financial reports in the European Single Electronic Format for financial years beginning on or after 1 January 2020. This is not considered to be problematic from the perspective of ICMA's primary market members.

In the UK, the results of the UK Listing Review were published on 3 March 2021 and welcomed by the FCA. As reported on page 43 of the last edition of this Quarterly Report, ICMA had responded to the corresponding consultation in December 2021.

The main focus of the UK Listing Review consultation appeared to be the UK equity markets. This was borne out by the recommendations issued in March, which relate primarily to equity issuances. However, the Review also recommended that HM Treasury conduct a fundamental review of the UK prospectus regime considering, as a minimum, the following areas:

- changing prospectus requirements so that in future, admission to a regulated market and offers to the public are treated separately;
- changing how the prospectus exemption thresholds function so that documentation is only required where it is appropriate for the type of transaction being undertaken and suits the circumstances of capital issuance; and
- use of alternative listing documentation where appropriate and possible, eg in the event of further issuance by an existing listed issuer on a regulated market.

The Review also recommended that, as part of the review of the prospectus regime, HM Treasury should consider whether prospectuses drawn up under other jurisdictions' rules can be used to meet UK requirements.

The Review recommends that the goal of the reform of the UK Prospectus Regulation should be an approach much closer to the one that existed in the UK before the introduction of the EEA Prospectus Directive and Prospectus Regulation. The Review considered but dismissed making "tweaks" to the UK prospectus framework (such as raising exemption thresholds, which appeared to have been suggested primarily from an equity angle) in favour of more fundamental reform that separates the requirements for admission to a regulated market from offers to the public.

If taken forward, the recommendations mean that the UK Prospectus Regulation regime could depart quite significantly from the EU regime.

Related to this, the ICMA response to the UK Listing Review noted that many issuers of wholesale vanilla bonds will wish to continue to access funding on a pan-European basis (ie in both the EU and the UK), as they have done for many years. It is therefore important that any changes that are made to the UK prospectus regime are made in such a way that preserves the smooth functioning of the pan-European wholesale market for new bond issues.

ICMA primary market members have long been focused on the regulation of bond prospectuses and listing requirements and will be interested to see how the recommendations in the UK Listing Review are taken forward by HM Treasury.

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The European single access point

On 2 March, ICMA responded to the European Commission's five week consultation on establishing the European single access point (ESAP) for companies' financial and sustainable investment-related information made public pursuant to EU legislation. ICMA had previously provided feedback on the ESAP topic in its 25 June 2020 response to the Commission's consultation on a new digital finance strategy for Europe / FinTech Action Plan (regarding questions 27/28) and in its 30 June 2020 feedback to the High-Level Forum Report on CMU (regarding Recommendation 1).

ICMA's response to the ESAP consultation focused mainly on prospectus information under the EU's Prospectus Regulation (PR). The response also touched briefly on information under certain other EU regimes – namely the Transparency Directive (TD), Non-Financial Reporting Directive (NFRD), Market Abuse Regulation (MAR), Packaged Retail and Insurance-based Investment Products Regulation (PRIIPs), Securities Financing Transactions Regulation (SFTR) and Regulation on Sustainability-Related Disclosures in the Financial Services Sector (SFDR).

Generally (though mostly from a PR perspective), the response was supportive of the ESAP concept but emphasised various aspects relating to its implementation (notably in terms of proportionality):

(a) inclusion of information under individual EU regimes should be subject to individual consideration in terms of (i) system compatibility and (ii) underlying need (given submission burdens and any existing access solutions);

(b) questions of non-IT form (including natural language), content, timing and legal/logistical responsibility (excepting ESAP's own hosting responsibilities following the receipt of information) should usually be left to the context of such individual regimes rather the ESAP structure;

(c) the ESAP should be open to, and not restrictive of, various submission IT/machine-readable formats/solutions – though there are difficulties around the European Single Electronic Format (ESEF – involving inline XBRL[1] tagging) and particular care is needed not to indirectly force either (i) the standardisation of financial instrument terms or (ii) subjective/simplistic (and so potentially misleading) summarising/labelling of complex financial instrument terms;

(d) the ESAP should enable third party search platform access (the response citing in this respect the *Finding Prospectus Information Online* article from pages 40-41 of the Third Quarter 2020 edition of this Quarterly Report);

(e) various options arise in terms of who would submit information into the ESAP (between reporting companies, regulators and infrastructures already involved in information dissemination flows);

(f) the potential for ESAP inclusion to formally constitute the "availability to the public" that is required under various EU regimes;

(g) administrative responsibility should rest with the authorities, but involve stakeholder input;

(h) any costs to submitters/reporting companies should be controlled to be proportionate (bearing in mind that the ESAP would effectively be operating on a monopoly basis), but ESAP content should be free to view.

Regarding PR information specifically, the response fully agreed on immediate inclusion within ESAP scope and commented on basic submission labels/search criteria: (i) "prospectus", "base prospectus", "supplement", "final terms" as document type, (ii) issuer name, (iii) issuer LEI, (iv) ISIN (except for base prospectuses and related supplements) and (v) document date. In this respect, the response again cited the *Finding Prospectus Information Online* article from pages 40-41 of the Third Quarter 2020 edition of this Quarterly Report. The response also noted that individual exchange-regulated markets should be able to opt in to the ESAP in relation to PR-like information arising in the context of their own admissions to trading.

It is however possible that PR information might not be treated as a first priority for the ESAP as, unlike information under other regimes, there is already a database in existence: ESMA's prospectus register. Its search criteria are stated to include issuer name (in full or in part), issuer LEI and ISIN. However, the register webpage states that "in the current release of the prospectus register, it is only possible to search for final terms and translations of summaries using the "host Member State(s)" as a search criterion" and that "it may not be possible to search for the final terms submitted by some competent authorities [that] are still working on adopting their systems to submit final terms to the new prospectus register." This may change (as reported in the Fourth Quarter 2020 edition of this Quarterly Report) as NCA obligations to provide certain prospectus-related data to ESMA in XML[2] format (under Article 12 and Annex VII of Commission Delegated Regulation (EU) 2019/979) are passed through to issuers.

Regarding the other EU regimes cited above, the response:

- TD – somewhat agreed on later inclusion, to the extent ESAP submission formally constitutes "public availability";

1. eXtensible Business Reporting Language.
2. eXtensible Mark-up Language.

- NFRD – fully agreed on inclusion, citing ICMA's 15 July 2020 response to the Commission's consultation on the Renewed Sustainable Finance Strategy;
- MAR – somewhat agreed on later inclusion, to the extent ESAP submission formally constitutes "public availability";
- PRIIPs – somewhat disagreed on inclusion, noting it may be prudent to await the outcome of the pending PRIIPs regime review given public comment on the risk of such documents being misleading;
- SFTR – somewhat disagreed on inclusion, noting public data is already made available in a standardised and centralised way by the trade repositories; and
- SFDR – somewhat disagreed on inclusion, noting (i) the performance of financial market participants against KPIs are not relevant to investors as they invest via financial products and not directly in financial market participants (if and when they do, NFRD is there to provide the necessary information) and (ii) KPIs are backward-looking and give no sense of direction of travel to investors.

ICMA will continue to engage on the ESAP topic as it develops.

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The CMRP: MiFID II/R product governance

Following the European Council, Parliament and Commission consensus on MiFID II/R amendments (notably the scope alleviation of the product governance regime) reported in the last edition of this Quarterly Report, a consequent amending directive was published in the EU's *Official Journal* on 26 February. The final version seemed to involve no material changes from the consensus relating to the scope alleviation of the product governance regime.

National transposition is due to take effect by 28 February 2022, and in this respect ICMA will consider any implications regarding the product governance materials in the ICMA Primary Market Handbook. However, it may be that no actual amendments are needed, to the extent that the alleviation means that the ICMA materials are either used (when transactions are in scope) or not (when transactions are out of scope).

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UK audit reform and comfort letters

On 18 March, the UK Government published a consultation on proposals focused on restoring trust in audit and corporate governance. Whilst the subject of this consultation does not directly relate to new bond issuance, it contemplates operational separation between audit and non-audit practices. It is unclear whether this might potentially raise questions of continuity in auditors providing comfort letters to underwriters in the context of new bond issues. This is because such comfort letters, effectively following on from statutory audits, ought to continue being delivered by audit practices following any separation from non-audit practices. ICMA is initially seeking to understand whether such questions are likely or not to arise in practice in order to determine whether it will respond to the consultation by its 8 July deadline.

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Sustainability-Linked Bonds Workshop

ICMA hosted a Sustainability-Linked Bonds Workshop on 25 February 2021 for members of the ICMA Financial Institution Issuer Forum (FIIF) and Corporate Issuer Forum (CIF). This was the first such joint event for the FIIF and the CIF and, given the commonality of interests in sustainability-linked bonds (SLBs), it is unlikely to be the last.

The ICMA Sustainability-Linked Bond Principles, which are voluntary process guidelines, are considered to be a very good and useful starting point for the issuance of SLBs, capable of allowing for innovation and appealing to a wide variety of issuers.

But one additional focus of the event was on how SLBs fit with financial institutions' funding profiles. In the regulatory capital context, the key step-up feature of an SLB could be considered to be an "incentive to redeem"; and while regulators are generally supportive of sustainable financing in the funding space, a change in capital rules is likely to give rise to concerns over unintended consequences. This is a developing topic for banks, with more work on the regulatory side and more guidance from the EBA expected.

The correct level of ambition of KPIs is important and can be ensured by careful and correct calibration of KPIs. Advance engagement with investors on an agreed framework and KPI calibration is to be encouraged, but of equal importance is better and simpler explanation of KPIs and how they are expected to be achieved by reference to peer comparability. However, issuers should not be too concerned if they do not meet their targets.

Increased issuance levels, diversity in issuers and targets and organic standardisation and comparability, all of which ought to result from more and more issuance, were all cited as potentially helpful to the development of the SLB market.

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however provided to be subject to blanket or transaction-specific opt-outs by issuers and investors.

ICMA will consider submitting comments to the FMSB on the draft standard by the specified deadline of 16 March.

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ICMA response to the UK Listings Review

On 18 December 2020, ICMA responded to the UK Listings Review call for evidence.

The UK Listings Review was launched on 19 November 2020 and is being led by Lord Hill. Although the focus is primarily on UK equity markets, it appears that the review of prospectus-related aspects will consider the rules for both debt and equity markets. ICMA's response related to the UK prospectus and related regulatory regimes as they apply to debt capital markets.

The response highlighted that market participants are familiar with the EEA and onshored UK Prospectus Regulation regimes, and this familiarity means that ICMA members tend not to face significant barriers from a prospectus regulation perspective when they seek to access wholesale debt capital markets. It seems likely that many issuers of wholesale vanilla bonds will wish to continue to access funding on a pan-European basis (ie in both the EU and the UK) going forward. It is therefore important that any changes that are made to the UK prospectus regime are made in such a way that preserves the smooth functioning of the pan-European wholesale market for new bond issues.

While the current regime broadly works in practice for new issues of "wholesale" vanilla bonds, there are some areas that could be improved without damaging the smooth functioning of that market. These include:

- facilitating the use of periodic disclosures for the purposes of new issue disclosure through incorporation by reference of "future" financial information;
- allowing supplements to be used to include additional, or amend existing, securities note information in a base prospectus;
- allowing issuers to prepare a supplement to include additional information, voluntarily, which is not "significant" within Article 23 of the UK Prospectus Regulation;
- refining the Article 6 test to ensure that prospectuses only contain the information bond investors need; and
- removing the need for a prospectus for secondary market non-exempt offers.

The response also discussed the concept of developing a suitable regulatory framework for a UK retail bond market, which would require a holistic consideration of the different regulatory regimes in order to ensure that UK retail investors are appropriately protected whilst not imposing regulatory burdens upon issuers that make it unattractive or commercially unviable for them to offer their securities to UK retail investors.

Finally, the response also outlined a number of additional, technical, points that the UK authorities may wish to consider in the context of the UK Prospectus Regulation regime, including:

- the alignment of the availability of UK prospectus and transparency "wholesale" disclosure regimes;
- the alignment of UK Prospectus Regulation and UK Listing Rules exemptions (in particular for bonds issued by charities and social housing associations);
- streamlining of sources of prospectus-related rules and guidance in the UK regulatory framework; and
- ensuring the UK's "equivalence regime" for prospectuses works effectively.

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EEA Prospectus Regulation developments

Capital Markets Recovery Package

As reported in the last edition of this Quarterly Report, the European Commission proposed a package of changes to various aspects of EEA capital markets regulation on 24 July 2020 as part of a "Capital Markets Recovery Package" in the wake of the COVID-19 pandemic. Proposed amendments to the EEA Prospectus Regulation formed one part of that package.

On 11 December, the European Parliament and the Council reached a provisional agreement on the proposed amendments to the Prospectus Regulation, which was welcomed by the European Commission and later endorsed by the Council on 16 December.

As reported in the last edition of this Quarterly Report, the central pillar of the changes is the introduction of a new EU Recovery Prospectus, which is designed to facilitate certain secondary equity issues. The EU Recovery Prospectus will not be available for issuance of debt securities. Certain other targeted amendments will also be made to the EEA Prospectus Regulation, including: (i) changes to the obligations on financial intermediaries to inform investors of certain information related to prospectus supplements and the associated period for withdrawal rights; and (ii) an increase in the threshold for the exemption from the obligation to publish a prospectus for offers of non-equity securities issued in a continued or repeated manner by a credit institution. These proposals are not expected to have a significant impact for ICMA members operating in the wholesale debt space.

One aspect that is likely to be of interest to ICMA members is the inclusion of a new recital related to ESG disclosure. While this will have no immediate, operative effect, the recital states that information on ESG matters by companies has become increasingly relevant for investors and the Commission should, in the context of its next review of the EEA Prospectus Regulation (which is due by 21 July 2022), assess whether it is appropriate to integrate sustainability-related information in the EEA Prospectus Regulation. Issues relating to current market practice for ESG disclosure in prospectuses is a live topic of discussion among ICMA primary market members.

The political agreement also included an amendment to the EEA Transparency Directive (that did not form part of the European Commission's original package) providing Member States with the option to postpone, by one year, the requirement for listed companies to prepare annual financial reports in the European Single Electronic Format for financial years beginning on or after 1 January 2020.

The Parliament and the Council will now be called upon to adopt the amendments formally without further discussion, possibly in February 2021, after the usual legal-linguistic revision of the text.

Machine readable data requirements

Also as reported in the last edition of this Quarterly Report, ICMA understands that NCAs began to introduce new data requirements for issuers on 30 November pursuant to the provisions of Commission Delegated Regulation (EU) 2019/979 that oblige NCAs to provide certain prospectus-related data to ESMA in XML format.

It is understood that different NCAs are taking different approaches to the form in which they require the relevant data to be submitted to them, meaning that the precise impact of this change for issuers and their advisors depends on the approach of the relevant NCA.

The rationale for this change seems to be to allow ESMA to update its Prospectus Register and gather increased data on the Prospectus Regulation-related activity, which could inform EU authorities' work on a further review of the EEA Prospectus Regulation in due course.

From a market perspective, it will be interesting to see whether any improvements to the ESMA Prospectus Register could help to address some of the concerns that have been raised previously by ICMA's buy-side members that finding published prospectuses online is not as straightforward as it could be. For further information on this issue, see the article on page 40-41 of the Q3 2020 edition of the ICMA Quarterly Report.

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Primary Markets

by Ruari Ewing and Charlotte Bellamy

Prospectus Regulation developments

Machine readable data requirements

As reported in the Q3 2020 edition of this ICMA Quarterly Report, Commission Delegated Regulation (EU) 2019/979 under the EU Prospectus Regulation (PR) regime includes obligations on NCAs to provide certain prospectus-related data to ESMA in XML format. Following reports that certain NCAs were starting to contact issuers and other market participants about their intention to start collecting such machine-readable data later this year, ICMA contacted various national competent authorities to gather more information on the likely impact of the new data requirements for issuers and other primary market participants. It seems that the precise timing for these new requirements is not yet firm, but they could be introduced during Q4 2020.

It seems that different NCAs are expecting to take different approaches to the form in which they will require the relevant data to be submitted to them. Some may require issuers or their advisors to submit relevant data in XML format. Others may provide an online form or Microsoft Excel spreadsheet which will automatically convert the data into the required XML format. This is likely to be more straightforward for many market participants in the vanilla bond market. Regardless of the precise approach, it seems clear that issuers will be required to submit additional data to national competent authorities when they issue securities and, in some cases, when they file or submit prospectuses for review or approval. The rationale for this is understood to be to allow EU authorities to gather more data on Prospectus Regulation-related activity, which could inform EU authorities' work on a further review of the EU Prospectus Regulation in due course.

Proposed amendments under the European Commission's Capital Markets Recovery Package

As highlighted elsewhere in this Quarterly Report, the European Commission published a Capital Markets Recovery Package in the context of the COVID-19 pandemic on 24 July. One part of the package was proposed amendments to the Prospectus Regulation.

The central pillar of the proposals is the introduction of a new EU Recovery Prospectus, which is designed to facilitate certain secondary equity issues. The EU Recovery Prospectus will not be available for issuance of debt securities. The European Commission also proposed certain other targeted amendments to the Prospectus Regulation, including: (i) changes to the obligations on financial intermediaries to inform investors of certain information related to prospectus supplements and the associated period for withdrawal rights; and (ii) an increase in the threshold for the exemption from the obligation to publish a prospectus for offers of non-equity securities issued in a continued or repeated manner by a credit institution. These proposals are not expected to have a significant impact for ICMA members operating in the wholesale debt space.

European Commission CMU Action Plan

As reported elsewhere in this Quarterly Report, the European Commission published a new Action Plan for a Capital Markets Union (CMU) on 24 September 2020 and an associated Annex. There are no express references to amendments to, or a review of, the Prospectus Regulation regime (unlike the European Commission's 2015 CMU Action Plan).

There is, however, a commitment to adopt a legislative proposal in Q3 2021 to set up a "European Single Access Point" (ESAP) to provide seamless, EU-wide access to all relevant information (including financial and sustainability-related information) disclosed to the public by companies. In its preliminary thoughts of 12 June on the European Commission's High Level Forum's Final Report, ICMA noted that it recognizes the advantages of an EU-wide digital access platform for companies' public financial and non-financial information. However, in introducing the ESAP, careful consideration would need to be given to the cost/benefit analysis associated with any new requirements for companies to adopt new or more extensive use of machine-readable data in the short- term (eg in disclosures under the Prospectus Regulation). These points were expanded in ICMA's response to the European Commission's call for feedback on the High Level Forum's Final Report of 30 June, and were also reflected in ICMA's response to Q.27 and Q. 28 of the European Commission FinTech action plan consultation of 25 June.

The European Commission has stated that the ESAP will "to the greatest extent possible, build on existing EU and national IT infrastructures (databases, registers) in order to avoid adding to companies' reporting burdens". It also states that "all information will be provided in comparable digital formats". The meaning and possible impact of this is not entirely clear. The development of the ESAP is an area that the ICMA primary market community may wish to monitor as proposals are developed.

ICMA response to the European Commission's Renewed Sustainable Finance Strategy consultation

As reported elsewhere in this Quarterly Report, ICMA submitted its response to the European Commission's consultation on its Renewed Sustainable Finance Strategy on 15 July. ICMA's response to the questions related to the Prospectus Regulation (Q.25 and Q.26) noted, among other things, that it is not necessary or desirable to introduce new requirements for green bonds into the Prospectus Regulation at this point in time.

Amendments to Level 2 (convertibles and other minor corrections)

As reported in the Q3 2020 edition of this ICMA Quarterly Report, the European Commission adopted certain amendments to Level 2 of the Prospectus Regulation in June 2020. The primary purpose of the amendments appeared to be to restore the previous Prospectus Directive position on the prospectus disclosure and supplement-related requirements for certain convertible, exchangeable or derivative securities. There were also certain corrections to minor mistakes and changes to the EU growth prospectus regime (which has historically not been a core area of focus for ICMA's primary market members). These amendments were published in the *Official Journal* on 14 September as Commission Delegated Regulation (EU) 2020/1272 and Commission Delegated Regulation (EU) 2020/1273. They entered into force on 17 September 2020, although certain provisions apply from 21 July 2019. There do not appear to have been any significant changes to the European Commission's original proposal.

Although ICMA understands that the bulk of convertible/exchangeable issuance falls outside the scope of the Prospectus Regulation, and so these changes may not have a significant impact in practice, it is expected that these changes will nevertheless be welcome for ICMA members and indeed align with informal comments made to the European Commission previously by ICMA.

ESMA annual report on EEA prospectus activity for 2019

ESMA published its annual report on EEA prospectus activity for 2019 in September 2020. It noted that the number of prospectus approvals across the EEA decreased to 3,113 from 3,390 in 2019, a fall of 8% compared to 2018, and that this decrease continues the downward trend observed since the 2008 financial crisis.

Slightly more than three quarters of approved prospectuses related to non-equity securities, with the most frequent security type being debt securities with a denomination of at least €100,000 (33%). Four national competent authorities approved two-thirds of all non-equity approved prospectuses: Ireland (24%), Luxembourg (22%), Germany (11%) and UK (10%). Around 44% of EEA prospectuses were base prospectuses.

The combined total of EU Growth and Secondary Issuance prospectuses (which were introduced under the new EU Prospectus Regulation) was 133, representing slightly more than 4% of total approvals for 2019. ESMA notes that this a promising sign considering that these document types only became available as of 21 July 2019. The figures show that these types of prospectus related to equity securities more often than non-equity securities, which is perhaps unsurprising.

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MAR review

On 24 September, ESMA published its final MAR Review report that covers *inter alia* several aspects ICMA has been engaging on. The final report follows ESMA's prior consultation, to which ICMA submitted a response in November 2019 (reported at pages 36-37 of the First Quarter 2020 edition of this Quarterly Report).

Regarding the concept of inside information, ESMA concluded in its report that the definition is sufficient and should remain basically unchanged. ESMA however proposed widening the definition in relation to MAR Article 7.1(d), so that inside information under that heading is constituted not just in relation to persons charged with order execution. ESMA also noted it stands ready to issue guidance on the definition of inside information (on specific scenarios, as a first step, that could enhance clarity on concrete and recurring issues and so may assist issuers). Distinctly, ESMA concluded no amendments are necessary to MAR in relation to delaying the disclosure of inside information (noting again in this respect ESMA's willingness to provide guidance on the definition of inside information).

Regarding pre-hedging (which can occur in the context of new bond issuance), ESMA noted it was not possible to conclude generally on its legitimacy, but again proposed to accede to requests for guidance. In this respect, ESMA noted three points that it would like to further develop in more comprehensive guidance:

(a) that pre-hedging should constitute a risk-management tool, to contain the exposure deriving from possible orders for which an RFQ has been submitted and should be designed to benefit the client in connection with the relevant orders and any resulting transactions;

(b) the context of RFQs concerning illiquid instruments;

(c) that compliance considerations arise under both MAR and MiFID II/R (with ESMA intending to further consider the broader context of order optimisation in market makers' and brokers' strategy, of market rules and of market impact).

Regarding (c), ESMA already identified some factors to consider when assessing if specific pre-hedging poses market abuse / conduct risks – namely whether (i) (on a case by case basis) clients clearly request, or are made aware of and consent to, pre-hedging, (ii) any pre-hedging benefit is passed to the client, (iii) reasonable steps are taken to minimize pre-hedging impact on the market and (iv) the client is informed how the pre-hedging has impacted execution of their transaction. Fulfilling all four factors would be a significant shift from current market functioning (but ESMA might merely be flagging them ahead of further guidance).

Regarding pre-sounding, ESMA acknowledged different readings of the regime's current enforceability (ICMA's response had raised this) and consequently proposed MAR be amended to clarify that MAR's Article 11 requirements are indeed obligatory (and not just a safe harbour), including provision for mandatory (rather than voluntary) national sanctioning powers. ESMA also proposed to amend the definition of pre-sounding to clarify that the regime applies not only where a transaction announcement follows the interactions concerned. It otherwise decided specific cases not be excluded from the regime's scope, noting negotiation/offering is already outside of definition following the recent SME listing package. (Many considered this was the case even before that.) In terms of simplifying the regime's procedural provisions, ESMA proposed:

(a) where no inside information is communicated, (i) that no prior consent be required from the market sounding recipient (MSR) to receive inside information, (ii) that no related prohibition/ confidentiality warnings need be given and (iii) that no further notice be required regarding information assessed as no longer being inside information – however these provisions might have already seemed to be intrinsically inapplicable;

(b) where inside information is communicated, (i) that no further notice be required regarding information assessed as no longer being inside information where the transaction is publicly announced, (ii) that where recording facilities are not available, written minutes agreed and exchanged via email or other electronic means suffice without a more formal exchange of signatures and (iii) that follow-up discussions can be covered by the initial pre-sounding warnings;

(c) in both cases, an ESMA power to amend its *Guidelines on Persons Receiving Market Soundings* to add recommendations specific to different MSRs (being "natural and legal persons, regulated and non-regulated entities, SMEs and large cap issuers").

Regarding insider lists, ESMA *inter alia* proposed (i) to maintain detailed information requirements (phone numbers, addresses etc), seeing such lists as serving a forensic investigation purpose (and not just as an evidentiary purpose), (ii) that insider lists' covering of effective/actual access to inside information could be managed by providing this be "to the best of [the list compiler's] knowledge", (iii) that service providers technically not acting on an issuer's behalf/account also need to keep their own lists and (iv) that issuers do not have to centralise the insider lists of persons acting on the issuer's behalf/account.

Regarding closed periods, ESMA proposed they not be extended, from persons discharging managerial responsibilities (PDMRs), to issuers (having concluded that on balance the benefits of extension did not justify the risks).

ESMA acknowledged certain other points, not specifically consulted on, that were raised (noting it will assess their merit), including (i) the scope of the buy-back safe harbour, (ii) implications of MAR's scope extension to MTFs, (iii) the risk of additional costs to market participants and (iv) the need to consult on any proposals not covered in ESMA's prior consultation. These points were raised in ICMA's response, but ESMA did not seem to acknowledge other points raised in ICMA's response regarding (i) bull market conditions arguably masking the full impact of the implementation of MAR, (ii) there having been no ESMA feedback on ICMA's 2014 proposed improvements to the stabilisation safe harbour or (iii) the potential value in ESMA's Market Integrity Standing Committee having its own consultative working group. ESMA also noted it may consider whether non-disclosure of inside information should be characterised as market manipulation.

It will be for the European Commission to consider ESMA's proposals in terms of legislating any changes to MAR under the review. ICMA is considering the implications of ESMA's final report with its members (including in terms of the practicability or otherwise of ESMA's proposals such as those on pre-hedging and pre-sounding). ESMA's conclusions at least on the enforceability of the pre-sounding regime are likely to be disappointing, to the extent they add additional administrative burdens and further disincentivise pre-sounding even where it is clear no inside information is involved – rather than "encourage" it, in line with ESMA's view of the regime's purpose. ICMA will generally continue to engage on the next steps of the review as they unfold.

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The CMRP: MiFID II/R product governance

On 24 July, as part of its Capital Markets Recovery Package (CMRP), the European Commission published a proposal for amendments to MiFID that *inter alia* touches on the scope of MiFID II/R's product governance (PG) regime. The Commission's proposal in this respect is for "corporate bonds with make-whole clauses" to be excluded from the regime, with the Commission separately acknowledging a "need [for this] to be complemented by a clear rule" that a make-whole provision does not of itself make such corporate bond instruments "packaged" under PRIIPs.

There has indeed been substantial debate about whether instruments with certain terms (make-whole provisions notably) are indeed packaged and so require a KID (if being made available to EEA retail investors), or whether they are part of the simpler, non-packaged, universe of instruments not so subject (see *inter alia* #3-7 in ICMA's September 2018 response to an FCA consultation, the ESAs' 19 July 2018 letter under *"callable"* and BaFiN's 22 August 2019 statement at #4). Since all MiFID II/R instruments are anyway within scope of the PG regime, a different debate has previously occurred in that respect. That is whether the PG regime should apply at all to bonds (or at least "non-complex" bonds if more legislatively expedient) and also that applying it to professional investors seems pointless practically (see *inter alia* ICMA's 15 May response to the Commission's MiFID review consultation reported at pages 37-38 of the 2020 Third Quarter edition of this Quarterly Report).

An explanation for the Commission's proposal to exclude corporate bonds with make-whole clauses from the PG regime might then be that it is a stepping-stone to a matching exclusion from the PRIIPs regime. In this respect, however, it would seem illogical not also to exclude even simpler products from the scope of the PG regime (bearing in mind also that such instruments can be sold on an execution-only basis, with PG target market definitions thus being arguably inconsequential). One might thus provide that the PG regime excludes non-complex instruments (an established MiFID concept and thus expedient), together with any instruments that would be non-complex but for the inclusion of a make-whole clause. One could even exclude, on a more conceptual and less instrument-specific basis, any instruments that would be non-complex but for the inclusion of terms that do not affect (adversely) the instrument's expected return (ie the contractual right to return of principal consistent with, or more than, the original amount invested and, if applicable, a contractual right to regular payments of interest that are not deferrable). It is intrinsic that such instruments raise no additional risks that are difficult to understand.

At the time or writing, EU Member States were reportedly also debating potentially widening the Commission's proposed exclusion. And the European Parliament's *rapporteur* had suggested, in his draft report (at amendments #3-#5 on pages 7-9), that the scope of the PG regime exclude *inter alia* non-complex bonds admitted to regulated markets, equivalent markets and MTFs.

Certification for staff providing investment advice

The response notes incidentally, regarding certification for staff providing investment advice, that any education requirements should be appropriately calibrated to the areas of advice/information being given (eg advisers in the fixed income space should not need granular certification relating to commodity investments).

Allocation justification recording

Lastly the response also notes broad consensus having been reached regarding how to apply MiFID's allocation justification recording regime (the experience so far having mainly been of added administration without meaningful benefits for borrowers or investors).

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Finding prospectus information online

It has been suggested in ICMA group discussions that finding published prospectuses online is not as straightforward as it could be.

Introduction: It has been suggested in ICMA group discussions that finding published prospectuses online is not as straightforward as it could be.

Publication requirements: Existing legislation usually requires regulator-approved prospectuses to be published prior to stock exchange admissions or non-exempt public offerings, for example under the EU's Prospectus Regulation. This may typically relate to either (i) a "standalone" prospectus (and any subsequent supplement) relating to specific, and usually imminent, bond issuance or (ii) a "base" prospectus (and any subsequent supplement) relating to general issuance under an issuance "programme" over a period stretching up to a year and completed by a "final terms" document relating to specific issuance. In the prevailing institutional (rather than retail) dynamic of the international bond markets, the standalone prospectus tends to be available to potential investors during an exempt offering in draft (notably excluding commercial terms such as issuance size, price and closing/redemption dates). It is then completed (importing the commercial terms from the final pricing announcement) for regulatory approval and publication in time for stock exchange admission on closing of the new issue (usually five business days after pricing). Approved base prospectuses are published up to a year prior to an exempt offering, with final terms then similarly completed for regulatory filing and publication in time for stock exchange admission.

Investor use: Institutional investors may choose to seek access to prospectus information *before* issuance as part of their investment decision analysis on specific issuance (in the case of a standalone prospectus) or generally on a issuance programme (in the case of a base prospectus). This may include a scenario where an investor may then approach an issuer to initiate a transaction as a "reverse enquiry". However, institutional investors have access to other information sources that they may choose to make additional or alternative use of. Investors may distinctly seek access to prospectus information for administrative purposes unrelated to investment decision-making (eg compiling data for settlement or internal reporting purposes). Investors may also seek access to prospectus information *after* issuance, again often for administrative purposes related to portfolio management.

Ideal data platform search functionality: The most efficient and timely way to access prospectus information then depends on the specific use context. In the context of a *draft standalone prospectus pre-issuance*, this is disseminated directly (as it evolves), to the investor bases of issuers' underwriting banks. In the context of a *published base prospectus pre-issuance*, ideal search functionality on a data platform (such as those of stock exchanges, ESMA's prospectus register and any EU single access point as envisaged by the CMU High Level Forum's June 2020 Final Report) would enable a search, based on just a handful of parameters (eg issuer LEI, with a "debt programme" filter), that would return the base prospectus (or sometimes where relevant several base prospectuses) and, importantly, any and all supplements related to a base prospectus – but maintain clarity by excluding other extraneous documents (final terms related to other issuances under the base prospectus, periodic reports under the EU's Transparency Directive, *ad hoc* announcements under the EU's Market Abuse Regulation etc – that should be separately searchable). In a *post-issuance* context, ideal platform search functionality would enable a search, based just on an ISIN, that would return, as applicable (and together with any related supplements), either the standalone prospectus or the final terms and its related base prospectus – but again maintaining clarity by excluding other extraneous documents. Whether post- or pre-issuance, data platforms should ideally enable searching at a European level at least.

Conclusion: ICMA will engage with ESMA, stock exchanges and any other relevant data platform providers to support efficient search functionality for prospectus information.

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Other primary market developments

There have been several other developments for ICMA's primary market members this quarter, the most significant of which are summarised below.

Machine readable data requirements under the EU Prospectus Regulation (PR)

Delegated Regulation 2019/979 includes obligations on NCAs to provide certain prospectus-related data (set out in Annex VII to the Delegated Regulation) to ESMA in XML format. ICMA understands that certain NCAs have contacted issuers and other market participants about their intention to start collecting such machine-readable data later this year (eg from October).

The obligations on NCAs at Level 2 of the PR appear to relate to the obligations on ESMA at Level 1 of the PR to prepare an annual report with statistics on prospectus approvals and notifications under Article 47 of the PR. It may also relate to ESMA's obligations to introduce a "notification portal" to facilitate communication of prospectuses and related documents between NCAs and ESMA under Article 25(6) of the PR and to publish prospectuses and related documents on its website under Article 21(6) of the PR.

The precise implications of NCAs seeking to "downstream" their obligations to issuers is not yet clear. Much will depend on the precise approach taken by individual NCAs, which could vary. ICMA is engaging with ESMA informally to try to understand the implications for ICMA members, and has noted that this is not an ideal time to introduce new requirements in this area given the significant challenges that many issuers are facing elsewhere and the importance of facilitating continued access to the EU's regulated markets during the COVID-19 pandemic.

Primary market aspects of ICMA's response to the European Commission consultation on an EU Digital Finance Strategy/FinTech Action Plan

As noted in the FinTech section of this Quarterly Report, ICMA submitted its response to the European Commission consultation on an EU Digital Finance Strategy/FinTech Action Plan on 25 June. There were two questions that were of particular interest to ICMA's primary market members, namely Q.27 and Q.28 relating to facilitating access to publicly available securities market information. ICMA's response noted that facilitating integrated access to documents by allowing investors to search for an issuer's LEI and then applying relevant filters on a centralized portal (akin to the US SEC's EDGAR) would be useful for investors. This appears to be what is envisaged by the proposal for a "EU Single Access Point" in the High Level Forum on Capital Markets Union *Final Report* of 10 June (see also below). However, careful thought would need to be given to the purpose and related consequences of any additional user features that could conceivably be added to such tool from the perspective of both investor protection and issuer liability. Furthermore, the introduction of any new requirements related to the machine-readable nature of securities market disclosures such as prospectuses could place a disproportionately high burden on market participants in the short-term and a thorough cost/benefit analysis would need to be conducted. Furthermore, some disclosures are more suited to being issued in a standardised, machine-readable format than others. Any drive to standardise the terms and conditions of, or disclosure for, securities in prospectuses in order to facilitate processing of securities market disclosure would be a significant disincentive for issuers to access Europe's capital markets. This would run counter the goals of CMU and be problematic in the context of the COVID-19 recovery.

Primary market aspects of ICMA's response to the High Level Forum on Capital Markets Union Final Report

The High Level Forum on Capital Markets Union published its *Final Report* on 10 June. Its coverage of topics related to primary markets (beyond crypto and ESG aspects) included notably: consumer financial literacy; official financial guidance; financial advisor certification; a new "knowledgeable investor" category (or loosening "professional investor" opt-up criteria); reviewing the PRIIPs regime (albeit not referencing regime purpose/scope); consumer non-engagement with disclosure; PR/disclosure length caps; digital comparison tools; the European Single Access Point (ESAP) for company data (a European EDGAR); inducements (in relation to investor advice); difficult withholding tax refund mechanisms; direct/ESMA supervision; "*de-minimis*" prospectus thresholds, the Market Abuse Regulation's broad MNPI definition and insider list contents, the EU post-trading landscape remaining fragmented along national lines (albeit not referencing long-standing international clearing in the ICSDs) and the definition of "shareholder". Following its preliminary thoughts, ICMA's response to the Commission's related consultation addressed many of these aspects (under the headings of Recommendations 1, 6g/h, 9a, 12e, 13a-e, 15, 16, 17a). Regarding the Market Abuse Regulation, the response noted (given the very short consultation period of just 20 days) that ICMA had been unable to consult on the proposed change regarding "significant price effect" at page 72 of the Final Report. It also noted, incidentally, that allowing issuers not to disclose "preliminary" inside information would not impact insiders (who would still treat it as any other inside information). It also noted harmonised, robust insolvency laws as more of a direct concern in the high yield bond space (given focus on "loss given default") than in the investment grade bond space (given focus mainly on "probability of default"). Otherwise the response (given the 2,000 character limit and the very short consultation period) mainly cited specific aspects of ICMA's existing public material: the ICMA Primary Market Handbook and nine ICMA consultation responses spanning 2009 to 2020 (on MiFID, PRIIPs, the Market Abuse Regulation, title to securities, Omnibus III and CMU).

ICMA informal language for Article 29(2) of the EU Benchmarks Regulation (BMR)

On 20 May, ICMA circulated and published on the *Other ICMA Primary Documentation webpage* (which is available to ICMA members and ICMA Primary Market Handbook subscribers) an updated version of its suggested language relating to Article 29(2) of the BMR. The main changes were refinements to the suggested explanatory statement that may be used in prospectuses where the administrator does not appear on ESMA's BMR registers. Other minor updates (related to the UK's departure from the EU, for example), were also made**.** Further details are available in the associated cover email to the ICMA Primary Market Documentation Group, which was also published on the *Other ICMA Primary Documentation webpage*.

Amendments to Level 2 Prospectus Regulation (convertibles and other minor corrections)

In early June, the European Commission adopted certain amendments to Level 2 of the Prospectus Regulation, namely amendments to Delegated Regulation 2019/980 and associated annexes and amendments to Delegated Regulation 2019/979 and associated annexes. The primary purpose of the amendments appears to be to restore the previous Prospectus Directive position on the prospectus disclosure and supplement-related requirements for certain convertible, exchangeable or derivative securities. There are also certain corrections to minor mistakes and changes to the EU growth prospectus regime (which has historically not been a core area of focus for ICMA's primary market members).

Although ICMA understands that the bulk of convertible/exchangeable issuance falls outside the scope of the Prospectus Regulation, and so these changes may not have a significant impact in practice, it is expected that these changes will nevertheless be welcome for ICMA members and indeed align with informal comments made to the European Commission previously by ICMA.

ICMA understands that the delegated regulations have been sent to the European Parliament and Council for a three-month scrutiny period (which would end in early September). This period can be extended for a further three months at the request of either the European Parliament or Council. If, at the end of the three-month scrutiny period, there have been no objections or requests for an extended scrutiny period, then the delegated regulations will be published in the *Official Journal.* The delegated regulations could be published in the *Official Journal* sooner if the European Parliament and Council confirm that they have no objections before the end of the three-month scrutiny period.

ICMA podcasts

ICMA has made available a large number of capital markets-related podcasts since the onset of the COVID-19 pandemic. The following podcasts are likely to be of particular interest to ICMA primary market members:

- *Importance of the Primary Debt Market and Current Conditions under COVID-19* (2 April 2020);
- *COVID-19: Practical Implications for European Primary Debt Capital Markets - a View from A&O* (28 April 2020); and
- *Electronic Signings: an English Law Perspective in the Time of COVID-19* (13 May 2020).

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Primary Markets

by Ruari Ewing and Charlotte Bellamy

CMU

The EU Prospectus Regulation: six months in

The impact of the new EU Prospectus Regulation, which replaced the previous Prospectus Directive in full in July 2019, is likely to be felt by many international bond issuers for the first time as we enter 2020. This is because most international bond issuance takes place under debt issuance programmes, the prospectuses for which (known as base prospectuses) only need to be updated annually. Many issuers will be updating their base prospectus under the new regime for the first time in H1 2020. With this in mind, we set out below a recap of the key changes introduced under the new regime that impact international bond markets.

General

The new EU Prospectus Regulation was developed as part of the European Commission's Capital Markets Union initiative. The legislative process started in 2015 with a review of the previous EU prospectus regime, the Prospectus Directive. The Commission stated that the purpose of its review was to "reform and reshape the current prospectus regime in order to make it easier for companies to raise capital throughout the EU and to lower the associated costs, while maintaining effective levels of consumer and investor protection." With this background, market participants wondered if there would be radical changes to the incumbent regime.

ICMA engaged heavily in the legislative process (as detailed in previous editions of this ICMA Quarterly Report), including on topics such as the retention of the alleviated disclosure regime for bonds with a minimum denomination of at least €100,000 which, helpfully, was kept in the end.

The ultimate outcome is that the radical changes that many bond market participants hoped for or feared (depending on the subject matter) did not materialise; and, generally, there have been limited practical changes for mainstream bond market participants working under the new regime. This is viewed as a good thing by many bond market participants, on the basis that they were familiar with the Prospectus Directive regime and it worked reasonably well in practice.

Structural changes

The new Regulation did introduce some structural changes, largely adding new options or flexibility to the infrastructure of the regime rather than changing or restricting the options that issuers had under the previous Prospectus Directive regime. While some of these might be relevant for bond issuers, the expectation is that the overall impact of these changes is likely to be marginal.

- *Qualified investors only:* One such structural change was the extension of the "wholesale" disclosure regime and exemption from the requirement to prepare a prospectus summary (which was previously only available in the case of bonds with a minimum denomination of €100,000 or more) to bonds which are to be admitted to trading on a regulated market, or a specific segment thereof, to which only qualified investors can have access. ICMA had supported this approach during the legislative process on the basis that it could be a useful way to allow issuers to issue low denomination bonds to qualified investors without needing to prepare onerous "retail" disclosure under the Prospectus Regulation. ICMA is aware of two "qualified investor only" regulated markets that have been established since the Prospectus Regulation was finalised. So far, we understand there has been limited use of these new markets, and many issuers have chosen to continue to issue their securities in high minimum denominations. There could be a number of reasons for this, some of which may be linked to considerations arising under other regulatory regimes such as the MiFID II product governance regime and the PRIIPs Regulation, along with other (non-regulatory) reasons for issuers not wishing or needing to issue low denomination securities.

- *Simplified disclosure regime for secondary issuance:* Another new structural change that could be relevant to ICMA members is the concept of simplified disclosure for "secondary issuances". The simplified disclosure regime is available to, among others, bond issuers where the issuer's shares have been admitted to trading on a regulated market or SME growth market continuously for the last 18 months or more. The level of take-up for this new regime remains to be seen. The initial view of some ICMA members is that some bond issuers may not be convinced that the alleviations available through the secondary disclosure regime outweigh the other requirements of the regime, most notably the requirement for a summary of the information disclosed under MAR over the last 12 months which is relevant as at the date of the prospectus.

Other "structural" changes to the regime are also generally viewed as unlikely to impact on current market practice for most bond issuers. For example, ICMA members have so far not expressed a widespread degree of interest in adopting the new "universal registration document", building on the French "*document de référence*". Similarly, the EU Growth Prospectus is aimed primarily at SMEs and so is unlikely to be relevant or available to many ICMA sell-side members.

Risk factors

Perhaps the main area where bond market participants will notice a change under the new Prospectus Regulation is risk factor disclosure. This was a key issue for legislators in formulating the new regime, amidst concerns that previous risk factor disclosure could be overly lengthy and difficult for investors to navigate. A new provision was introduced (Prospectus Regulation Article 16), which requires issuers to limit risk factor disclosure to those risks that are specific to the issuer and/or the securities and which are material for an informed investment decision, as corroborated by the content of the prospectus. Issuers are also required to assess the materiality of risk factors and have the option (but are not compelled) to disclose that assessment by using a qualitative scale of low, medium or high. Risk factors must also be categorised depending on their nature and the most material risk factors in each category must be mentioned first. ESMA has issued *Guidelines on Risk Factors under the Prospectus Regulation* designed to assist competent authorities in their review of risk factors.

The precise implications of these new requirements are likely to become clearer as competent authorities start to review and approve more prospectuses in the coming months. One thing, however, seems to be clear: risk factor disclosure is a key area of focus for authorities and simply following previous practice is unlikely to be an option for many issuers.

Advertisements

Another aspect that impacts ICMA members is the newly widened definition of "advertisement", which was amended from an "announcement" under the Prospectus Directive to a "communication" under the new Prospectus Regulation. While the rules relating to advertisements are not radically different from those under the Prospectus Directive regime (particularly in the context of exempt – or "wholesale" – public offers), there are some new requirements such as the need to include hyperlinks to the prospectus and final terms or to the webpage where the prospectus will be published. In addition, the newly broadened scope means that bond underwriters and others have needed to consider which communications fall within the newly widened regime and which do not. ICMA facilitated discussions among members on this topic when the new Prospectus Regulation was introduced and market practice in this area appears to be bedding down.

Summaries

The summary regime under the previous Prospectus Directive was widely criticised, primarily due to its rigidity and the negative impact that it had on the helpfulness of prospectus summaries for retail investors. Many market participants were pleased to see that the summary regime was overhauled under the Prospectus Regulation, with the new requirements being set out at Level 1. There were some concerns from ICMA members with the new regime, such as the limit on the number of risk factors that can be included in the summary. It is also worth noting that the new regime makes it clear that it is *not* possible to include a summary in a base prospectus, and this has been confirmed by ESMA in its *Q&A on Prospectuses*. It remains to be seen whether this will impact upon issuers seeking to draw up a summary at the time of a drawdown under a programme. However, as noted above, the majority of international bond issuers issue securities with a minimum denomination of €100,000 or more and, helpfully, the exemption from the requirement to prepare a summary for prospectuses relating to such securities was retained in the Prospectus Regulation. That exemption now also applies in the case of prospectuses for securities that will be traded on a "qualified investor only" market or market segment. As such, the prospectus summary requirements are unlikely to be applicable to the majority of international bond issuance for the reasons noted above.

Other changes

The new regime introduced some other small, but nevertheless helpful, changes for bond market participants.

- *Withdrawal rights:* Among these was a confirmation by ESMA in its *Final Report on Draft RTS under the new Prospectus Regulation* that withdrawal rights do not arise in the context of exempt offers of wholesale securities being admitted to trading. This had been a source of much debate when the Prospectus Directive was revised in 2012.
- *Taxation disclosure:* Another change that was considered to be helpful by ICMA members was a confirmation in Recital 47 of the Prospectus Regulation that prospectuses need only contain a warning that the tax laws of the investors' and issuer's Member State might have an impact on the income received from the securities. Detailed tax disclosure relating to the countries where an offer may be made or where admission to trading may be sought (which, for a passported prospectus could be several Member States) is no longer required.

Outstanding areas of concern

There are currently a relatively small number of areas which ICMA members have identified as being potentially problematic or unclear in practice for the international vanilla bond market, such as the categorisation of certain disclosure requirements in the Level 2 delegated regulation, which impacts upon whether the information can be provided in final terms or whether it needs to be provided in the base prospectus. There are reportedly also some concerns in other markets (eg in relation to which Level 2 disclosure requirements apply in the context of convertible bonds and how certain Level 2 disclosure requirements can be complied with in the context of structured products referencing non-EEA ISINs). Further concerns could arise as more prospectuses are submitted for review under the new regime. ICMA will continue to engage with members and the authorities on any such issues.

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Other issues impacting prospectus disclosure

In addition to the new Prospectus Regulation regime itself, there are a handful of other initiatives with the potential to impact upon prospectus disclosure and practice.

- *Brexit:* The UK's withdrawal from the EU will impact upon the ability of issuers to passport their prospectuses between the EU27 and the UK when passporting rights cease. ICMA has published Q&A on this topic for ICMA members.
- *ESG disclosure:* ICMA is also monitoring developments in the area of ESG disclosure, including developments connected with the proposal in the *European Commission Action Plan on Financing Sustainable Growth* to specify prospectus content for green bond issuances. In this regard, it was interesting to see a joint *Position Paper on Green / Social / Sustainable Bonds* published by the AFM and AMF in April 2019 suggesting that a "full prospectus Annex" under Level 2 of the Prospectus Regulation is not necessary, and recommending an alternative approach under which (i) the issuer would be solely responsible for qualifying its bond issuance as green, social or sustainable; and (ii) should it decide to qualify its issuance as such, the issuer would be required to provide additional information in the "use of proceeds" section of the prospectus, notably whether it intends to comply with green bond voluntary standards (such as ICMA's *Green Bond Principles* or the Climate Bond Initiative's Climate Bond Standards), to publish a report on the use of the green bond proceeds and to mandate a third party verification.

> **Many issuers will be updating their base prospectus under the new regime for the first time in H1 2020.**

- *ESMA Q&A on Prospectuses and National Competent Authority Guidance on the Prospectus Regulation:* These publications can also impact upon market practice in the area of prospectus disclosure. ICMA is not currently aware of any concerns with the most recently published *ESMA Q&A on Prospectuses*. In relation to national competent authority guidance, BaFin published a guidance note (available in German) on 10 September 2019 setting out the criteria it intends to apply when scrutinising prospectuses for compliance with the requirements of "comprehensibility" under the Prospectus Regulation regime. It will be interesting to see if other national competent authorities publish similar guidance on this (or other) topics and, if so, the impact this could have upon prospectus disclosure across Europe (noting that a core purpose of the Prospectus Regulation regime is to harmonise prospectus disclosure).
- *Review of the ESAs:* As previously reported in this Quarterly Report (eg in the Q4 2017 edition), during the review of the European Supervisory Authorities (EBA, EIOPA and ESMA), the European Commission proposed the transfer of powers to approve certain types of prospectus from national regulators to ESMA. ICMA and others raised concerns that this could negatively impact upon the efficiency (in terms of speed, predictability and cost) of the current prospectus approval process with national regulators. This proposal was not taken forward in the final legislative agreement among the European Parliament, Council and Commission and so, for the time being at least, the *status quo* in relation to prospectus approval with national competent authorities (rather than ESMA) is expected to endure.

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The new Swiss prospectus regime: a practical guide

On 1 January 2020, the new Swiss Financial Services Act "FinSA" (Finanzdienstleistungsgesetz "FIDLEG" / Loi fédérale sur les services financiers "LSFin") came into effect, together with its subsidiary implementing ordinance "FinSO" (Finanzdienstleistungsverordnung "FIDLEV" / Ordonnance sur les services financiers "OSFin") that was approved on 6 November 2019.

This new regime, which constitutes a major overhaul of the Swiss prospectus requirements, modernises the Swiss legal framework for capital market issuances, amongst other things revising the prospectus requirements for Swiss market issuers and underwriters. The current arrangements around the Swiss vanilla debt market provide for flexible access and allow many issuers to enter the market within a short time frame and the new arrangements under FinSA preserve this flexibility in many instances. Four alternatives are available to issuers (see Homburger's October 2019 briefing for further detail) and the choice depends to a large extent on the current status of the issuer in terms of existing issuance programmes, listings and disclosure obligations.

Ex-ante approval: Before debt securities can be publicly offered in Switzerland or admitted to trading on a Swiss trading venue, a prospectus (in English or one of Switzerland's official languages) must be approved by a review body licensed by the Swiss Financial Market Supervisory Authority (FINMA) and published. Draft prospectuses need to be submitted ten calendar days in advance for repeat issuers (20 days for first-time issuers) and can incorporate a wide range of existing documents by reference. It is envisaged that this route is likely to be used for first time or infrequent issuers and is analogous to the current situation where such issuers generally present a preliminary prospectus prior to launch.

Ex-post approval: This alternative preserves the speed to market enjoyed by many issuers in the Swiss market currently. Where (notably) a debt securities issuer receives a confirmation (the Confirmation) from an underwriting Swiss bank or securities firm that that the most important information about it, any guarantor and the debt securities is publicly available when the public offer begins, then the draft prospectus need *only* be submitted for approval within two months thereafter. (In practice the unapproved final prospectus is likely to be published prior to settlement, with submission for approval following thereafter.)

In providing for this Confirmation, FinSA in effect tasks the relevant Swiss bank or securities firm as the gatekeeper for Swiss investor protection for this particular issue of debt securities. In this respect and as a practical approach to being able to issue the Confirmation, it is envisaged that the Swiss bank or securities firm (most likely to be the member of the underwriting group which is undertaking the documentation for the issue and in parallel to usual due diligence procedures) will request a written confirmation from the issuer (and any guarantor) to evidence the basis on which the Swiss bank or securities firm was satisfied that the most important information is indeed publicly available at the time of launch.

It is expected that this route will be most appropriate for issuers that already have debt or equity securities listed at the time of launch on a stock exchange which meets the requirements of the Swiss review body.

Filing / automatic approval: A further alternative, for prospectuses already approved by a recognised non-Swiss regulator (expected to be *inter alia* from the EU and the US)

Primary Markets

by Ruari Ewing

European Distribution of Debt Instruments (EDDI) consultation

On 28 May 2019, the European Central Bank published a six week consultation on the proposed European Distribution of Debt Instruments (EDDI) initiative.

EDDI is proposed to have three modular elements:

- a pre-trade element providing technical syndication functionality (announcements, order collection, order book management and allocation);
- a post-trade solution providing a centralised issuer-facing clearing functionality that is connected to existing central securities depositories (CSDs) to provide investor-facing clearing functionality; and
- related harmonisation (potentially including corporate actions and bond terms and conditions).

The articulation of these elements seemingly has mainly had in mind European supranational and agency borrowers syndicating new issues of euro-denominated bonds that are to then be cleared in central bank money. However, the consultation holds open the possibility of EDDI applying to a much wider range of bonds, including those:

- denominated in currencies other than euro;
- issued by national governments' debt management offices (DMOs) or even corporates – and potentially from outside the euro area or even the EU;
- issued via auction instead of syndication.

The consultation states that EDDI's modular elements are individually voluntary for issuers, who may choose to use all, some or none or of them. It also states that EDDI does not seek to disintermediate existing actors in the market. The advantages of EDDI are argued to be:

- providing more efficient syndication pre-trade;
- facilitating post-trade clearing Europe-wide by connecting investor-facing CSDs across national borders;
- straight-through connectivity between the pre-trade and post-trade elements (to the extent both are used); and
- harmonisation. In this respect, it is felt EDDI could materially contribute to CMU and the strengthening of the euro.

ICMA consulted its members for their input, including by reference to existing syndication and international clearing solutions, and submitted the ICMA response by the consultation's 9 July response deadline.

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EU Prospectus Regulation

On 21 June 2019 were published the:

- 14 March Commission Delegated Regulation (EU) 2019/980 on prospectus format, content, scrutiny and approval and detailed disclosure annexes; and
- 14 March Commission Delegated Regulation (EU) 2019/979 concerning regulatory technical standards on key financial information for the prospectus summary, data and machine readability of prospectuses, advertisements, prospectus supplements and prospectus publication.

ICMA is now notably working with member groups to update the technical materials in the ICMA Primary Market Handbook that have an incidence to the EU's prospectus regime – namely Appendices A8 (A8 Final terms and pricing supplement), A13 (Selling restrictions and legends - PRIIPs Regulation, Prospectus Directive, UK) and A16 (Sub-€100,000 denomination bonds under the Prospectus Directive and retail cascade legends). It is expected that revised appendices will be circulated at least informally ahead of the new Prospectus Regulation coming into force on 21 July (with formal publication following as soon as possible thereafter).

However, many of the implications of the new regime will only become clear in the context of actual transactions (likely to be mostly from the autumn as many issuers have had their issuance programmes grandfathered under the preceding Prospectus Directive) as regulators and market participants work together to apply its provisions in practice. Consequently, it is quite possible that Appendices A8, A13 and A16 will be further revised following initial practical experience of the new regime.

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Asset-Backed Commercial Paper (ABCP)

The Securitisation Regulation brought in a raft of regulatory changes to the responsibilities (and sanctions) on those involved in establishing and operating both term securitisation transactions and ABCP programmes. In particular, it brought in new disclosure and reporting obligations relating to the sharing of documents and periodic information relating to any securitisation (and the relevant securitised exposures) with investors and any competent authorities supervising such investors or the other parties involved in establishing or managing the securitisation. A June 2019 article (see pages 26-29) by Clifford Chance considers the approaches that may be taken by those establishing and managing ABCP programmes on the basis of the current legislation."

Circulated on 10 June, AFME's *First Quarter 2019 Securitisation Data Report* shows that European ABCP issuance was €158.5 billion in the first quarter of 2019. This is a sharp increase of 62.4% versus the prior quarter and of 132.3% versus the same quarter in the prior year; and is more than in any other quarter in the past decade. Multi-seller conduits (99.1% of total), particularly from France (68.4% of total) and Ireland (28.2%), continue to dominate as the largest issuance category in the ABCP market.

In order to provide a comprehensive package of clarifications for market participants ESMA has developed a set of Q&A, most recently updated on 27 May, based on stakeholder feedback and questions on the disclosure technical standards received by ESMA. These cover many technical issues on how to complete template fields and aim at providing guidance to market participants seeking further context that may be helpful for their future expectations of how to comply with these RTS/ITS. Nevertheless, they are being provided in advance of the possible adoption of the disclosure RTS/ITS being adopted by the EC and consequently, are subject to possible changes.

ESMA's website also provides a, gradually growing, list of the STS notifications it has received. Thus far the public transactions have all been non-ABCP transactions and have involved verification given by either one of two firms, Prime Collateralised Securities and STS Verification International. However, of the three private transactions on ESMA's list two are reported as being ABCP transactions.

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Review of Russian and international practices

On 5 June 2019, ICMA and the Self-Regulatory Organization National Finance Association (NFA) in Russia published a comparative review of practices and procedures in the Russian and international primary debt capital markets. The review outlines dynamics in the Russian primary bond markets and then contrasts related dynamics in the international syndicated markets.

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Primary Markets

by Ruari Ewing and Charlotte Bellamy

Prospectus Regulation

The new EU Prospectus Regulation is due to apply from 21 July 2019. Ahead of this, the European Commission and ESMA have been working on various subsidiary acts.

The key Level 2 acts that will be relevant for ICMA members are (i) a delegated regulation on prospectus format, content, scrutiny and approval and (ii) RTS on key financial information for the prospectus summary, data and machine readability of prospectuses, advertisements, prospectus supplements and prospectus publication. These items are discussed further below.

Delegated regulation on prospectus format, content, scrutiny and approval and detailed disclosure annexes

The European Commission published a draft delegated regulation and disclosure annexes on 28 November 2018 and requested feedback by 26 December. ICMA submitted its feedback on 21 December, as detailed in the last edition of this Quarterly Report. Many of ICMA's concerns stemmed from the fact that much of the detailed provisions had been redrafted from *ESMA's Final Report on Technical Advice under the Prospectus Regulation* (which had largely used existing provisions from the current Prospectus Directive regime, with which national competent authorities and market participants are familiar). In some cases, this had led to confusing or ambiguous disclosure requirements.

On 14 March, the Commission adopted a delegated regulation and related annexes – which ICMA is now reviewing with members.

ICMA understands that the European Parliament and Council have a three-month non-objection period, which can be extended for a further three months. If the European Parliament and Council do not object within the first three-month period or if, before the expiry of that period, both co-legislators inform the Commission that they will not object, then the delegated regulation is published in the *Official Journal* and will enter into force on the date specified in the delegated regulation.

RTS on key financial information for the prospectus summary, data and machine readability of prospectuses, advertisements, prospectus supplements and prospectus publication

ESMA published its *Final Report on Draft RTS under the new Prospectus Regulation* in July 2018 (see the Q4 2018 edition of this ICMA Quarterly Report for commentary).

On 14 March, the Commission adopted a delegated regulation and related annexes – which ICMA is now reviewing with members.

ICMA understands that the European Parliament and Council have a one-month non-objection period which can be extended by two further one-month periods. If the European Parliament and Council do not object to the RTS within the one-month non-objection period or if, before the expiry of that period, both co-legislators have informed the Commission that they will not object, then the RTS is published in the *Official Journal* and enters into force on the date specified in the RTS.

In addition to the Level 2 acts, there are also certain Level 3 provisions that will be of interest to ICMA members, namely ESMA's Guidelines on Risk Factors and Q&A on Prospectuses.

ESMA Guidelines on Risk Factors

The new risk factor requirements under the Prospectus Regulation are likely to be a key area of focus for ICMA members. ESMA published a *Consultation Paper on Guidelines on Risk Factors* in July 2018. ICMA responded to that consultation ahead of the 5 October deadline (see the Q4 2018 edition of the ICMA Quarterly Report for further details).

On 29 March, ESMA published a Final Report - *ESMA Guidelines on Risk Factors under the Prospectus Regulation* – which ICMA is now reviewing with members.

ESMA Q&A on Prospectuses

On 28 March, ESMA published Questions and Answers on the Prospectus Regulation – which ICMA is now reviewing with members. (The preceding Questions and Answers Prospectuses 29th updated version under the Prospectus Directive continues to be publicly available.)

Other prospectus-related matters

ESAs review (Omnibus III)

ICMA has been monitoring developments relating to proposals to centralise approval of certain prospectuses with ESMA pursuant to the ESAs review (reported on page 29 of the Q4 2018 edition of the ICMA Quarterly Report).

On 21 March, the European Council issued a press release confirming the Council Presidency and the European Parliament reaching a provisional deal on a supervisory framework for European financial institutions. No related legislative texts had been published at the time of writing, but press reporting seems to indicate that responsibility for prospectus approvals will remain with Member State regulators.

Brexit

On 15 March, ICMA updated its FAQs on the impact of Brexit in primary markets for its members. This includes a FAQ on the impact of Brexit on pan-European bond prospectus approval. ICMA will keep this FAQ under review and will aim to support members through the period ahead.

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Note: Charlotte Bellamy is now on parental leave. In her absence, members can contact Ruari Ewing (ruari.ewing@icmagroup.org) for information on the EU Prospectus Regulation.

ICMA Primary Market Handbook: recent updates

On 26 March, ICMA published certain updates to the *ICMA Primary Market Handbook* and communicated this to ICMA members and ICMA Primary Market Handbook subscribers and holders via a circular (ICMA login details are required to access the circular online).

The changes are set out below.

- An amendment to Recommendation R6.4 (*Access to distribution*) to clarify that the Recommendation remains subject to any issuer objection that is in writing.
- In the case of Appendices A8 (*Final terms and pricing supplement*), A13 (*Selling restrictions and legends (EEA PRIIPs Regulation, EEA Prospectus Directive, UK*)) and A16 (*Sub-€100,000 denomination bonds under the EEA Prospectus Directive and retail cascade legends*), to include or update a notice that the standard language is being revised in the light of the UK's withdrawal from the European Union and draft revised language is available to ICMA members and Handbook subscribers on request.
- Also, in the case of just Appendix A8 (*Final terms and pricing supplement*), to remove the free text option in relation to completing CFI and FISN information.
- An update to Appendix A13a (*Selling restrictions (Hong Kong and Singapore)*) further to the implementation of Singapore's Securities and Futures (Offers of Investments) (Securities and Securities-based Derivatives Contracts) (Amendment) Regulations 2018.

Further information (including open links to the amended pages) is available on the ICMA Primary Market Handbook amendments/archive webpage.

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The new EU Prospectus Regulation is due to apply from 21 July 2019.

only slightly from what is regarded as a plain vanilla bond will bring that security into scope as a packaged product, requiring a KID to be produced. An example would be the inclusion of a "make whole" provision. The fact that this and other terms can be to the benefit of investors but bring a bond within PRIIPs, combined with the fact that equities are not subject to the PRIIPs regime yet present greater risks to the retail investor, has led many to question the efficacy and rationality of the PRIIPs regime. Under PRIIPs, a KID must not only be accurate but may also be interpreted to require the inclusion of all material information. The imposition of this requirement with attendant issuer liability for both a three-page KID and a full 100+ page prospectus has not only created perplexity but more significantly led many issuers to refuse to produce a KID and instead restrict placement of newly issued bonds to non-retail investors in the EEA.

The PG regime has had similar consequences. It has effectively created an investor suitability obligation, not just at the point of sale (the approach taken in the past by regulation), but also imposing this obligation on issuers, underwriters, and secondary market sellers over the entire lifetime of the instrument. The practical burden of compliance with PG has caused many EU-originated issues to curtail altogether placement of bonds to retail investors (see the 2018H1 vs 2017H1 percentage change in EUR benchmark issuance reported in the Fourth Quarter 2018 edition of this Quarterly Report).

While the goal of these primary market aspects of MiFID and PRIIPs is enhanced investor/consumer protection, it seems the impact has mainly been an increase in administrative burdens and a reduction in retail access to the bond markets. ICMA will continue to engage EU authorities and national competent authorities to better achieve desired regulatory outcomes while maintaining resilient and efficient markets.

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Prospectus Regulation

The EU Prospectus Regulation is due to apply from 21 July 2019 and work is underway on developing Level 2 and Level 3 measures. A high-level snapshot of where things stand is set out in the box below.

Further information on the most recent developments, namely the publication by the European Commission of draft Prospectus Regulation Level 2 delegated regulation and annexes and a summary of other prospectus-related matters is also set out below.

Prospectus Regulation Level 1

The EU Prospectus Regulation is final and was published in the EU *Official Journal* in 2017. Certain parts of it are already in application but it will apply in full from 21 July 2019.

Level 2

Delegated regulation on prospectus format, content, scrutiny and approval and detailed disclosure annexes

The European Commission published a draft delegated regulation and disclosure annexes on 28 November 2018 and requested feedback by 26 December 2018. ICMA submitted its feedback on 21 December (see further details below). The Commission's deadline to adopt the delegated acts is 21 January 2019 (this deadline is set out at Level 1).

RTS on key financial information for the prospectus summary, data and machine readability of prospectuses, advertisements, prospectus supplements and prospectus publication

ESMA published its *Final Report on Draft RTS under the new Prospectus Regulation* in July 2018 (see the last edition of this ICMA Quarterly Report for commentary). ESMA's Final Report is now with the Commission, who will decide whether to endorse the proposed RTS. We understand that, if the Commission decides to endorse the RTS without amendment, the European Parliament and the Council would have a one month "non-objection period" within which to consider the RTS. This period can be extended by one month. If the European Parliament and the Council do not object to the RTS within the relevant non-objection period, or both the Parliament and the Council tell the Commission before the end of the period that they do not intend to object to the RTS, then the RTS will be published in the *Official Journal* and will enter into force on the date specified in the RTS.

Level 3

ESMA Guidelines on Risk Factors

ESMA published a *Consultation Paper on Guidelines on Risk Factors* in July 2018. ICMA responded to that consultation ahead of the 5 October deadline. See the last edition of the ICMA Quarterly Report for further details.

ESMA Q&A on Prospectuses

It is anticipated that the *ESMA Q&A on Prospectuses* will require updating in order to reflect the provisions of the new Prospectus Regulation. The timing for that update is not yet clear.

Level 2 delegated regulation on prospectus format, content, scrutiny and approval and detailed disclosure annexes

(i) Background

The most recent development in relation to the development of the new Prospectus Regulation regime is the publication by the Commission of a draft delegated regulation and disclosure annexes on 28 November 2018. Once finalised, the delegated regulation and annexes will form the bulk of the Level 2 provisions under the new Prospectus Regulation.

The Commission's publication follows ESMA's *Final Report on Technical Advice under the Prospectus Regulation,* which was published at the end of March 2018. The Q3 2018 edition of this ICMA Quarterly Report included an article on page 22-23 on the content of that Final Report.

The Commission requested feedback on the draft delegated regulation and disclosure annexes by 26 December 2018. ICMA submitted its feedback on 21 December.

(ii) Summary of ICMA feedback to the Commission

The opportunity to review the Commission's proposed draft delegated regulation and annexes was welcome. However, the time allowed to formulate and provide such feedback, combined with the significant drafting changes that were made to the proposed provisions in *ESMA's Final Report on Technical Advice under the Prospectus Regulation* meant that developing fulsome feedback on the draft delegated regulation and annexes was very challenging.

As a general point, debt capital market participants had previously highlighted to the Commission and ESMA that they, and NCAs, are familiar with the existing Prospectus Directive Level 2 provisions. It was therefore considered to be helpful that ESMA had not departed significantly from the language of the existing Prospectus Directive regime in the ESMA Final Report. Market participants expressed surprise at the Commission's approach of amending much of the precise drafting contained in the draft delegated regulation and draft annexes.

It appears that there was no intention to change the approach set out in ESMA's Final Report substantively. However, in some cases the drafting changes resulted in substantive differences and/or unclear disclosure requirements that could be problematic for NCAs and market participants if they are not rectified in the final delegated regulation and annexes.

ICMA submitted detailed feedback to the Commission highlighting those areas of the delegated regulation and annexes where it appeared that the drafting changes had inadvertently changed the position or resulted in an unclear disclosure requirement. Some of the particular points of concern that ICMA flagged were as follows:

- The provisions of the delegated regulation relating to the circumstances in which certain non-equity securities disclosure annexes should apply are difficult to interpret and, in some cases, could be read as being out of line with the Level 1 position.
- Various provisions related to the interaction of final terms and base prospectuses that were included in *ESMA's Final Report on Technical Advice under the Prospectus Regulation* and reflected the position in the current Prospectus Directive Level 2 regime have not been carried forward to the draft delegated regulation and annexes. Although it does not appear that there is any intention to change the current approach on these matters, it is not clear why those provisions were not carried forward and in many cases it would be helpful if they were set out explicitly at Level 2.
- Persons responsible for the prospectus are required by the disclosure annexes to give a responsibility statement in the prospectus. The precise wording of these disclosure requirements has been amended in different ways in different annexes and it is no longer clear exactly what the responsibility statements would be required to say. Again, it does not appear that this was an intentional change, as the new disclosure requirements do not make sense grammatically in most cases. There are other, similar, changes in the draft annexes where drafting changes have resulted in disclosure requirements that no longer seem to make sense grammatically.
- The draft disclosure annexes envisage that, where a PRIIPs KID is used as part of the prospectus summary (which can be required by individual NCAs pursuant to Article 7(7) of the Prospectus Regulation), then any information disclosed in the summary from the PRIIPs KID would also need to be disclosed elsewhere in the

> **Market participants expressed surprise at the Commission's approach of amending much of the precise drafting contained in the draft delegated regulation and draft annexes.**

prospectus. There are concerns that this could result in unexpected results in practice.

- There is likely to be continued uncertainty in relation to the precise approach that will need to be taken in relation to the new risk factor disclosure requirements, which is expected to be one of the most significant practical changes for issuers under the new Prospectus Regulation regime when it enters into force on 21 July 2019.
- In relation to credit-linked securities, the effect of making the disclosure of information relating to the reference entity (or the issuer of the reference obligation) Category A is that it will effectively prevent issuers making such issuances under final terms, unless they have supplemented their base prospectus with the relevant information, which will add cost and time to the issuance process.

There were some positive elements to the Commission's draft delegated regulation and annexes. These included:

- the Commission's decision not to take forward the suggestion in the ESMA Final Report that a length limit on prospectus cover notes should be imposed;
- the Commission's efforts to address the detailed comments that ICMA submitted to ESMA on the simplified disclosure regime for secondary issuances to ensure that such regime is not more onerous than the disclosure regime for primary issuances;
- the Commission's change to the tax disclosure requirement so that it now refers to the issuer's "country" of incorporation rather than the issuer's "Member State" of incorporation, which is helpful for third country issuers; and
- the deletion of the definition of "debt securities" because the reference in that definition to the obligation to pay the investor 100% of the nominal value had led to certain securities such as zero coupon notes falling outside the definition of "debt securities" under the current Prospectus Directive regime, which was problematic and confusing in practice.

(iii) Next steps

ICMA intends to follow up with Commission contacts in relation to the feedback it submitted in writing.

The Level 1 Regulation provides that the Commission's deadline to adopt delegated acts in these areas is 21 January 2019 (ie six months ahead of the implementation date).

Other prospectus-related matters

ICMA is monitoring developments related to the European Commission Action Plan on Financing Sustainable Growth published in March 2018, under which the Commission announced its intention to specify by Q2 2019 the content of the prospectus for green bond issuances to provide potential investors with additional information.

Overall, we are expecting a busy period ahead for ICMA primary market members as they begin to prepare for the implementation of the Prospectus Regulation on 21 July 2019.

For many members, the impact of Brexit will be one part of those considerations. ICMA has published FAQs on the impact of Brexit in primary markets for its members, including a FAQ on the impact of Brexit on pan-European bond prospectus approval. ICMA will keep this FAQ under review and will aim to support members through the period ahead.

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US Resolution Stay Regime

The US banking regulators adopted rules known as the "QFC stay rules" in 2017 to improve the resolvability and resilience of US G-SIBs and their subsidiaries worldwide, as well as the US subsidiaries, branches and agencies of non-US G-SIBs.

The rules are intended to mitigate the risk of destabilising terminations of certain contracts, which is a perceived impediment to the orderly resolution of a G-SIB. They accomplish this by requiring that those contracts include

In some cases, the drafting changes resulted in substantive differences or unclear disclosure requirements.

 

Primary Markets

by Ruari Ewing and Charlotte Bellamy

Prospectus Regulation

The EU Prospectus Regulation is due to apply from 21 July 2019 and work is under way on developing Level 2 and Level 3 measures. There have been two significant developments for debt capital markets participants recently.

- First, ESMA published its *Final Report on Draft RTS under the new Prospectus Regulation*, covering key financial information for the prospectus summary, data and machine readability of prospectuses, advertisements, prospectus supplements and prospectus publication in July.
- Second, ESMA published a *Consultation Paper on Guidelines on Risk Factors*, also in July.

ESMA Final Report on Draft RTS under the new Prospectus Regulation

ESMA was mandated to prepare draft regulatory technical standards in certain specific areas of the Prospectus Regulation, namely key financial information for the prospectus summary, data and machine readability of prospectuses, advertisements, prospectus supplements and prospectus publication.

As reported in the 2018 Q2 edition of this Quarterly Report, ICMA responded to ESMA's consultation paper on the proposed draft RTS in March 2018, broadly supporting the RTS in areas where ESMA had carried across existing certain Prospectus Directive Level 2 provisions and raising certain queries on other areas.

Overall, the final draft RTS is improved from the original proposal in some areas, although other areas remain as originally proposed and so may require some thought in terms of their practical application.

An area that has been improved for debt capital market participants is the requirements on key financial information for the prospectus summary. One of the key concerns in this area was the relatively prescriptive approach that had been proposed, together with a cap on the number of additional line items or APMs that could be included in the summary. ICMA members urged ESMA to remove this cap; and were pleased to see that ESMA understood the concerns of debt capital markets participants and removed the cap in the final draft RTS.

Another key area of concern for ICMA members related to the advertisements provisions, where the expanded definition of "advertisement" at Level 1 (now capturing "communications" rather than "announcements") gave rise to some questions as to how the proposed provisions would work in practice for underwriters. This area of the RTS remains relatively unchanged. For example, in many cases the requirements still relate to both oral and written advertisements. This may be an area of focus for ICMA members in advance of the implementation date in July 2019, as they consider how to implement the new regime in practice across a broader range of "advertisements".

The original proposals for RTS relating to prospectus publication and supplements were relatively uncontroversial and there have been very few changes to the final draft RTS. In relation to supplements, ESMA has helpfully provided some clarification in relation to withdrawal rights, which has long been an area of uncertainty under the current PD and, given the drafting of the Prospectus Regulation, could have been a continuing area of uncertainty under the new regime. ESMA states that it believes that withdrawal rights "do not apply to prospectuses for the admission to trading of wholesale non-equity securities as these do not fall within Article 23(2) of the Prospectus Regulation, under which withdrawal rights relate to offers of securities to the public. This in ESMA's view does not encompass exempt offers of wholesale securities being admitted to trading." This is a welcome clarification.

In relation to data and machine readability, ESMA had suggested that issuers may be required to submit significant amounts of data to NCAs, if required by the relevant NCA. These proposals have been carried through to the final draft RTS largely unchanged. Depending on the approach that individual NCAs take, this could represent a significant additional regulatory reporting burden for issuers.

The final area of the RTS relates to a notification portal. ESMA did not consult on this area of the RTS. The notification portal is a portal through which NCAs will submit Prospectus Regulation-related documents to other NCAs for the purposes of passporting. ESMA states that issuers and other stakeholders will have no direct interaction with the portal.

The draft RTS were delivered to the European Commission in July. The Commission must decide whether to endorse the RTS within three months of receiving it (ie by mid-October 2018). If the Commission decides to adopt the RTS without amendment, the European Parliament and the Council will then have a one month "non-objection period" within which to consider the RTS. This period can be extended by one month. If the Parliament and the Council do not object to the RTS within the relevant non-objection period, or both the Parliament and the Council tell the Commission before the end of the period that they do not intend to object to the RTS, then the RTS will be published in the *Official Journal* and will enter into force on the date specified in the RTS. This means that if the Commission adopts the draft RTS with no amendments and neither the European Parliament nor the Council object, the RTS could be published in the *Official Journal* before the end of this year.

ESMA Consultation Paper on Guidelines on Risk Factors

For ICMA members, one of the most significant changes to the current prospectus regime is the introduction of new, specific provisions relating to risk factors under the Prospectus Regulation.

The background to this change was a concern among authorities that risk factor sections in prospectuses could be too lengthy and general in nature, or contain language which negated the risk. This was a finding of the 2016 *ESMA Peer Review on the Prospectus Approval Process*. In the light of this, new provisions were introduced to the Prospectus Regulation regime at Level 1, which (broadly) require risk factors to be limited to risks that are specific and material and presented in a limited number of categories depending on their nature, with the most material risk factors mentioned first in each category.

ESMA was mandated to develop guidelines to assist competent authorities in their review of the specificity and materiality of risk factors and the presentation of risk factors across categories depending on their nature. Following this mandate, ESMA consulted market participants on proposed draft guidelines on risk factors under the Prospectus Regulation. ICMA responded to that consultation ahead of the 5 October deadline.

For ICMA members, one of the most significant changes to the current prospectus regime is the introduction of new, specific provisions relating to risk factors.

The draft guidelines are addressed to national competent authorities, but ESMA expects that persons responsible for the prospectus will take the draft guidelines into account before submitting a draft prospectus for approval.

ESMA has proposed 12 draft guidelines relating to specificity, materiality, corroboration of specificity and materiality, presentation of risk factors across categories, focused/concise risk factors and risk factors in the summary.

Generally, many of the draft guidelines appear to be flexible and proportionate, and the position set out in the consultation paper is a helpful starting point. The precise impact of the draft guidelines on issuers will depend on the approach taken by NCAs in applying the guidelines. It is hoped that NCAs will make use of the flexibility envisaged in the guidelines (in particular by not viewing the "example" risk factors as templates to which risk factors should be matched). As with all areas of prospectus regulation application, it is important that NCAs consider the intended audience of the prospectus (ie retail or wholesale investors) and calibrate their review accordingly. Issuers will also need to ensure that they are able to make consistent and compliant risk factor disclosure in markets beyond Europe, and it is hoped that NCAs will also bear this in mind.

One specific area of concern with the guidelines might be the focus on the need for quantitative information to illustrate the potential negative impact of a risk factor. Disclosure of quantitative information to illustrate the potential negative impact of risk factors is currently rare in debt securities prospectuses. It is likely to be very difficult to disclose quantitative information on the negative impact of the risk factor in a manner that is not misleading for investors. By way of example, it would be very difficult to quantify and disclose in a non-misleading way the negative impact of any reputational damage an issuer or guarantor might suffer as a result of a particular risk factor. In addition, the draft guidelines seem to indicate that qualitative information can only be provided when quantitative information is not available. This could be problematic for issuers because it may not always be clear whether quantitative information is "available" or not. It could be challenging for issuers to diligence whether quantitative information is available internally or externally for a particular risk factor and, if so, model that information to ensure it can be appropriately disclosed in a non-misleading manner. It is hoped that ESMA may reconsider the emphasis on the need for quantitative information in the final guidelines.

Overall, it is anticipated that risk factor disclosure could be a key area of the Prospectus Regulation that will require some time and thought in the lead-up to next summer as the first Prospectus Regulation-compliant prospectuses are prepared and submitted. This was reflected in comments from both official sector and market participants at IFLR's 9th EU Prospectus and Primary Market Issuance conference on 27 September, which ICMA supported.

Level 2 delegated acts: next steps

ESMA issued its *Final Report on Technical Advice under the Prospectus Regulation* at the end of March 2018, which included technical advice relating to the format and content of the prospectus and scrutiny and approval of the prospectus. The last edition of this ICMA Quarterly Report included an article on page 22-23 on the content of that Final Report.

Following receipt of ESMA's Final Report, it is anticipated that the Commission will publish draft delegated acts on its Better Regulation portal in mid-October, and there will be a four week period during which market participants can submit feedback. The overall deadline for the Commission to adopt the delegated acts is 21 January, which is six months ahead of the date on which the Prospectus Regulation will be fully implemented.

Other prospectus-related matters

ICMA is monitoring developments related to the *European Commission Action Plan on Financing Sustainable Growth* published in March 2018, under which the Commission is intending to specify by Q2 2019 the content of the prospectus for green bond issuances to provide potential investors with additional information.

Overall, we are expecting a busy period ahead for ICMA primary market members as they begin to prepare for the implementation of the Prospectus Regulation on 21 July 2019. For many members, the impact of Brexit will be one part of those considerations. ICMA will aim to support members through this implementation period.

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ICMA Primary Market Handbook: recent updates

On 26 September 2018, ICMA published several updates to the ICMA Primary Market Handbook and communicated this to ICMA members and ICMA Primary Market Handbook subscribers and holders via a circular (ICMA login details are required to access the circular online).

The changes were as follows.

- In Chapter 5 (Bookbuilding and launch) certain terminology used in Recommendation R5.1 was amended to align with the title of the recommendation, "initial price thoughts". In addition, a new item 5.7B flagging certain considerations relating to X accounts (confidentiality, transparency, potential impact on demand disclosure and allocation/pricing recommendations and only issuers having the ability to review and reconcile) was included.
- In Appendix A1 (Agreement Among Managers (Versions 1 and 2), a new section titled *Version 1 – Asia Pacific (ex-Japan) Subscription Agreement Amendments* was added.
- In Appendix A7 (ECP documentation for Investment Grade issuers), a note relating to the MiFID II product governance regime was added.
- Several changes were made to Appendix A8 (Final terms and pricing supplement) namely: (i) language relating to the PRIIPs Regulation was included; (ii) a note relating to the MiFID II product governance regime was added; (iii) placeholders for legal entity identifiers (LEIs) and certain other codes were added; (iv) a note relating to the UK's withdrawal from the European Union and the implementation of the Prospectus Regulation was added; and (v) certain other minor, corrective changes were made.
- Appendix A13 (Selling restrictions and legends (EEA PRIIPS Regulation, EEA Prospectus Directive, UK), previously titled Selling restrictions (UK & EEA Prospectus Directive)) was significantly revised to include language relating to the PRIIPs Regulation, to update the EEA Prospectus Directive selling restrictions and legends and to include a note relating to the

Primary Markets

by Ruari Ewing and Charlotte Bellamy

Prospectus Regulation

The Prospectus Regulation is due to enter into full application on 21 July 2019. This means that work on developing Level 2 provisions is in full swing. Significantly, ESMA issued its *Final Report on Technical Advice under the Prospectus Regulation* at the end of March 2018. Among other things, the Final Report included the outcome of ESMA's consultations on *Format and Content of the Prospectus* and *Scrutiny and Approval of the Prospectus* to which ICMA had previously responded in September 2017.

The Final Report is 502 pages long and helpfully sets out detailed feedback on the responses that ESMA received to its public consultation. ICMA reviewed the Final Report with members and noted that many of the detailed disclosure requirements at Level 2 seem relatively unchanged from the current Prospectus Directive regime. Whilst it may be argued that perhaps not enough has been done to make the most of the new tailored disclosure test at Level 1, the fact that things seem relatively unchanged is likely to be helpful to market participants as it will reduce friction when the Prospectus Regulation enters into application next summer, and it reflects the general acceptance by market participants that the current Prospectus Directive regime works well in practice. However, inevitably adjustments will be required to address the amendments that have been made and there are a few surprising suggestions in the Final Report, detailed below. ICMA had the opportunity to discuss these points informally with ESMA and the Commission after the Final Report was published, which was welcome.

- *Cover notes:* ESMA suggests that a prospectus cover note will not be mandatory but, where one is included in the prospectus, its length will be limited to three sides of A4. As nearly all bond prospectuses have a cover note of some description, it is expected that potentially the new length limit would be applicable to nearly all bond prospectuses. For many bond issuers, this might mean restructuring their prospectus cover notes to include only the most important information and information that is required by law to be disclosed prominently. The basis for ESMA's suggested length limit is unclear, as there is no reference to prospectus cover notes in the Level 1 text. In addition, ICMA is not aware of any investor concerns on the length or format of current cover notes. It will be interesting to see if this suggestion is taken forward in the final Level 2 delegated acts.
- *PRIIPs KIDs and prospectuses:* ESMA's view is that where a PRIIPs KID is used as part of the prospectus summary, the information in the PRIIPs KID must also be disclosed elsewhere in the prospectus. The rationale for this is that the prospectus summary must summarise information that is included elsewhere in the prospectus. While there is some logic to this, ESMA's approach might lead to unexpected results in practice. For example, as noted in the 2018 Q2 edition of this Quarterly Report, the FCA acknowledged in a *Statement on Communications in relation to PRIIPs* that certain aspects of a KID could be misleading, noting: "Where firms selling or advising on PRIIPs have concerns that the performance scenarios in a particular KID may mislead their clients, they should consider how to address this, for example by providing additional explanation as part of their communications with clients." Might the mandatory inclusion of information from KIDs in a prospectus compound any concerns surrounding information in KIDs being misleading?
- *Tax disclosure:* A useful element of the new Prospectus Regulation is Recital 47, which states: " ... a prospectus should only contain a warning that the tax laws of the investor's Member State and of the issuer's Member State of incorporation might have an impact on the income received from the securities. ..." This should result in simpler tax disclosure in practice. However, ESMA notes that it feels unable to depart from the reference to the issuer's and investor's "Member State" in its Final Report. This means that the associated disclosure requirement in the draft delegated acts refers to the "tax legislation of the investor's *Member State* and of the issuer's *Member State* of

incorporation…" (emphasis added). This seems potentially problematic for third country issuers and/or where investors are based in a third country. If this formulation of words is carried through to the final Level 2 delegated acts, it will be important that this disclosure requirement is not interpreted rigidly by NCAs, so that issuers can refer to their country of incorporation and/or investors in a third country in order to avoid incorrect and confusing disclosure where the issuer and/or investors are located in one or more third countries.

- *Secondary issuance requirements:* In its response to the ESMA consultation on the format and content of the prospectus, ICMA made a number of comments on the proposed disclosure annex for secondary issuance. These comments were intended to be technical in nature and designed to ensure that the disclosure requirements for the alleviated secondary issuance regime were consistent with, and not more onerous than, the disclosure requirements in the primary debt disclosure annexes. Several of these points were not taken into account, although there does not seem to be a policy reason for this. It is hoped that the Commission will rectify this position in the final delegated acts, to ensure that debt issuers have the chance to benefit from the secondary issuance regime.
- *Definitions:* ESMA decided not to define certain terms that are used in the draft delegated acts, for example the term "wholesale debt". The rationale for this is ESMA's understanding that it cannot clarify a term used in Level 1. This means that where a term, or a similar term (eg "wholesale market for non-equity securities"), is used in Level 1, ESMA considers that it cannot provide a definition at Level 2. It is hoped that the circumstances in which the "wholesale debt" disclosure annexes apply will be clear once all the provisions of the delegated acts are published. Presumably, this will be where non-equity securities have a minimum denomination of €100,000 or are admitted to trading on a regulated market, or a specific segment thereof, to which only qualified investors have access.

In terms of next steps, the Commission is currently considering ESMA's Final Report and is due to adopt delegated acts by 21 January 2019. ICMA understands that drafts of the delegated acts will be made available publicly as part of the Commission's Better Regulation approach and will be open for comment for four weeks. It is expected that this will happen in autumn 2018.

Otherwise, we are expecting:

- ESMA to publish its final position on RTS for certain areas of the Prospectus Regulation (key financial information for the prospectus summary, data and machine readability of prospectuses, advertisements, prospectus supplements and prospectus publication) towards the end of July 2018 (see the 2018 Q2 edition of this Quarterly Report for a summary of ICMA's response to the ESMA consultation on these points);
- ESMA to publish a consultation paper on guidelines on risk factors in mid-July 2018, with the consultation running until early October 2018 and the guidelines to be published in March 2019 (this stems from the new requirements relating to risk factors in Article 16 of the Prospectus Regulation);
- ESMA to begin working on equivalence criteria for prospectuses drawn up under the laws of third countries (the precise timing for this is currently unclear); and
- ESMA to begin work on Level 3 measures under the Prospectus Regulation, for example to update the *Q&A on Prospectuses*.

Separately, the *European Commission Action Plan on Financing Sustainable Growth* published in March 2018 states: "Within the framework of the Prospectus Regulation, the Commission will specify by Q2 2019 the content of the prospectus for green bond issuances to provide potential investors with additional information." ICMA intends to monitor developments on this point. It is hoped that the Commission will not specify overly prescriptive requirements that could raise potential liability concerns for issuers and/or unnecessarily hinder issuance of green and other sustainable bonds.

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PRIIPs and MiFID II product governance: ICMA papers

Since the beginning of the year, various ICMA members have reportedly been using the ICMA1 ("all bonds"/"professionals only") and ICMA2 ("simple listed bonds"/"general retail") draft approaches to the PRIIPs and MiFID II product governance (PG) regimes. These were outlined in the 2017 Q4 and 2018 Q1 editions of this Quarterly Report, respectively.

The ICMA1 and ICMA2 draft approaches and a related programme paper have now been published on the ICMA MiFID II/R in primary markets webpage.

ICMA staff are considering related updates to the ICMA Primary Market Handbook.

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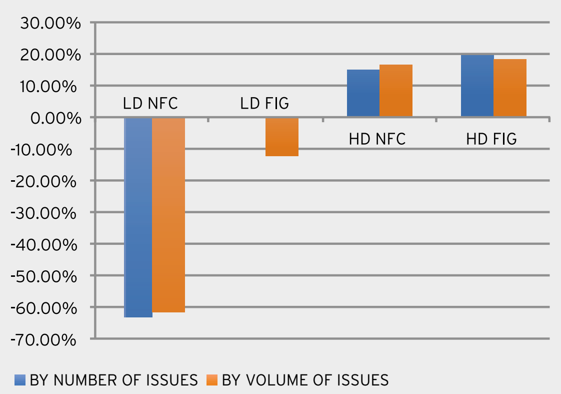
Q1 data (the single currency scope limitation being to simplify the analysis). Given the many possible types of debt securities (involving different combinations of features) that have evolved to meet borrower and investor needs, there is no exhaustive and authoritative bond type nomenclature. ICMA's analysis consequentially focused on benchmark issuance (aggregate issue sizes of €500 million or more) as a rough proxy for vanilla bonds, since the only other bonds of that size are likely to be asset/mortgage-backed bonds that can be controlled for in Dealogic's nomenclature. Lastly, bonds have not traditionally had generic formal "retail" designations (having rather various retail-like characteristics stemming from regulatory, commercial or other drivers). ICMA's analysis consequentially focused on denomination as a rough proxy for potential retail status. Many bonds have €100,000 denominations, meaning that they can only be bought or sold in sizes of at least that order of magnitude (the trading value of vanilla bonds tends to oscillate around 100% of the denomination's face value – absent default or similar concerns). However general retail investors will only plausibly buy bonds with denominations of around €100, €1,000 or perhaps €10,000.

The analysis[1] by number and value of issuances, as shown in the chart below, reveals a marked decrease in low denomination issuances (over 60% in the case of non-financial corporate bonds), in contrast to 15%-20% increases in high denomination issuances.[2]

Percentage change in issuance 2018 Q1 over 2017 Q1



LD NFC = low-denomination, non-financial corporates; **LD FIG** = low denomination, financial institutions; **HD NFC** = high denomination, non-financial corporates; **HD FIG** = high denomination, financial institutions

Source: Dealogic

It remains to be confirmed whether this very significant reduction in vanilla low denomination bonds (i) indicates an ongoing trend, (ii) is caused by the PRIIPs and/or PG regimes and/or (iii) will be a concern for European authorities (eg in the context of the EU's CMU objectives). These initial results give food for thought in any case. A simpler statistic yet may be found in the number of KIDs known by ICMA to have been prepared among all benchmark bonds (not just the above EUR data set) since the PRIIPs regime took effect: none so far.

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Prospectus Regulation: draft RTS

On 8 March 2018, ICMA submitted its response to *ESMA's Consultation Paper on Draft RTS under the New Prospectus Regulation*.

The consultation paper covered five distinct areas for which ESMA is mandated to deliver draft RTS to the European Commission, namely key financial information for the prospectus summary, data and machine readability of prospectuses, advertisements, prospectus supplements and prospectus publication.

Key financial information in the prospectus summary

ESMA has proposed a relatively prescriptive approach for the inclusion of key financial information in the prospectus summary, setting out a limited number of tables for broad categories of issuers which mandate certain financial statement line items to be included in the prospectus summary. A degree of flexibility is envisaged through (i) requiring certain line items only where they have been disclosed elsewhere in the prospectus, and (ii) the ability for the issuer to include up to three additional line items or alternative performance measures (APMs) in the summary.

ICMA has raised concerns with the proposed approach, noting that prescriptive requirements can give rise to unexpected results in practice when they are applied to the wide range of prospectuses prepared under the EU prospectus regime. This introduces increased costs for issuers, who need to spend time understanding how best to comply with prescriptive requirements that do not necessarily fit with their business.

1. This analysis involved a data set of 953 bond issues worth €882.7 billion, roughly equally split between the first quarters of 2018 (as of 21 March) and 2017. Around a quarter of the issues did not have denomination data and were discarded, leaving 698 issues worth €694.9 billion to analyse (again roughly equally split between the two first quarters). Aside from two issues only with €50,000 denominations, all issue denominations were relatively polarised between low denominations (€1,000 or less) and high denominations (€100,000 or more). 38 asset/mortgage-backed bonds were excluded (as non-vanilla), as were 160 sovereign, supranational and agency (SSA) bonds (as significantly less impacted or even exempt from the new regimes) – thus leaving 498 bonds worth €393 billion from financial institution and non-financial corporate borrowers most likely to be impacted (in a ratio of around 6/4).

2. The excluded SSA issuances decreased generally, though more markedly in high denominations.

To ameliorate this concern, ICMA has encouraged ESMA to remove the proposed cap on the number of additional line items or APMs that can be included in the summary (to the extent the prescriptive annexes to the proposed draft RTS are retained).

Separately, ESMA's proposals in relation to APM disclosure in the summary are not yet clear. For example, ESMA refers to issuers using footnotes to explain APMs where necessary, but it is not clear if that approach is mandatory or not.

Data and machine readability

ESMA has proposed a very detailed set of data to be reported by national competent authorities (NCAs) to ESMA. Furthermore, ESMA has proposed that NCAs would be able to ask issuers to report that information to the NCA.

It appears that the submission of data to ESMA has two purposes: (i) to allow ESMA to compile its report on prospectuses in accordance with Prospectus Regulation Article 47 which seems to be intended to facilitate regulatory oversight of prospectuses and issuance within the scope of the Prospectus Regulation; and (ii) to allow investors to search for prospectuses published under the Prospectus Regulation.

While purpose (i) is unobjectionable, the data that ESMA requires should be kept to a minimum to avoid any unnecessary cost and administrative burdens on NCAs and market participants.

Purpose (ii) is envisaged in Prospectus Regulation Article 21(6) and Recital 63, and the general principle of facilitating investor access to documents published under the Prospectus Regulation is understandable. However, from an investor protection perspective, it seems important that the updated Prospectus Register does not develop into more than a simple tool allowing investors to search and access documents published under the Prospectus Regulation, for example by giving information on securities outside of the published documents and/or allowing investors to compare different securities without looking at the relevant prospectuses. ICMA has encouraged ESMA to avoid this pitfall through both the design of the updated Prospectus Register and also by minimising the information that is available to the public in the database.

ICMA has therefore suggested that ESMA keeps the data required to a minimum (including removing certain of the data items which do not seem strictly necessary for ESMA to fulfil its obligations under Level 1).

Separately, it is important that ESMA does not push the reporting burden from NCAs on to issuers. This will increase costs and administrative burdens for issuers, which is not in line with the general legislative intent of the Prospectus Regulation. It would also result in a doubling up of compliance costs and administrative burden, with the issuer providing the information to the NCA and the NCA then needing to check the information provided to it by the issuer in order to ensure it is providing correct information to ESMA. Also, given the information required is relatively straightforward and, in many cases, better known by the NCA than the issuer, it is unclear why issuers should be required to provide this information to NCAs.

Advertisements

ESMA has carried across certain existing Prospectus Directive (PD) Level 2 provisions relating to advertisements. It has also suggested some new requirements which largely relate to the content and warnings contained in advertisements.

Unfortunately, ICMA's concerns with the Level 1 definition of advertisement were not taken on board by the co-legislators when the Prospectus Regulation was being finalised, meaning that the definition of "advertisement" under the Prospectus Regulation could potentially capture a wide range of oral and written "communications" (rather than "announcements", which was the term used in the PD). In light of this wide definition, some of ESMA's proposals may be problematic in practice.

In its consultation paper, ESMA provides some examples of the types of communication that it considers to be captured by the new definition of advertisement. The examples appear to be helpful and generally in line with the concept of a communication that is widely disseminated (regardless of whether each individual communication is bilateral or not), rather than a bespoke or specific bilateral communication that might happen on a one-off basis.

However, even with this helpful list of examples, concerns remain in relation to how certain elements of the proposed draft RTS will apply in practice. The ICMA response outlines those concerns and gives practical examples of the problems that could arise in practice. As a result of this, ICMA has encouraged ESMA to restrict the proposed new requirements to written advertisements only, and suggested certain other technical changes to the proposed draft RTS.

ICMA is also discussing the potential impact of the broadened definition of the term "advertisement" under the Prospectus Regulation with members.

Supplements

ESMA has largely carried across existing PD Level 2 provisions relating to circumstances that require a prospectus supplement, which is helpful. While ICMA's general view remains per the ICMA 2013 response to the *PD II Consultation on Supplements* (ie it should be for issuers to decide whether a specific situation meets the test for publishing a supplement and it is not necessary for legislation to prescribe specific instances of when a supplement is required), market participants are now familiar with these requirements and so retaining them will avoid additional costs for issuers in analysing and understanding any new provisions with their legal advisers.

ICMA's response also reiterates the point made in the ICMA 2017 response on *Format and Content of the Prospectus* that a profit forecast should not be mandatory for prospectuses related to non-equity securities, and so the additional supplement trigger proposed by ESMA should not be relevant for the majority of non-equity prospectuses.

Publication

ESMA proposes to carry across relevant provisions from the current PD Level 2 measures, which is a helpful approach and will minimise additional costs for issuers.

Next steps

The deadline for ESMA to deliver its final report with draft RTS on the topics covered in this consultation is 21 July 2018.

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Prospectus Regulation: other aspects

ESMA published its *Final Report on Technical Advice under the Prospectus Regulation* covering format and content of the prospectus, format and content of the EU Growth Prospectus and scrutiny and approval of the prospectus on 3 April 2018. ICMA previously responded to the consultations on *Format and Content of the Prospectus* and *Scrutiny and Approval of the Prospectus* in September 2017.

ESMA's technical advice has been delivered to the European Commission for consideration and is expected to form the basis for the bulk of the Level 2 provisions under the Prospectus Regulation, which will take the form of Commission delegated acts. In terms of timing, the indicative timetable set out in the Commission's request to ESMA for technical advice (reproduced at page 252 of ESMA's Final Report) indicates that:

- the Commission will prepare draft delegated acts on the basis of ESMA's technical advice by June 2018;
- the draft delegated acts will be translated and adopted by October 2018;
- the European Parliament and the Council will have an objection period until April 2019; and
- the date of application of the Prospectus Regulation and delegated acts will be 21 July 2019.

ICMA will carefully consider the impact of ESMA's final report with interested members. One immediate point to note is that, helpfully, it appears that the proposal to mandate disclosure of profit forecasts and profit estimates will not be taken forward for debt prospectuses, with ESMA stating at para 129 of the final report: "ESMA is of the view that profit forecasts and profit estimates are not generally deemed to be as important for non-equity (in contrast to equity) investors, and it will not include in its technical advice that outstanding profit forecasts or profit estimates must be reproduced in non-equity prospectuses. Nevertheless, an issuer of non-equity securities must assess whether or not an outstanding profit forecast is material for investors. If so, it must be included in the prospectus in accordance with Article 6 of the PR." This approach is welcome and in line with the ICMA response to the consultation on *Format and Content of the Prospectus*. Less helpfully for issuers, ESMA suggests that a statement on any profit forecast or estimate will still be required, but does not require such statement to be given by auditors. In addition, the Technical Advice includes a three page limit on prospectus cover notes, which may require some changes to current prospectus disclosure.

Also in relation to profit forecasts, ESMA published an updated *Q&A on Prospectuses* including a new question 102 on the definition of profit forecast on 28 March 2018. The Q&A gives guidance and examples of what would and would not be a profit forecast and notes that it is not possible to remove information from the scope of the definition of profit forecast by merely stating that it is not a profit forecast.

In relation to other aspects of the Prospectus Regulation, we are currently expecting:

- a consultation paper on ESMA guidelines on risk factors to be published in mid-July 2018, with the consultation running until early October 2018 and the guidelines to be published in March 2019;
- ESMA to begin working on equivalence criteria for prospectuses drawn up under the laws of third countries (the precise timing for this is currently unclear);
- the majority of provisions under the Prospectus Regulation will apply from 21 July 2019, although certain provisions are already in application or will apply from 21 July 2018.

Separately, the European Commission Action Plan on *Financing Sustainable Growth* published in March 2018 states: "Within the framework of the Prospectus Regulation, the Commission will specify by Q2 2019 the content of the prospectus for green bond issuances to provide potential investors with additional information." ICMA intends to monitor developments on this point. It is hoped that the Commission will not specify overly prescriptive requirements that could raise potential liability concerns for issuers and/or unnecessarily hinder issuance of green and other sustainable bonds.

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The EU has as a matter of public policy exempted from its initial and periodic transparency regimes bonds issued by an EEA Member State or by related official bodies. It has been noted that Member States publish abundant information on their financial situation which is, in general, available in the public domain. Given the connection with Member States of their related official bodies, it follows that such information in their respect should not need to be provided in the prospectus either. It is therefore proportionate that such bond manufacturer's product governance responsibilities (being otherwise the bonds discussed in the preceding two paragraphs) should again also be based on admission to a regulated market, the disclosure obligations consequent on it and a similarly enduring target market.

A negative target market is unlikely for these bonds given diversification/portfolio considerations and absent the exercise of regulatory intervention powers. However, any such negative target market will be subject to consideration in the specific circumstances.

Other aspects: ICMA members have further discussed various alternative ways of complying with MiFID II's allocation justification recording, inducements (and costs and charges) and trade and transaction reporting regimes. There seems to be sufficient understanding of the dynamics of the various alternatives for decisions to be made ahead of 2018's bond syndications.

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ICMA language for new bond issues

MiFID II/R and PRIIPs: As outlined above, ICMA has circulated substantially final draft suggested language for inclusion in new bond issues to address the PRIIPs Regulation and MiFID II/R product governance regimes.

Benchmark Regulation: ICMA has also circulated informally suggested language for prospectuses to address the requirements of Article 29(2) of the Benchmark Regulation.

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> **ICMA has circulated that rationale and related draft forms of language for consideration by transaction syndicates.**

Prospectus-related developments

Status and expected developments for the Prospectus Regulation: As reported on page 30 of the last ICMA Quarterly Report, ICMA submitted its responses to ESMA's Level 2 consultation papers on *Format and Content of the Prospectus* and *Scrutiny and Approval of the Prospectus* on 28 September 2017. Delivery of technical advice following these consultations is expected in the first quarter of 2018.

Separately, ESMA published a consultation paper on draft RTS under the Prospectus Regulation on 15 December 2017. This consultation covers key financial information for the summary, data and machine readability, advertisements, supplements and publication. The deadline for responses is 9 March 2018. ICMA will be considering a response to this consultation paper with the ICMA Prospectus Regulation Working Group.

The majority of provisions under the Prospectus Regulation will apply from 21 July 2019 (although certain provisions are already in application or will apply from 21 July 2018).

ESAs review (Omnibus III) – ICMA response: The ICMA primary market constituency submitted feedback to the European Commission on its proposal to centralise approval of certain prospectuses with ESMA pursuant to the ESAs review on 4 December 2017. The feedback was in line with the article on this topic on page 29 of the last edition of the ICMA Quarterly Report.

Updated ESMA Q&A on Prospectuses: ESMA has deleted Q27 and updated Q29, Q31, Q32 and Q44 in its Q&A on Prospectuses. The changes appear to be uncontroversial and consequential to the entry into application of certain parts of the Prospectus Regulation in July 2017 (two years in advance of the date for entry into application of the majority of provisions, as noted above).

Updated ESMA Q&A on Alternative Performance Measures (APMs): The most recent additions to the *ESMA Q&A on APMs* relating to *ESMA Guidelines on APMs* also appear to be uncontroversial.

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Primary Markets

  

by Ruari Ewing, Catherine Wade and Kate Craven

Omnibus III and prospectus approvals

On 20 September, the European Commission published a 283 page proposal for a new Regulation (Omnibus III) on the European Supervisory Authorities (ESAs – EBA, EIOPA and ESMA), together with a related 184 page impact statement and shorter press release and fact sheet. Feedback is also invited by 16 November.

Inter alia, the proposal provides (at pages 239-240) that the new Regulation would transfer, from national regulators to ESMA, the approval of certain prospectuses under the Prospectus Directive (PD) – namely those regarding (i) admissions to qualified investor-only regulated markets (or such specific segments thereof), (ii) asset-backed securities, (iii) "specialist" issuers (property, mineral, scientific research-based and shipping companies) and (iv) non-EU third country issuers. It also provides (at page 236) that the new Regulation would also transfer to ESMA the advertisement powers relating to the offers and regulated market admission requests covered by such prospectuses.

Whilst a single European regulator has been envisaged generally, it is not clear why these particular prospectus changes are being singled out and at this time, particularly given the preceding Commission consultation (to which ICMA responded in May) and feedback statement made no mention of prospectuses.

It is important that EU policy making is evidence-based. In this respect, the Commission notes that ESMA's existing convergence work has been "unable to promote supervisory convergence and the landscape of prospectus approval requirements remains fairly fragmented across the EU" and that there is "also a risk of supervisory arbitrage as issuers might target national CAs which they consider less demanding in order to get approval for prospectuses." However, ESMA's convergence work is not completed (presumably at least partly because the European co-legislators constantly change the underlying rules), with risk factors for example due to be covered in 2018. And furthermore, it is not clear that market users perceive actual challenges to market operation and investor protection in this respect – regarding qualified investor-only regulated markets at least, European regulatory philosophy considers that such investors require less protection than other investors (indeed offers to qualified investors-only require no prospectus approval at all). The reference to arbitrage as a hypothetical possibility is telling in this respect – there are many hypothetical risks to market resilience, but presumably good regulation principles contemplate that new rules should address circumstances where detriment has actually occurred or is likely to do so (based on evidence).

The Commission also notes: "many national CAs would have to hire prospectus readers with the skills to deal with these relatively rare types of prospectuses" and "duplication of resources in different national CAs for a few cases only". However, such a burdening of resources is not pre-ordained. Several national regulators are highly experienced in approving prospectuses in specific contexts and issuers of debt securities with denominations of €1,000 or more are already able to choose in this context any national regulator that satisfies the PD's nexus criteria. The Commission also notes that in the context of the "United Kingdom's exit from the Union, Luxembourg might be faced with a disproportionate workload" – but this again seems to be general hypothesising (unless Luxembourg's CSSF has expressed concerns in this respect).

The Commission also notes that the PD's current advertisement regime provides for fragmented supervision across host national regulators. However, such supervision could be concentrated with the current home national regulator that approved the related prospectus.

A key aspect would be the ability of ESMA to deliver a seamless transition by approving prospectuses at the same level of efficiency (in terms of speed, predictability and cost) as the most efficient national regulators currently do (also bearing in mind third country listing options such as New York, Dubai, Singapore and Hong Kong). This is particularly so given the constant stream of ongoing disruption being faced by the markets as the wall of new EEA regulations (MiFID II, PRIIPs, Benchmark Regulation, etc) continues to be delivered. Such a seamless transition would presumably involve significant budgetary and human resourcing implications (including in terms of specific legal/sectoral/linguistic expertise) and the Commission acknowledges generally (ie even without focusing on a seamless transition) that the "personnel implications of a move toward central ESMA approvals of certain wholesale and ABS prospectuses could be considerable".

Regarding specialist issuers specifically, there may also be logistical challenges with transferring approval to ESMA as the "specialist" nature of such issuers is not always initially apparent (so an approval application might be initiated with a national regulator, then suspended part-way as specialist status is recognised and then re-started at the ESMA level). Regarding qualified investor-only regulated markets/segments, the Commission states these are "expected to develop and grow over time, potentially amounting for a significant number of future wholesale non-equity prospectuses". However, the concerns above regarding seamless transition may result in issuers preferring to continue seeking national regulator approval of prospectuses with €100,000 denominations, which would undermine the Prospectus Regulation's Level 1 purpose of granting regulatory recognition to such qualified investor only regulated markets/segments.

Ultimately, the proposal for transferring prospectus approval to ESMA seems to run clear risks in the pursuit of hypothetical gains – and so more concerns for the future of European primary markets that ICMA will seek to feed back to the Commission.

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EU Prospectus Regulation

ICMA submitted its responses to the ESMA Level 2 consultations on *Format and Content of the Prospectus* and *Scrutiny and Approval of the Prospectus* on 28 September. The responses are in line with our previous communications on the Prospectus Regulation. Ruari Ewing and Catherine Wade spoke at the IFLR 8th Prospectus Rules Conference on 26 September, which included speakers from the European Commission, ESMA and a number of national regulators as well as industry experts.

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PRIIPs and MiFID II/R product governance

ICMA continues to work on anticipated approaches, in the Eurobond markets (ie syndicated cross-border bond issuance), to the product governance (PG) and PRIIPs regimes coming into effect from 2018. These approaches would not purport to be exhaustive or exclusive, but are anticipated to be useful to the extent transaction parties wish to minimise deal/syndicate-level deliberations, to maximise execution efficiency and speed (bearing in mind that many seasoned borrowers today are able to mandate a syndicate of underwriters to then price a benchmark-sized new issue within hours intra-day).

Background

It may be helpful to recap briefly on the PG/PRIIPs regimes by way of background. For PRIIPs, simplifying substantially: (i) any person manufacturing a "packaged" product, before it is "made available" to retail investors in the EEA, must publish a key information document (KID) and then regularly review it, and if needed, publish a revised KID; and (ii) any person advising on, or selling, such a product must provide retail investors in the EEA with the KID in good time before those retail investors are bound by any contract or offer. For PG, simplifying substantially: (i) MiFID II persons that "create, develop, issue and/or design financial instruments, including when advising corporate issuers on the launch of new financial instruments" are "manufacturers" for PG purposes (with co-manufacturing documented in an agreement); (ii) MiFID II persons that "offer or sell financial instrument[s]" are "distributors" for PG purposes (with no connection to the manufacturer being explicitly required); (iii) manufacturers must identify, and communicate to distributors, a compatible target market of investors and periodically review that target market; and (iv) distributors must identify their own target markets (by either adopting manufacturer's target market or refining it) – all on a "proportionate" basis.

Neither regime "grandfathers" pre-existing bonds and there has been limited consensus on what does *not* constitute a "packaged" product. This is partly due to various public statements by the European Commission and ESMA that seemingly purport to widen the range of what might otherwise have been perceived as "packaged". Practically in the context of syndicated bond issuance, borrowers are understood to be manufacturers for both PRIIPs and (if a MiFID II person) PG purposes (together with, as co-manufacturers for PG purposes only, any MiFID II person underwriters that satisfy the related "advising" characteristic). Though post-2018 "distribution" of pre-2018 bonds is subject to the PRIIPs (if "packaged") and PG regimes, the "manufacturing" of such bonds, however, occurred prior to the PRIIPs and PG regimes coming into effect.

Regulations, the DMP will need to demonstrate that the disclosure was made in the normal exercise of their employment, profession or duties, in order to comply with Article 10 MAR.

It is not a breach of MAR for a DMP not to follow the processes and requirements set out in the Level 2 Sounding Regulations (including Article 3(1) and 3(4) of Delegated Regulation 2016/960) when disclosing information which is not inside information during a market sounding."

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EU prospectus regime

The Prospectus Regulation was published in the *Official Journal* on 30 June 2017. The final text includes several technical amendments since the final compromise text of the Prospectus Regulation dated 16 December 2016. The Regulation will enter into force on 20 July 2017. Most provisions will apply two years from the date of entry into force (ie 21 July 2019), although some provisions will apply earlier.

ESMA commenced its consultation on Level 2 measures on 6 July, publishing three consultation papers. The three consultation papers follow from the European Commission request to ESMA for technical advice on possible delegated acts published in February 2017 and contain draft technical advice on the format and content of the prospectus, on the EU growth prospectus and on scrutiny and approval. The consultation period runs until 28 September 2017 and ICMA intends to fully engage in the consultation process over the summer period, involving its Prospectus Regulation Working Group.

It is interesting to note from the European Commission request for technical advice, that the Commission appears to have chosen not to exercise its power to adopt delegated acts to supplement the Level 1 requirements relating to risk factors. The new Level 1 provisions on risk factors are expected to be a key concern for issuers of debt securities, as they introduce new requirements to assess the materiality of risk factors based on the probability of their occurrence and the expected magnitude of their negative impact, to present risk factors in a limited number of categories depending on their nature and to mention the most material factor in each category according to the issuer's assessment of materiality. It is not clear how these new, high level requirements will impact in practice, particularly without more detailed guidance or other measures at Level 2 or 3. It is hoped that ESMA may consider this in approaching its work on the Prospectus Regulation.

Ahead of the ESMA Level 2 consultation, ICMA emphasised two key themes in communications and discussions with the Commission, ESMA and various other relevant regulators and official institutions. These are areas which could have considerable significance for debt market participants:

- *Article 13: Minimum information and format of the prospectus:* This relates to the detailed disclosure requirements for prospectuses. ICMA's proposal is to leave the current disclosure annexes broadly unchanged and to reflect the statement in Article 6 that the "necessary information" for an investment decision depends on, among other things, the type of security, by setting out different overriding disclosure tests for different types of securities and state that disclosure of specific items in the annexes is only needed to the extent that it is pertinent to the relevant disclosure test. ICMA welcomes ESMA's CP proposal to leave the wholesale debt disclosure annex largely unchanged.
- *Article 22: Advertisements:* The change in the definition of what constitutes an advertisement, from the existing prospectus regime to the final Level 1 text of the Prospectus Regulation, to mean a "communication" rather than "announcement" means that it risks capturing bilateral communications (written or oral). The impact of this change would be disproportionate and could undermine

The Commission appears to have chosen not to exercise its power to adopt delegated acts to supplement the Level 1 requirements relating to risk factors.

> **The costs to underwriters in complying with these rules have been significant.**

the effectiveness of the market soundings regime under the Market Abuse Regulation which provides a regulatory framework for private bilateral communications. The ICMA proposal is that advertisements be interpreted as only communications that are of general import or widely disseminated. ICMA staff had the opportunity to discuss this (among other matters) at the European Commission Prospectus Regulation Workshop on 29 March and we note from the (informal and non-binding) "key takeways from the working sessions" paper circulated after the workshop that this was a view on which there was a broad consensus. It is hoped that ESMA will consider further guidance to address this concern, at Level 2 or Level 3 as appropriate.

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Bank of Italy Article 129 reporting requirements

As reported in the last edition of Quarterly Report, the introduction of the Bank of Italy's Article 129 reporting requirements for underwriters placing securities in Italy was not as smooth as one might have hoped. To recap, underwriters experienced several unexpected practical difficulties in operating the platform and there were ambiguities in some of the information reporting requirements. The costs to underwriters in complying with these rules have been significant, with some banks considering the need to hire dedicated staff to handle the new reporting burden.

A specific challenge encountered by underwriters of syndicated issues of bonds, which are typically allocated using the pot system, was that the reporting system only allowed for reporting by one underwriter, envisaging that the billing and delivery (B&D) bank would report all information. In the case of pot deals where there may be "exceptions" placed by one or more underwriter(s) outside of the pot system, this required the B&D bank to gather that information from the other syndicate members and report the exceptions on their behalf which could result in time delays in reporting, inefficiencies and potentially inaccurate reporting.

Following ICMA's engagement with the Bank of Italy in the latter part of last year and the early part of this year, the Bank of Italy announced amendments to its reporting platform and updated its instruction manual and FAQs as of 11 April 2017. These changes (which came into effect immediately) have been welcomed by market participants as they allow more flexibility in the reporting of securities placed in Italy, particularly in relation to pot deals. The updates allow for more than one underwriter to input information in relation to a specific bond issuance. This is particularly helpful in relation to the reporting of exceptions placed outside of the

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EU prospectus regime

As reported in the last edition of this Quarterly Report, a political agreement was reached on a new Prospectus Regulation, intended to replace the current Prospectus Directive regime, in December 2016. Following extensive advocacy efforts by ICMA and others, the political agreement at Level 1 is significantly improved from the European Commission's original proposal for bond market participants. In particular:

- A differentiated wholesale disclosure regime and exemption from the requirement to prepare a summary has been retained for bonds with a minimum denomination of €100,000 or where bonds are offered on an exempt basis (eg to qualified investors only) and admitted to trading on a regulated market, or a specific segment of a regulated market, to which only qualified investors can have access. The European Commission's proposal for a "unified" disclosure regime for retail and wholesale bonds, that would have significantly increased disclosure burdens for wholesale debt issuers, has not been taken forward.
- While there may need to be changes to risk factor disclosure practice in the light of new requirements in the Prospectus Regulation, risk factors will *not* need to be categorised into categories of "low risk", "medium risk" and "high risk", as per the European Commission's original proposal.
- The proposal that third country issuers would need to appoint a representative in the EU has not been taken forward.
- The timeline for implementation has been extended by one year, allowing more time for Level 2 measures to be consulted upon and finalised before the Prospectus Regulation applies in practice.

ICMA continues to engage fully with regulators as the legislative process progresses. At the request of the UK Treasury, ICMA prepared a table of technical comments on the final compromise text of the Prospectus Regulation dated 16 December 2016 for use during the jurist linguist process. It is hoped that many of these small, technical comments will be reflected in the final text that is published in the *Official Journal*.

In addition, ICMA chaired a roundtable with the European Commission at the London Stock Exchange on 7 March 2017, with Tilman Lueder, Head of the Securities Markets Unit at the European Commission, as well as issuers, investors, underwriters and law firms. This was an excellent opportunity to start discussions on the shape and direction of Level 2 measures under the Prospectus Regulation. The roundtable helpfully took place shortly after the European Commission had published a request to ESMA for technical advice on possible delegated acts under the Prospectus Regulation.

Perhaps the most important element of the Level 2 measures for debt securities is the approach to the detailed disclosure requirements that will be drawn up under Article 13 of the Level 1 text. This was the main focus of the roundtable discussion, and ICMA has since communicated its thoughts on this (and other) points to ESMA and various other relevant regulators and official institutions. ICMA staff also had the opportunity to discuss Level 2 measures further at the European Commission's workshop on this topic on 29 March.

It is clear that a key policy aim for legislators is the need to encourage issuers to prepare shorter and simpler disclosure, and to make it easier for companies to enter and raise capital on public markets by reducing burdens on issuers. With this in mind, ICMA has suggested:

- including a new, specific disclosure test for debt securities in the Level 2 text, reflecting the statement in Article 6 that the "necessary information" for an investment decision depends on, among other things, the type of the security;

ICMA has suggested including a new, specific disclosure test for debt securities in the Level 2 text.

- the new disclosure test for debt securities would be whether the information relates to the issuer's ability to pay interest or principal (ie the information that investors actually need for an investment decision in debt securities); and
- the current annexes to the PD Regulation that set out the detailed disclosure requirements for debt securities would be left as they are (which will ensure a smooth transition from the current Prospectus Directive to the new Prospectus Regulation with minimal extra burdens and costs for issuers), but they would become subject to the new, specific disclosure test described above.

This would mean that issuers could choose not to disclose a specific disclosure requirement if it was not pertinent to the new, security-specific disclosure test, thereby allowing issuers to prepare more focused, shorter disclosure.

The ICMA proposal could therefore achieve two key policy goals: (i) moving towards shorter prospectuses; and (ii) minimising costs and burdens for issuers to make it easier for them to enter and raise capital on public markets.

An alternative approach of reviewing the current annexes to the PD Regulation to amend or delete individual requirements is unlikely to achieve these goals. This is because it is difficult to see how any one or more of the disclosure requirements in the current annexes could be altered or removed such that it would make a significant difference to current disclosure practices, while retaining an appropriate level of investor protection given the wide variety of issuers and debt securities to which the PD Regulation annexes apply.

It is also worth emphasising that any drafting changes to the current annexes to the PD Regulation, even if they appear helpful, are likely to introduce increased costs and burdens for issuers when the Prospectus Regulation is introduced. This is because issuers' advisors and the regulators reviewing their prospectuses are familiar with the current requirements, which allow a smooth, efficient issuance process. The experience of implementing the amended Prospectus Directive in 2012 demonstrated that small drafting changes or inconsistencies (eg the use of the word "key" in one provision and "material" in another provision) can have significant practical implications, including increases in legal costs and delays to transactions.

For these reasons, it is hoped that regulators will consider the approach suggested by ICMA in approaching the preparation of Level 2 disclosure requirements for debt securities.

Separately, it is interesting to note that the European Commission appears to have chosen not to exercise its power to adopt delegated acts to supplement the new Level 1 requirements relating to risk factors. Those new Level 1 provisions are expected to be a key concern for issuers of debt securities, as they introduce new requirements to assess the materiality of risk factors based on the probability of their occurrence and the expected magnitude of their negative impact, to present risk factors in a limited number of categories depending on their nature and to mention the most material risk factor in each category, according to the issuer's assessment of materiality. It is not clear how these new, high level requirements will impact in practice, particularly without more detailed guidance or other measures at Level 2 or 3. It is hoped that ESMA may consider this in approaching its work on the Prospectus Regulation.

In terms of next steps, it is now expected that the Level 1 text will be published in the *Official Journal* in June or July 2017, and would enter into force 20 days after publication. Most provisions are expected to apply two years from the date of entry into force (ie in June or July 2019), although some provisions will enter into application earlier, as described in the last edition of this Quarterly Report. It is expected that ESMA will consult on Level 2 measures in mid-2017, and ICMA intends to engage fully in this process.

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PRIIPs Regulation

The PRIIPs Regulation is due to apply from 1 January 2018. Since the publication of the last edition of this Quarterly Report, ICMA has continued to work towards consensus on the practical steps that issuers and underwriters could take to avoid making vanilla bonds that could fall within the product scope of the PRIIPs regime available to MiFID II retail investors. This approach has been pursued in the light of: (i) the difficulty in concluding that all types of vanilla bonds are not "PRIIPs" (and therefore fall outside the product scope of the regime), given ambiguities in the legislative drafting and

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EU prospectus regime

A political agreement was reached on a new Prospectus Regulation, intended to replace the current Prospectus Directive regime, in December 2016. Most provisions are expected to apply at some point in the first half of 2019 (around two years after the Prospectus Regulation is published in the *Official Journal*), although some provisions will enter into application shortly after publication in the *Official Journal*, which is expected to happen in 2017.

A document dated 16 December 2016 published by the EU Council sets out the "final compromise text" of the Prospectus Regulation. For the wholesale bond market, it seems that there have been a number of welcome improvements from the Commission's original proposal (covered in the First Quarter 2016 edition of this Quarterly Report).

Two key points to highlight initially from the perspective of the wholesale vanilla bond market are as follows:

- *Wholesale disclosure regime:* The wholesale disclosure regime and summary exemption for bonds with a minimum denomination of €100,000 that applies under the current Prospectus Directive has been retained. However, the wholesale disclosure regime and summary exemption will *also* be available for bonds that are the subject of an exempt public offer (eg are offered to qualified investors only) and admitted to trading on a regulated market, or a specific segment of a regulated market, to which only qualified investors can have access. If this option is used, there would also need to be restrictions in place to prevent re-sales to "non-qualified investors".

  This compromise position is welcome and in line with the general approach suggested by ICMA following extensive discussions with members and regulators. Market participants will now need to consider exactly how the new "qualified investor only" option for wholesale prospectus disclosure will work in practice. This will include, for example, whether there are any existing "qualified investor only" regulated markets or segments of regulated markets in Europe, or whether such markets/segments would need to be established. In addition, the detailed requirements for the wholesale disclosure regime will be set out in Level 2 measures, which are yet to be developed.

  Overall, the Level 1 position in relation to wholesale bond disclosure is significantly improved from the Commission's original proposal.

- *Risk factor disclosure:* The agreed approach in relation to new risk factor disclosure requirements may be more problematic for market participants. It appears that the Council's approach to the new risk factor requirements has been taken forward, involving (among other things) risk factors being presented in a limited number of categories depending on their nature, with the most material risk factors being mentioned first in each category. As reported in previous editions of this Quarterly Report (notably the last edition), this could represent an increase in liability for issuers and so the practical implications of this will need to be considered carefully by market participants.

There are likely to be various other important implications for the bond market that will emerge over time as market participants digest the final Level 1 text and any Level 2 measures when they are made available. An example of this might be the implications of a change to the definition of "advertisement" from an "announcement" to a "communication". This is of course a small drafting change in the legislation, but one which could have significant implications for market participants if it means that the Prospectus Regulation advertisement regime applies to any written or oral communication, including bilateral e-mails and telephone conversations. Such an approach would seem disproportionate and would likely be very challenging (if not unworkable) in practice.

It is also worth highlighting now that new provisions relating to convertible securities are expected to apply at some point in 2017, shortly after the Prospectus Regulation is published in the *Official Journal*. Broadly, the provisions introduce a new requirement to prepare a prospectus in respect of shares resulting from the conversion or exchange of other securities if the resulting shares represent 20% or more of the number of existing shares. Following extensive advocacy by ICMA, the agreed text now includes various carve-outs from this provision, including for shares qualifying as Common Equity Tier 1 of certain institutions issued as a result of the conversion of their Additional Tier 1 instruments on a trigger event. As with all provisions, the precise language used in the final agreed text will need to be studied carefully to determine the precise practical implications.

In terms of next steps, it is anticipated that the text will be adopted by the co-legislators following the usual jurist-linguist checks. It is expected that the final text would then be endorsed by the European Parliament and the Council before being published in the *Official Journal*, likely in the second quarter of 2017.

ICMA will continue to engage with members and official institutions as the legislative process progresses, in particular on Level 2 measures which are expected to be developed during 2017 and 2018.

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Market soundings under the Market Abuse Regulation

The Market Abuse Regulation (MAR) introduced a new market soundings regime which applies to the disclosure of both inside information and non-inside information.

This is a key area of focus for ICMA's members with profound implications, particularly because the new regime gives rise to a number of questions and uncertainties. ICMA has been discussing the implications of the new regime with its primary market sell-side constituency through its Committees and Working Groups in Europe and Asia. This topic has also been discussed in a number of other fora, including regional conferences, the ICMA Board and the ICMA Committee of Regional Representatives.

The main focus has been on the implications of the rules for sounding information other than inside information, especially in relation to investor meetings (where a transaction might subsequently follow) and the posting of MTN (and SSA) price levels. Considerations have included what constitutes a "transaction announcement", "acting on the issuer's behalf" and "gauging interest", noting that there is currently limited (or no) guidance from regulators on these and other relevant points. In addition, there is a question surrounding the scope of the MAR soundings regime, which ICMA understands is being considered by ESMA.

ICMA, with input from major law firms, has been developing a paper outlining the emerging sell-side thinking on these points. ICMA is intending to discuss this with relevant regulators before making it available more broadly to assist market participants in their practical dealings with market soundings. In the meantime, ICMA has also held a number of briefing calls that have been open to members, investors and issuers, the slides for the most recent of which on 13 December 2016 are available, amongst other things, on the ICMA MAR (primary aspects) webpage. The next briefing call on MAR soundings for members is expected to be scheduled for late January.

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Packaged Retail and Insurance-based Investment Products (PRIIPs)

As noted in the last edition of this Quarterly Report, various Member States expressed a view in autumn 2016 that the date of application of the PRIIPs regime should be delayed by 12 months. Since then, the date of application has indeed been delayed to 1 January 2018 by an amending Regulation published in the *Official Journal*. This delay is welcome as it will give market participants more time to familiarise themselves with the new regime and allow legislators to finalise the necessary Level 2 measures.

Notwithstanding the delay, ICMA continues to work towards consensus on the practical steps that issuers and underwriters could take to avoid making vanilla bonds that could fall within the product scope of the PRIIPs regime available to MiFID II retail investors, in the expectation that the PRIIPs KID is an unworkable concept at least in the vanilla context (see previous editions of this Quarterly Report, notably the 2014 Third Quarter edition). Such practical steps may include updated selling restrictions, related warning legends on prospectuses and final terms and additional diligence of order books. In addition, it may be necessary to consider whether admission to trading on a particular market or markets could mean that a relevant product has been "made available" to retail investors if, for example, retail investors have direct access to that market. ICMA will continue to discuss these practical questions with its primary market members and plans to work towards finalising suggested language for prospectuses in the first part of 2017. Such suggested language could be relevant for debt programme updates taking place in 2017.

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by Ruari Ewing and Charlotte Bellamy

EU prospectus regime

The Prospectus Directive review is entering a new, important period. The three co-legislators have now agreed their positions and are expected to enter into negotiations known as trilogues at the end of October 2016, with a view to reaching political agreement on a final text for the Prospectus Regulation by the end of 2016.

ICMA remains heavily focused on the proposals and continues to be in touch with relevant legislators to highlight the concerns of the vanilla bond market. Previous editions of the ICMA Quarterly Report have commented upon the European Commission's proposal published in November 2015 (see First Quarter 2016 edition of this Quarterly Report) and the general approach of the Council of the European Union, published in June 2016 (see Third Quarter 2016 edition of this Quarterly Report). The final of the three co-legislators' texts is the text adopted by the European Parliament in September 2016.

ICMA has reviewed and compared the three texts, focusing in particular on seven key points for the vanilla bond market, and communicated a preferred approach and drafting suggestions to key MEPs, national regulators and the European Commission. Both the European Parliament and Council texts include a number of helpful improvements for the bond market. It is crucial that those improvements are retained in the final text if Europe's wholesale bond market is to continue to function effectively with bonds listed on European regulated markets.

The seven points that ICMA has highlighted as being particularly important for the bond market are:

1. the need to maintain differentiated disclosure for wholesale and retail bonds, including an exemption from the prescribed format summary requirement for wholesale bonds;
2. the need to calibrate the new risk factor requirements in a manner that is workable for issuers;
3. the need to ensure that the prospectus summary liability regime and the purpose of the summary are clear and consistent throughout the Prospectus Regulation;
4. the scope of the general disclosure test, which could be narrowed for bonds to ensure prospectuses only contain the information that investors really need;
5. clarity in relation to investor withdrawal rights triggered by the publication of a supplement and the circumstances in which they apply;
6. a suitable implementation period that allows Level 2 measures to be properly considered, consulted upon and delivered in sufficient time for market participants to adjust to the new regime; and
7. the need to ensure that a new threshold that would require a prospectus to be prepared for the admission to trading on a regulated market of shares resulting from the conversion or exchange of other securities where the resulting shares represent 20% or more of the number of shares already admitted to trading does not have unintended consequences for regulatory capital and loss absorbing capacity (eg CoCos) and other securities that may be converted mandatorily under BRRD.

Of the above concerns, the most important point is the need to maintain distinct disclosure regimes for wholesale and retail bonds, including an exemption from the summary requirement for wholesale bonds. This distinction exists under the current regime on the basis that bonds with a minimum denomination of €100,000 or more benefit from a lighter, wholesale regime and an exemption from the prescribed format summary requirement. Removing the distinction between wholesale and retail bonds for disclosure purposes (as suggested by the European Commission in its November 2015 proposal) would introduce significant additional costs for Europe's wholesale bond issuers, with no corresponding benefit for the institutional investors to whom they offer and sell their bonds. This was confirmed by statements made by Pamela Gachara of the

Investment Association at the recent IFLR Prospectus Rules Conference, who noted that institutional investors are in favour of a distinct disclosure regime for wholesale bonds. However, Pamela Gachara also noted that institutional investors face significant practical difficulties in allocating bonds across various portfolios (and a consequential challenge in relation to treating their customers fairly) as a result of the current €100,000 minimum denomination regime.

Institutional investors' concerns in this area are one of the reasons that ICMA has been advocating for a differentiated disclosure regime, including an exemption from the prescribed format summary requirement, for bonds that are *offered to qualified investors only*. This "qualified investor only" approach was adopted by the European Parliament in its text. While this regime would not be as simple or easy to apply in practice for sell-side market participants as the current €100,000 minimum denomination regime, it should address institutional investors' concerns with the current regime and may also allow retail investors to invest in bonds *indirectly*, for example through MiFID authorised discretionary managers who would take investment decisions on behalf of their retail investor clients. Allowing such indirect retail investment in capital markets products would represent a step towards one of the central aims of the Capital Markets Union initiative by giving retail investors a means of saving for their retirement (something that will be increasingly important as Europe's population ages).

We understand, however, that there are concerns in some quarters that a "qualified investor only" approach may mean that retail investors could buy securities on a regulated market without the benefit of a retail prospectus. One option that could be considered to address this concern would be to require securities with wholesale prospectuses that are offered to qualified investors only to be admitted to a segregated section of a regulated market that is only available to qualified investors.

In addition, market participants noted at the recent IFLR Prospectus Rules Conference that the €100,000 minimum denomination regime and a "qualified investor only" regime are not mutually exclusive. Legislators may therefore wish to consider the possibility of including both options in the Prospectus Regulation, in order to give issuers the flexibility to choose the most appropriate option for the circumstances. For example, where securities are not considered to be suitable for retail investors (eg CoCos), issuers may wish to continue to use high minimum denominations, as well as offering those securities to qualified investors only.

Whichever option or combination of options is chosen, the key point remains that a distinction between the disclosure requirements for wholesale and retail bonds (including an exemption from the prescribed format summary) must be retained in the Prospectus Regulation if Europe's vanilla bond markets are to continue to function effectively within the scope of the Prospectus Regulation.

A separate issue that also has the potential to encourage bond issuers to consider structuring their bond issuance to fall outside the Prospectus Regulation regime (for example by listing their securities on markets outside of Europe and only conducting exempt offers in Europe) are the new requirements in relation to risk factor disclosure. It is essential that these requirements are calibrated properly, bearing in mind the need to ensure risk factor disclosure is useful for investors, but also that increasing issuers' liability will increase their costs and potentially affect their appetite to issue securities within the scope of the Prospectus Regulation regime. While market participants seem to agree that increased awareness in relation to risk factor disclosure is needed to ensure that such disclosure is approached on a more considered basis, the prescriptive requirements proposed by the European Commission and the Council are unlikely to achieve their intended results. Indeed, such prescriptive requirements may, at best, result in increased costs for issuers and disclosure that is arguably less useful for investors (in particular if issuers are required to categorise their risk factors in to categories of low risk, medium risk and high risk) and, at worst, represent another reason for issuers to structure their bond issuance to fall outside the Prospectus Regulation regime. Pamela Gachara of the Investment Association acknowledged this in her speech at the IFLR Prospectus Rules Conference, noting that issuers do need to consider the materiality of their risk factor disclosure carefully, but that the rules should not be overly prescriptive.

It is hoped that legislators appreciate the significance of the concerns noted above as they move towards reaching a political agreement in the coming months. As always, further information on these points and the other five key concerns noted above is available from ICMA staff.

The most important point is the need to maintain distinct disclosure regimes for wholesale and retail bonds.

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Primary Markets

by Ruari Ewing and Charlotte Bellamy

EU prospectus regime

Prospectus Directive Review

As reported in previous editions of this Quarterly Report, ICMA is fully engaged with the current review of the European Prospectus Directive regime. The latest development is the agreement of a general approach by the Council of the European Union. This will form the basis of the Council's negotiating position in trilogue with the European Commission and Parliament.

The Council text makes a number of amendments to the draft Prospectus Regulation proposed by the European Commission on 30 November 2015. As ever, ICMA is focused on the impact of the proposed Prospectus Regulation on the cross-border vanilla bond market, and it is encouraging to see that some of the most concerning provisions in the Commission's text have been amended. So the proposals appear to be moving in a helpful direction generally, but there are some remaining concerns, particularly in relation to the new risk factor requirements. A summary of the key areas on which ICMA is focused is below.

(i) *Wholesale disclosure regime:* The Council appears to have reinstated the PD2 position with respect to the €100,000 minimum denomination threshold (ie there appears to be both a public offer exemption and differentiated disclosure for bonds with a minimum denomination of at least €100,000). It is very encouraging to see that the importance of having distinct wholesale and retail debt disclosure requirements has been recognised. Such a distinction is crucial in ensuring that Europe's wholesale bond market can continue to function efficiently and corporate borrowers can access the funding they need while providing an appropriate level of disclosure to the institutional investors to whom they offer securities. Differentiating between bonds with a minimum denomination of at least €100,000 or less than €100,000 per the current PD2 regime and the Council's general approach is indeed one way of achieving that, and has the benefit of being a clear regime that is easy to apply in practice. An alternative would be to provide an exemption from the prospectus summary requirement and a differentiated disclosure regime for prospectuses for admission to trading on a regulated market of bonds offered solely to qualified investors. That approach would have the benefit of encouraging issuers to issue in low denominations, which could in turn increase indirect retail access to debt securities. This will be important as Europe's population ages and retail investors are in ever greater need of capital markets investment opportunities. There are also a number of other, technical, advantages to a "qualified investor only" regime for issuers and institutional investors that ICMA has been discussing with regulators and MEPs. It is also worth noting that a "qualified investor only" approach was proposed by the then ECON rapporteur, Philippe de Backer, MEP in the draft ECON report (covered in the Second Quarter 2016 edition of this Quarterly Report).

(ii) *Risk factors:* The Council has amended the Commission's proposed requirement for issuers to categorise risk factors by materiality by suggesting that risk factors be categorised according to their type, with the most material risks being mentioned first in each category. The Council also envisages that the issuer *may* disclose its assessment of the probability of a risk materializing and the magnitude of the negative impact of such risk using a qualitative scale of low, medium or high. While this is likely to be seen as an improvement on the Commission text, there continue to be concerns that the provisions will raise liability questions for issuers. ICMA has communicated those concerns to certain national regulators and it is hoped that those points will be borne in mind as the legislative process progresses.

(iii) *Summaries:* The standalone requirement for the summary to be not misleading remains in the Council text, which is disappointing because it casts doubt on what appears to be the co-legislators' intention for liability to attach to the issuer only if the summary is misleading *when read with the rest of the prospectus*. In addition, the Council has retained a cap on the number of risk factors that can be included in the summary, albeit in a slightly different format to the Commission's proposal. This approach is also likely to raise liability concerns for issuers.

(iv) *20% limit for convertibles:* The Council appears to have tried to address concerns relating to the apparent need for a prospectus for securities issued as a result of recovery and resolution-driven actions under BRRD and the conversion of regulatory capital/loss absorbing capacity. These adjustments are helpful, although it is likely that the proposed language will require some technical amendments in order to fully address market participants' concerns in this area.

(v) *Third country issuer representative:* The Council has helpfully suggested that the new requirement for third country issuers to appoint a representative in the EU be amended to remove the liability element for the third country issuer representative.

(vi) *Implementation:* It is also very helpful that the Council has suggested that the majority of provisions would apply 24 months from the date of entry into force, rather than 12 months, as this should provide sufficient time for the necessary Level 2 requirements to be developed and finalised before the new regime applies in practice.

In terms of developments in the European Parliament, the original Economic and Monetary Affairs Committee (ECON) *rapporteur* (Philippe de Backer, MEP) stepped down in order to take a position in his national government, and was replaced by Petr Ježek, MEP. This change appears to have resulted in a slight delay to the expected timetable.

However various MEPs suggested additional amendments to the Prospectus Regulation in two separate documents (Amendments 135 to 347 and Amendments 348 to 649) following the publication of Philippe De Backer, MEP's draft ECON report in March 2016 (as reported in the Second Quarter 2016 edition of this Quarterly Report).

Many of the MEPs' proposed amendments appear to be helpful. However, there appear to be a number of concerning amendments removing debt issuers' flexibility to choose their home Member State for prospectus approval. This proposal has the potential to increase market fragmentation and, as such, would be a retrograde step away from the concept of a Capital Markets Union and a single internal market. Some justification given for the proposed changed is that the current regime could invite "regulatory arbitrage" or encourage a "race to the bottom", which is not the case. The Prospectus Directive is a maximum harmonisation Directive and the Prospectus Regulation will be directly applicable in all Member States. Regulatory arbitrage or a race to the bottom is therefore not possible. Corporate borrowers value the current flexibility afforded by the home Member State definition because it allows them to choose a national competent authority (NCA) with the expertise and resources to handle their debt transactions. Smaller markets' NCAs will be less well equipped to deal with complex debt transactions in a timely manner. Some evidence of this can be seen in a recent ESMA *Peer Review Report on Prospectus Approval Processes* (see further below). It is therefore hoped that these unhelpful suggested amendments are not taken forward by the European Parliament.

Once the European Parliament has finalised its position, the legislative process is expected to move to a stage known as trilogue, in which a final text is negotiated among the European Parliament, Council and Commission. We understand trilogue may begin in September 2016, as previously anticipated. This means that the new Prospectus Regulation could be published in the *Official Journal* at some point in the first half of 2017, and apply either 12 months or 24 months thereafter.

ICMA is continuing to engage fully with national regulators and official institutions and MEPs as the legislative process progresses.

Other developments under the current Prospectus Directive regime

As noted above, ESMA published a *Peer Review Report on Prospectus Approval Processes* on 30 June 2016. The peer review focused on the quality and consistency of the prospectus approval process of national competent authorities (NCAs). The peer review appears to conclude that staff involved in the prospectus approval function at NCAs have the requisite knowledge to meet the requirements of the PD regime, although there may be differing levels of efficiency at different NCAs. The peer review highlighted areas of the prospectus approval process that could be further harmonised, including approaches to risk factors. ESMA reports that recurrent concerns emerged as regards the comprehensibility of prospectuses (in particular base prospectuses) and that factors which could be seen as negatively impacting on comprehensibility included the overall length of the prospectus, the format of the summary, extensive risk factor and cover note disclosure, and the amount and manner in which information was incorporated by reference. Legislators are already seeking to address many of these themes in the proposed Prospectus Regulation.

ICMA also responded to two UK FCA consultations relating to the prospectus regime. First, ICMA submitted an informal email response on 9 May 2016 relating to proposed Technical Note 604.2 on the PD advertisement regime, as envisaged in the UKLA Primary Market Bulletin No. 13, noting that the FCA may wish to consider whether and how any ESMA Q&A on the PD advertisement regime (which may be published in the coming months, as reported in the Second Quarter 2016 edition of this Quarterly Report) may affect the Technical Note. Second, ICMA submitted a response on 8 June 2016 relating to proposed Technical Note 634.1 on financial information on guarantors in debt prospectuses and requests for omission, as envisaged in the UKLA's Primary Market Bulletin No. 14, welcoming the Technical Note and highlighting some minor areas that the UKLA may wish to consider clarifying.

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Bank recovery and resolution

Contractual recognition of bail-in

Model clause update: ICMA has worked with AFME to update the model clause for contractual recognition of bail-in pursuant to BRRD Article 55 of "other liabilities" (ie not debt securities but liabilities arising under other third country law governed contractual documentation) that was previously mentioned on page 45 of the First Quarter 2016 edition of this Quarterly Report. The updated clause was prepared following the adoption by the European Commission of a Delegated Regulation with regard to certain BRRD-related regulatory technical standards. While there were some small differences between the provisions adopted by the European Commission and the final EBA RTS on which the original model clause was based, those differences were not felt to necessitate a change to the model clause. Rather, the changes to the model clause reflected comments received from market participants and market practice developments in the intervening period following the finalisation of the original model clause.

UK Prudential Regulation Authority Supervisory Statement on Contractual Recognition of Bail-in: The UK Prudential Regulation Authority (PRA) published Policy Statement PS17/16 and Supervisory Statement SS7/16 on 29 June 2016, following a consultation on amendments to the PRA rules relating to the contractual recognition of bail-in to which ICMA submitted a joint response with the BBA on 16 May 2016.

The key area of focus for ICMA's primary market constituency was the PRA's proposed guidance in relation to the "impracticability" exclusion from the requirement to include a contractual recognition of bail-in in non-EU law governed contracts, which is included in the Supervisory Statement. The Supervisory Statement is unchanged from the version originally proposed by the PRA, and the PRA notes that it expects BRRD firms to make their own reasoned assessment with regard to impracticability.

Contractual Stays

As reported in the Second Quarter 2016 edition of this Quarterly Report, the PRA rules in relation to contractual stays in financial contracts governed by third-country law prohibit in-scope firms from creating new obligations or materially amending existing obligations under certain non-EEA law governed financial arrangements unless the counterparty has agreed to be subject to similar restrictions on termination to those that would apply as a result of a UK firm's entry into resolution or the application of crisis prevention measures if the financial arrangement were governed by the laws of any part of the UK.

The rules are now in force in respect of third-country law financial arrangements with counterparties which are credit institutions or investment firms and, despite some uncertainty in relation to the precise scope of the rules, market practice in primary debt capital markets appears to be moving towards a settled position. ICMA worked with a number of law firms and through its Legal & Documentation Committee to develop a suggested clause for firms to use in relevant primary debt capital markets documentation. That clause has been circulated to the relevant ICMA primary market committees and working groups and is available from ICMA staff on request.

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Primary Markets

by Ruari Ewing and Charlotte Bellamy

EU prospectus regime

Prospectus Directive Review

The European legislative process for overhauling the current Prospectus Directive regime is well under way. ICMA has been engaged in this process since it began, as reported in previous editions of this Quarterly Report.

Currently, the European Parliament and Council are considering a new proposed Prospectus Regulation intended to replace the existing Prospectus Directive, which the European Commission published on 30 November 2015. The initial reactions of those bodies to the European Commission's proposal can be seen in the draft Economic and Monetary Affairs Committee (ECON) report and the first EU Council Presidency compromise.

The draft ECON report appears to reflect some of the key messages ICMA has been communicating to MEPs and regulators through a series of meetings and other correspondence, which is heartening. In particular:

(i) The draft report proposes an exemption from the prospectus summary requirement and a differentiated disclosure regime for prospectuses for admission to trading on a regulated market of bonds offered solely to qualified investors. As reported in the First Quarter 2016 edition of this Quarterly Report, these points are very important for the wholesale bond market, which currently enjoys, among other things, a prospectus summary exemption and a differentiated disclosure regime in relation to prospectuses for admission to trading on a regulated market of bonds with a minimum denomination of €100,000 or more. The removal of the €100,000 minimum denomination regime has been supported by the ECB (as set out in the ECB Opinion on the proposed Prospectus Regulation), among others.

(ii) The new requirement for third country issuers to appoint a representative in the EU has been deleted in the ECON draft report, which is welcome because this requirement had the potential to disincentivise third country issuers from accessing Europe's debt capital markets.

(iii) The ECON draft report also envisages that the date of application of the Prospectus Regulation would be 24 months (rather than 12 months) from entry into force, and certain Delegated Acts would be adopted six months before the date of application. This is helpful because it should minimise the risk of a disorderly implementation of the new Prospectus Regulation due to Level 2 measures not being available in time for the application of the Level 1 provisions.

On the other hand, the draft ECON report appears to make no change to the proposed requirement for issuers to categorise risk factors in to three categories according to materiality. There also appears to be no change to the cap on risk factors in summaries. These points are concerning for the wholesale bond market, primarily due to the significant liability concerns that could arise for issuers, as explained in more detail in the First Quarter 2016 edition of this Quarterly Report.

ICMA is also concerned that the changes to the prospectus exemption for a request for admission to trading on a regulated market of shares resulting

> **The draft ECON report appears to reflect some of the key messages ICMA has been communicating to MEPs.**

from the conversion or exchange of other securities contained in Article 1.4(b) of the proposed Prospectus Regulation could have unintended consequences for certain types of convertible security. Article 1.4(b) introduces a new proviso stating that this exemption will only apply if the resulting shares represent less than 20% of the number of shares already admitted to trading. The proposed 20% limit would mean that a prospectus may be required for the admission to trading of securities issued as a result of banks' and other institutions' regulatory capital instruments automatically and mandatorily converting into shares on the occurrence of a breach of a capital ratio or at the point of non-viability of the institution.

This is concerning for a number of reasons. First, there is no investment decision to be made by investors at the time of conversion of these instruments which would require an offer prospectus. Information in relation to the shares will be available to investors in the usual way under Transparency Directive and Market Abuse Regulation requirements, given that the shares would be of the same class as those already listed. Second, it would be impracticable for a distressed issuer to produce a share listing prospectus either at all or in the brief period required by the interaction of the terms of the securities (which require immediate share issuance) and the relevant local listing regime (which is likely to require almost immediate listing to mitigate fungibility concerns as between existing and new shares). The proposed 20% limit in Article 1.4(b) is unlikely to provide sufficient headroom given increasing regulatory requirements for such forms of capital and loss absorbing capacity; in particular where conversion is into a variable number of shares depending on the issuer's share price at the time of conversion. In light of the above, ICMA has suggested to relevant MEPs and regulators that the 20% proviso in Article 1.4(b) should be deleted or, if it is not deleted, various other, more complicated drafting amendments will need to be made in order to prevent this provision having unintended consequences for issuers of regulatory capital instruments.

In terms of next steps, ICMA understands that the draft ECON report was due to be presented in the European Parliament on 7 April 2016. There are likely to be amendments to the report after that point, culminating in a vote in ECON on the report on 13 June. The Internal Market and Consumer Protection Committee is also understood to be preparing an opinion on the proposed Prospectus Regulation, which should be available in early April.

Separately, the first Council Presidency compromise text is understood to be a first draft reflecting the non-contentious points upon which Member States currently agree. We understand there is likely to be further discussion and amendment (particularly on the more contentious points) in the coming weeks. This is reassuring as, from an initial review, many of ICMA's key concerns (eg in relation to wholesale disclosure, summaries, risk factors and the 20% threshold for convertibles described above) do not appear to have been addressed. However, the positive points appear to include (i) a change to the third country issuer representative requirement (where the responsibility element has been removed) and (ii) the implementation period (where the date of application has been extended to 24 months from entry into force), which is in line with the draft ECON report.

The timing for the Council to finalise its position is unclear.

If the Council and European Parliament were to finalise their respective positions in Summer 2016, then the final text could be published in the *Official Journal* in early 2017 and apply from early 2019 (assuming the proposals to extend the date of application are taken forward).

ICMA intends to continue to engage with relevant MEPs and national and European regulators in relation to the proposed Prospectus Regulation.

Other developments under the current Prospectus Directive regime

A Delegated Regulation concerning prospectus approval and publication and advertisements was published in the *Official Journal* on 4 March 2016 and entered into force on 24 March 2016. The text is very similar to the version adopted by the Commission on 30 November 2015, which was reported in the First Quarter 2016 edition of this Quarterly Report. It was anticipated previously that ESMA would publish Q&A in relation to certain areas of uncertainty regarding the advertisements provisions in the spring of 2016. However, it is understood that ESMA is reconsidering this and, if there is to be Q&A, it is unlikely to be published before the end of June 2016.

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MAR implementation: pre-sounding and stabilisation

The EU's new Market Abuse Regulation (MAR) regime is due to replace the existing Market Abuse Directive (MAD) regime from 3 July (regardless of the probable MiFID II regime postponement). The MAR legislative process is not complete, with various Level 2 measures still pending and potentially only likely to be finalised shortly before the 3 July coming into application deadline and any Level 3 guidance only anticipated thereafter. In this respect, ICMA's lead-manager constituency is considering potential practical implications for pre-sounding and stabilisation in the context of investment grade Eurobond syndicated issuance – with a clear picture potentially only emerging once the new regime will have bedded down.

Pre-sounding

Regarding pre-sounding, the European Commission had been expected (further to an early March Commission list of planned initiatives) to adopt final technical standards in March, ahead of a European Parliament and Council objection period of one month or three months (depending on whether the text is the same as the draft standards set out in ESMA's September 2015 Final Report reported in the First Quarter 2016 edition of this Quarterly Report).

It seems firms are fairly clear as to the practical implications of the expected new requirements, with expectations that MAR sounding processes will generally be similar to current MAD processes, albeit substantially more burdensome procedurally (notably in terms of detailed disclosure and record-keeping obligations). One conceptual change however relates to soundings that are considered not to involve inside information (bearing in mind that firms tend to treat information as "inside" if in doubt), with firms expecting the additional non-wallcrossed compliance burden to be manageable given the overwhelming majority of soundings being likely to be on a wallcrossed basis anyway. No consequential amendments to the ICMA Primary Market Handbook seem necessary at this time (though this will be kept under review).

Distinctly, ESMA published on 28 January a consultation *inter alia* on draft guidelines for persons receiving market soundings (with a response deadline of 31 March) that ICMA did not respond to given the proposed guidelines' relevance to investors rather than to lead-managers.

Stabilisation

Regarding stabilisation generally, the Commission adopted regulatory technical standards (in the form of a Commission Delegated Regulation) on 8 March with entry into application from 3 July. The standards are subject to a Parliament and Council objection period, which the Parliament has indicated it expects to expire on 8 June (ie three months from adoption). However, regarding stabilisation-related publication means, the Commission had again been expected to adopt final standards in March further to ESMA's "draft implementing technical standards on the technical means for appropriate public disclosure of inside information and for delaying the public disclosure of inside information" set out in Annex XII of ESMA's September 2015 Final Report.

Whilst it seems firms are fairly clear as to the practical implications of the new requirements (with expectations that MAR stabilisation processes will generally be similar to current MAD processes), some significant new considerations and/or additional practical burdens seem to arise (notably to mitigate some uncertainties around the new regime:

(i) Stabilisation reports seem likely to be addressed to all EEA national regulators, as it may not be clear which of them will be a "competent authority of the trading venue" given MAR's scope extension to Multilateral Trading Facilities (MTFs) and (once the MiFID II regime applies) Organised Trading Facilities (OTFs) – for many of which timely certainty as to the securities concerned does not seem possible.

(ii) To the extent neither ESMA nor EEA national regulators have published dedicated stabilisation reporting addresses, it seems likely that national regulators' general addresses will be used.

(iii) Pending the coming into application of the MiFID II regime, the stabilisation reports will be required to comply with the transaction reporting provisions of the current MiFID regime (which will be familiar to firms). However, once the MiFID II regime comes into application, any familiar national nuances stemming from national implementation of the current MiFID regime (being solely Directive-based) will be replaced by just the one set of provisions set out in MiFIR (a direct effect Regulation).

(iv) To the extent ESMA does not provide guidelines as to what stabilisation transaction "details" are to be published, it seems likely that firms will publish (on the same timeline as their reports to regulators) what they currently report to regulators


Primary Markets: Lead Managers

by Ruari Ewing and Charlotte Bellamy

EU prospectus regime

Prospectus Directive Review

On 30 November 2015, the European Commission published a proposed Prospectus Regulation, intended to replace the existing Prospectus Directive (PD).

As reported in previous editions of this Quarterly Report, this follows a European Commission consultation, to which ICMA responded in May 2015. The European Commission's proposal is not accompanied by an industry consultation. Rather, the European Council and European Parliament will consider the Commission's proposal and work towards agreement on a final Level 1 text through the ordinary legislative procedure. Depending on how that process progresses, a new Prospectus Regulation could be published in the *Official Journal* at some point in 2016 or early 2017 and apply just over one year thereafter.

The proposed Prospectus Regulation includes a number of interesting changes to the current regime, some of which may be helpful in improving ease of access to capital markets for bond issuers while maintaining appropriate levels of disclosure for investors. For example, the removal of a requirement for a base prospectus summary is a welcome and sensible step towards ensuring that base prospectuses are easily analysable and comprehensible. Depending on the detailed provisions of the Level 2 legislation, the proposed minimum disclosure regime for secondary issuances (which would apply to issuers of non-equity securities whose equity has been admitted to trading for at least 18 months) and suggestions regarding a removal of the requirements for detailed tax disclosure could also be helpful changes.

However, there are some proposed changes that could cause concerns for the currently well-functioning wholesale vanilla debt market, which is a critical source of funding for Europe's companies and banks. A summary of the most important of those concerns is set out below, although there are a number of other issues that may also merit further attention and consideration.

1. *The Prospectus Regulation should not require a Prospectus Regulation-compliant summary to be prepared if securities will be initially offered to qualified investors only:* Currently, there is no requirement to prepare a PD-compliant summary where a prospectus relates to the admission to trading on a regulated market of non-equity securities having a denomination of at least €100,000. That exemption from the requirement to prepare a PD-compliant summary is sensible, because it recognises that institutional investors do not require a PD-compliant summary in order to make an investment decision. However, the proposed Prospectus Regulation appears to require a Prospectus Regulation-compliant summary to be prepared for all issues of debt securities, regardless of their characteristics or to whom they will be sold. The costs associated with this are likely to be significant. Additional burdens like these should only be introduced if they are justified by a corresponding investor (or other stakeholder) need. However, in this case, there is no obvious institutional investor need for a Prospectus Regulation-compliant summary. As such, the requirements place an unnecessary

burden on issuers. This should be rectified by not requiring a summary if the prospectus relates to the admission to trading on a regulated market of non-equity securities that will be offered to qualified investors only.

2. *The proposed requirement to categorise risk factors creates liability concerns for issuers and could have unintended consequences:* The proposed Prospectus Regulation contains a new provision requiring issuers to categorise risks according to their relative materiality. This is concerning for a number of reasons. First, it could expose issuers to increased liability given the potential for risks to be mischaracterised. The requirement will present particular liability concerns for issuers that offer securities in the US market as well as the European market, as it may make it difficult for issuers to provide consistent disclosure to investors in the US and Europe. Second, it is not clear exactly how issuers will be able to apply the requirement in practice given the interplay of various risk factors with each other and the uncertainty around the weight issuers should give to the likelihood and/or potential impact of risk factors in categorising them. Third, the requirement is unlikely to have the desired effect. It could serve to make risk factor sections more confusing if investors need to cross-refer to different sections in order to read the risk factors, rather than risk factors being ordered thematically which is the current practice. It could also have unexpected consequences and mislead investors into focusing on the first category of risks only, when all the risks included in the prospectus will be considered material by the issuer. Fourth, the rules are unlikely to address the concern that risk factor sections have become excessively lengthy. This is because the general test for what a prospectus needs to include is still very broad. In order to properly address the issue of overly long prospectuses, regulators should consider amending this test for non-equity securities, in order to allow issuers to include more focused, relevant disclosure in their prospectuses. For example, relevant disclosure for debt securities would include information that is necessary to enable an investor to make an informed assessment of the issuer's ability to pay interest and repay principal under the bond only.

3. *The restriction on the number of risk factors that can be included in the summary is unnecessary and arbitrary:* The proposed Prospectus Regulation imposes an arbitrary limit on the number of risk factors that can be included in a summary. Not only is this requirement unnecessary (as the proposed six-page limit on the length of the summary will ensure that summaries are short), but it is too blunt an instrument to be workable in practice. Selecting the "five most material risks" will pose significant practical challenges and liability concerns for issuers. How should an issuer select the five most material risks when it believes there to be six, seven or more? The proposal could also mean that the summary is misleading for investors, who may focus most heavily on the five risk factors in the summary, and neglect to consider the other risk factors, which could affect their investment decision.

4. *It is not clear why third country issuers require a "representative" in Europe:* The proposed Prospectus Regulation also requires third country issuers to designate a representative established in their home Member State, which shall (among other things) be responsible for ensuring compliance of the prospectus with the requirements of the Prospectus Regulation. The rationale for this new requirement is not clear. It is difficult to see what investor protection benefit there might be from a third country issuer representative. There is a reference to the representative being a point of contact for national competent authorities, although it is not clear why National Competent Authorities cannot continue to communicate directly with third country issuers and their advisers in the way they currently do (and will continue to do with European issuers). This provision will increase costs for third country issuers and therefore increase barriers to, and potentially hinder the growth of, Europe's capital markets. Unless there is a clear rationale and investor protection benefit associated with this requirement, it is important that consideration is given to removing it.

5. *The grandfathering period is helpful, but should be longer:* The proposed Prospectus Regulation helpfully contains a grandfathering provision, stating that prospectuses approved in accordance with the current Prospectus Directive shall continue to be governed by those rules until the end of their validity or until twelve months have elapsed after the date that the Prospectus Regulation applies, whichever occurs first. However, based on the implementation experience of PD II (which was difficult for both market participants and National Competent Authorities), this grandfathering period needs to be longer. Given many of the detailed provisions relating to prospectus content will continue to be contained in Level 2 rules, it would be helpful if this grandfathering period referenced the date of application of the Level 2 rules, rather than the Level 1 rules. If that is not possible, the 12 month period currently referenced in the Prospectus Regulation should be extended to 24 months in order to ensure market participants and National Competent Authorities are sufficiently familiar with the new

regime (at both Level 1 and Level 2) to allow an orderly implementation.

ICMA will continue to discuss the implications of the proposed Prospectus Regulation in relevant committees and working groups. ICMA also intends to continue to engage with various regulators at national and European level to discuss the proposed Prospectus Regulation.

Other developments under the current Prospectus Directive regime

Omnibus II Delegated Regulation concerning prospectus approval and publication and advertisements: As anticipated, the European Commission adopted a Delegated Regulation concerning prospectus approval and publication and advertisements on 30 November 2015. This follows ESMA submitting final RTS to the European Commission in June 2015, which was reported on page 34 of the previous edition of this Quarterly Report. It is understood that the Council has invoked its extension on the objection period and the objection period will last until 30 January 2016. As such, the Delegated Regulation would be published in the *Official Journal* in February 2016 at the earliest and would enter into force on the twentieth day following publication in the *Official Journal*. It is also understood that ESMA envisages producing two Q&A on the advertisements section of the RTS (as noted on page 34 of the previous edition of this Quarterly Report), which would be published in late March.

ESMA Q&A on Prospectuses: ESMA published a revised version of the ESMA Q&A on Prospectuses in December 2015. There is a new Q&A 96 relating to disclosure for securities subject to conversion or write-down powers under the BRRD, where ESMA states: "Where the issuer considers the possibility of bail-in to be material … this should be reflected in the risk factors section and summary of a prospectus", and gives some detail on the minimum content of a bail-in risk factor. It is not anticipated that this new Q&A will require changes to existing market practice. There is also a revised question (Q26) relating to the calculation of the €5 million limit in PD Article 1(2)(h) and the €75 million limit in PD Article 1(2)(j), which is less likely to be relevant to the wholesale bond market.

Omnibus II filing final terms with host national competent authorities: The Omnibus II Directive amended Article 5(4) of the Prospectus Directive so that the home National Competent Authority, as opposed to the issuer, has responsibility for filing final terms with a host National Competent Authority. This change was due to take effect in Member States' legislation from 1 January 2016. In this regard, we understand that the Luxembourg, Irish and UK National Competent Authorities will require final terms and certain information to be provided to a specific email address. More information is available on this UKLA webpage and page 2 of this CSSF Newsletter.

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Packaged Retail and Insurance-based Investment Products (PRIIPs)

On 11 November 2015, the Joint Committee of the European Supervisory Authorities (ESAs) – EBA, EIOPA and ESMA – published a Joint Consultation Paper (subsequently followed on 6 January 2016 by a one page errata document) on PRIIPs key information documents (KIDs), which are primarily for structured products. (See further the Third Quarter 2014 edition of this Quarterly Report in respect of product scope). The Consultation Paper includes draft Regulatory Technical Standards (RTS) under the PRIIPs Regulation. The European Commission also published its earlier Final Report on a consumer testing study on KID format and content.

Background: These publications follow (i) the ESAs' November 2014 Discussion Paper, to which the Joint Associations Committee (JAC) responded, with ICMA's support; (ii) December 2014 *Official Journal* publication of the PRIIPs Regulation; and (iii) the ESAs' June 2015 Technical Discussion Paper, to which ICMA responded. See further the past editions of this Quarterly Report, which detail *inter alia* historic concerns around residual ambiguity of KID purpose and related liability (despite previous highlighting efforts) and the (consequentially limited) feedback given to the ESAs as they have sought to define the KID's detailed format and content requirements in this ambiguous context.

KID purpose/investor understanding: In this regard, the Recitals to the draft RTS state that (emphasis added):

(a) the KID "designed to ensure that it is *easy* for retail investors to read, understand and compare";

(b) the KID's summary risk indicator "should be accompanied by sufficient narrative explanations of the risks of the PRIIP to allow for an informed decision";

(c) the KID "can be expected to be also used as a summary of the main features of the PRIIP";

(d) the "information contained in the [KID] should be capable of being *relied* on by a retail investor when making an investment decision";

(e) "Given that changes may be important for retail investors and their future allocation of investment involving some underwriters reportedly providing data from over 1,000 transactions that involved manually populating over 30,000 data fields.

Ongoing process: The terms of reference stated the FCA's intent to engage stakeholders (notably including issuers as well as investors) during its study (and welcomed any inputs by 22 June on its terms of reference). ICMA arranged for the FCA to meet a specific delegation from the Public Sector Issuer Forum (on 17 September), and to meet the ICMA Corporate Issuer Forum on 1 October. An FCA interim report is expected around year-end 2015 and a final report is expected in spring 2016. It is relevant to note in this context that the final MiFID II Level 2 instrument has been expected to be adopted over the summer (subject only to European Parliament/ Counsel veto) ahead of coming into effect in 2017.

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Prospectus Directive

As reported in previous editions of this Quarterly Report, the next review of the Prospectus Directive (PD) is under way and was launched under the umbrella of the European Commission's Capital Markets Union initiative. Pages 27-29 of the previous edition of this Quarterly Report contain a summary of ICMA's response to the European Commission's consultation on the next review of the Prospectus Directive.

The European Commission's Capital Markets Union Action Plan that was published on 30 September 2015 confirmed that the Commission will modernise the Prospectus Directive to make it less costly for businesses to raise funds publicly, which will involve an update of when a prospectus is needed, streamline the information required and the approval process, and create a genuinely proportionate regime for SMEs to draw up a prospectus and access capital markets.

The European Commission is expected to publish legislative proposals designed to achieve those policy goals before the end of 2015 and submit those proposals to the European Parliament and the Council for review.

ICMA has been engaging with a number of national regulators, ESMA and the European Commission via meetings and conference calls both in advance of, and after, submitting its response to the PD consultation.

The 6th Euromoney Prospectus Rules Conference on 29 and 30 September in London was a good opportunity for market participants and regulators (including the European Commission, ESMA and various national regulators) to meet and discuss the future of the PD and how it interacts with other regulation such as PRIIPs and MiFID II. One of the key themes to emerge from the conference was the importance of considering the PD review in the context of CMU: there is clearly a need to consider how issuers can be encouraged to use or continue to use capital markets in Europe, as well as a need to protect investors effectively, when thinking about changes to the PD. Market participants also spoke about the crucial function that the wholesale debt market plays in funding the real economy and the corresponding importance of ensuring that any changes that are made to the PD are made in a way that will ensure the continued efficient functioning of that market.

Other points that were raised for consideration included:

- the need to learn from the practical issues faced by market participants and national regulators at the time PD II was implemented by ensuring that PD III provides for an appropriate grandfathering period to allow market participants and national competent authorities to adjust to the new rules;
- the need to re-visit the prescribed format summary requirements, which (while well intentioned) have resulted in summaries that are difficult for retail investors to read and understand;
- questions around how the length of prospectuses can be reduced (in particular risk factor sections), including a consideration of whether an adjustment to the "necessary information" test in PD Article 5 could be amended to encourage more tailored disclosure; and
- questions around whether burdens on issuers could be alleviated by allowing "future" incorporation by reference of certain regulated information and/or removing the prospectus requirement for secondary issues.

Market participants also emphasised the need to ensure that issuers can continue to access the capital they need in an efficient and cost-effective manner, with appropriate and proportionate liability levels. This point was emphasised not only in relation to the PD review, but also in the context of the PRIIPs regime and the liability for the KID (which has been discussed in several previous editions of this Quarterly Report, including the 3Q 2014 edition).

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Separately, it is expected that the European Commission will publish a Green Paper on Retail Financial Services in 4Q 2015, which will be followed by a public consultation. A roadmap for such a Green Paper has been published, but it is not clear how or whether the review of the PD will be affected by the review of retail financial services. It is to be hoped that the European Commission takes a joined up approach to the review of the Prospectus Directive in the context of the Capital Markets Union initiative and the review of retail financial services, which may involve making a set of smaller, self-contained changes to the PD now, and leaving the door open for a more fundamental and coordinated review later in the CMU project.

Omnibus II Directive changes: As reported in the previous edition of this Quarterly Report, the European Commission is considering final draft RTS on prospectus-related issues under the Omnibus II Directive that ESMA submitted to the European Commission at the end of June 2015. The draft RTS relate to the Prospectus Directive approval, publication and advertisement rules and would impact the Prospectus Directive currently in force (PD II) rather than the review of the Prospectus Directive reported above.

While the final draft RTS are improved from the original proposals (eg the deletion of the incorporation by reference RTS), ICMA still has some concerns with the application of the proposed RTS on advertisements, which it has flagged to the Commission.

In particular, the proposed requirement to disseminate amended advertisements following the publication of a supplement to the prospectus is likely to be problematic from a number of perspectives. Primarily, this stems from the fact that the definition of advertisement includes a large number of different types of advertisement, so one regime is unlikely to be capable of being effectively applied in practice to all types of advertisement. It is not clear how the proposals will work for advertisements such as preliminary prospectuses or roadshow materials in particular. ICMA is also concerned that the PD advertisement regime should not undermine the prospectus regime by giving investors a false sense of the importance of an advertisement over the prospectus.

Following the 6th Euromoney Prospectus Rules Conference, we understand that the Omnibus II RTS are due to be published at some point before the end of 2015 and there is likely to be guidance from ESMA on the application of the advertisement rules to certain types of advertisement such as preliminary prospectuses and roadshow materials. It is hoped that such guidance will be put in place in a timely fashion, so that uncertainty for market participants is minimised.

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FCA CoCo rules

As reported in the previous edition of this Quarterly Report, the FCA has published its Policy Statement containing the final permanent marketing restriction relating to CoCos. The permanent rules replaced the temporary rules previously in force on 1 October 2015.

There are several differences in the wording of the permanent and temporary rules. However, despite those differences in wording, there are a number of reasons why lead managers of new issues within the scope of the permanent rules may think it prudent to continue to apply the practices and procedures developed under the temporary rules from 1 October 2015.

One of the overarching reasons is that the purpose of the temporary rules (broadly, to prevent CoCos being held by mass retail investors) appears to apply equally to the permanent rules. Both sets of rules also appear to be results-based, with the potential for lead managers' conduct to be judged with hindsight. While the FCA Policy Statement states that the


Primary Markets

by Ruari Ewing and Charlotte Bellamy

Prospectus Directive

As reported in the previous edition of this Quarterly Report, the European Commission launched a consultation on the next review of the Prospectus Directive (PD) in February 2015, to which ICMA responded on 1 May 2015. The ICMA response answered the multiple choice questions on the European Commission consultation website and made some additional suggestions in a separate letter. (ICMA consolidated the answers to the survey and the separate letter into one document, for ease of review). ICMA also supported a Joint Associations Committee on Retail Structured Products (JAC) response questionnaire and response letter, which took the same approach as ICMA on many of the questions in the consultation questionnaire, and also raised some specific points related to the retail structured product market.

Generally, it is hoped that the Commission will take the opportunity that Capital Markets Union (CMU) presents to consider the PD Review in a holistic manner, in order to achieve a coherent and consistent framework that balances investor protection and regulatory burdens on issuers. While the PD has been identified as a priority for early action under CMU, it is unlikely that significant improvements can be made by amending the PD in isolation. Rather, policy makers should identify the measures that will need to be taken to achieve the objectives of CMU using the various regulatory tools at their disposal.

Some of the main objectives of CMU appear to be the promotion of growth in economies, the creation of employment and adjustment of the balance of funding of the real economy away from bank lending towards capital markets. The means to achieve these purposes include: (i) reducing costs of capital market issuance for issuers, both to make capital markets more competitive with bank lending and to provide issuers with cheaper funds; and (ii) increasing demand, by expanding the investor base in corporate bonds to include (for example) retail investors. This second point aligns with recent statements by Commissioner Hill that EU households are the main source for the long-term funding of the European economy, which is why savers and individual investors should be placed at the heart of the CMU initiative.

Some progress towards the CMU objectives could be made through changes to the PD, as discussed in the full ICMA response and briefly below. However, in terms of expanding the investor base in corporate bonds to include retail investors, regulators should consider how this can be achieved while ensuring a sufficient level of retail investor protection. In this regard, the PD is only one of a number of possible regulatory tools. Other tools such as MiFID intermediation should also be considered.

In light of evidence which suggests that disclosure is ineffective in the hands of retail investors, because they either do not read long-form disclosure or misunderstand short-form disclosure, the retail disclosure regime under the PD is unlikely to be an effective tool for retail investor protection. It therefore introduces cost to issuers without benefit to investors. Removing the retail disclosure regime under the PD

> **The current review of the PD could focus on a set of smaller, self-contained changes to the PD now, but leave the door open for a more fundamental and coordinated review later in the CMU project.**

and the corresponding distinction between bonds with a denomination of more or less than €100,000 for disclosure purposes should have no impact on retail investor protection, which should be addressed instead by ensuring that sales are made through properly supervised MiFID financial intermediaries. Not only will this represent more effective retail investor protection, it will also result in a reduction in costs for issuers and more bonds being issued with low denominations, which will benefit both institutional and retail investors.

Removing the retail disclosure regime would entail an acknowledgement that prospectuses are not documents intended for retail investors to read. Rather prospectuses would become a document to be read and used by financial intermediaries, who would then advise their retail clients under the MiFID suitability and appropriateness regimes.

While such an approach could have a significant beneficial effect in terms of boosting retail markets, it would require careful consideration of the interaction of different pieces of legislation (notably the PD and MIFID) and so may not be viewed as feasible for a short-term review of the PD. However, that should not mean that this proposal (or other more fundamental proposals in relation to the PD) is discarded. Rather, the current review of the PD could focus on a set of smaller, self-contained changes to the PD now, but leave the door open for a more fundamental and coordinated review later in the CMU project.

Another change that could be made in this further, more fundamental review of the PD is to consider whether a provision should be introduced to override existing conflicts of laws arrangements in relation to prospectus liability, in order to ensure that issuers do not face litigation in multiple jurisdictions and under different laws.

Examples of smaller, "self-contained" changes that could be made in this review of the PD are:

- a re-interpretation of the test for what a prospectus needs to include to focus only on information that may affect the issuer's ability to fulfil its obligations under the bond, with the aim of allowing issuers to prepare more streamlined and focused prospectuses;
- a liberalisation of the incorporation by reference rules to allow incorporation by reference of specified future information (eg future financial information), which would reduce the need for a supplement to be prepared when such future information is published;
- removing the need for a prospectus for secondary market non-exempt offers, on the basis that the ongoing disclosure regimes under the MAD and the TD provide the necessary information to secondary market purchasers; and
- reviewing the prescribed format summary requirements, which have resulted in summaries that are difficult to understand, particularly in a base prospectus context.

It is also hoped that certain of the proposals put forward in the European Commission's Consultation Document which appear to be contrary to the aims of CMU will not be taken forward. These include the extension of the scope of the PD to admission to trading on MTFs (which would remove a valuable source of flexibility for issuers) and the imposition of an arbitrary maximum length cap on prospectuses (which could result in significant liability concerns for issuers).

Finally, an overriding point to bear in mind in any consideration of changes to the PD is the importance of protecting the existing, efficient wholesale debt market in Europe. Applying changes to the PD to encourage SME and/or retail access to capital markets should be done in a way which avoids any adverse effect on the functioning of the wholesale market.

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UK FCA investment and corporate banking market study

The Terms of Reference (ToR) for a UK FCA investment and corporate banking market study were published on 22 May 2015. This follows the FCA's Wholesale Competition Review call for inputs in July 2014 (to which ICMA filed a response in October 2014) and consequent feedback statement in February 2015 (see further coverage in the Fourth Quarter 2014 edition and Second Quarter 2015 edition of this Quarterly Report) and related feedback from roundtables. The UK Fair and Effective Markets Review's Final Report (see further in the Capital Market Initiatives section of this Quarterly Report) has also since concluded that bundling and cross-subsidisation and the transparency of the corporate bond allocation process will be assessed as part of the FCA's market study.

In terms of process, the FCA intends to engage stakeholders (notably including issuers as well as investors) during its study and, though not formally consulting on the ToR, welcomed any inputs by 22 June. Hopefully Eurobond issuers (who have been less vocal historically on new issue processes than investors) will continue to engage with the FCA in this respect, with ICMA's support. An FCA interim report is expected around year-end 2015 and a final report is expected in spring 2016.

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Other primary market developments

FCA CoCo rules: The FCA has published its Policy Statement containing the final permanent marketing restriction (PMR) relating to CoCos. ICMA is working with the ICMA Legal & Documentation Committee and ICMA PDCM Compliance Working Group to discuss the practical implications of the final PMR.

Omnibus II Directive RTS: ESMA has submitted a Final Report containing draft RTS on prospectus-related issues under the Omnibus II Directive to the Commission. The draft RTS relate to the Prospectus Directive approval, publication and advertisement regimes, and follow an ESMA consultation to which ICMA responded in December 2014 (as reported in the First Quarter 2015 edition of the ICMA Quarterly Report). Helpfully, the concerning proposals relating to incorporation by reference that were included in the Consultation Paper have been removed from the final draft RTS. The Commission has three months to decide whether to endorse ESMA's draft RTS.

MiFID II complex / non-complex instruments: On 15 June 2015, ICMA filed a response to an ESMA Consultation Paper on draft guidelines on complex debt instruments and structured deposits. The response highlighted notably that complexity for MiFID's narrow purpose (availability of execution-only) should not be taken to equate either to toxicity or to a universal definition of complexity.

ICMA also supported a Joint Associations Committee (JAC) 15 June response on retail structured products (RSP) in further depth from the RSP angle. Distinctly, ICMA also supported a 1 June JAC response to JAC response to the UK FCA's consultation TR15/2 (*Structured Products: Thematic Review of Product Development and Governance*). The response focused on the recognition of the requirement for tailored solutions, coordination with global regulators, identifying the target market, proportionality and the read-across to other products.

PRIIPs: The Joint Committee of the ESAs (EBA, EIOPA and ESMA) published a Technical Discussion Paper on risk, performance scenarios and cost disclosures for KIDs for PRIIPs on 23 June 2015, with a deadline for comment of 17 August. ICMA will be considering carefully what feedback would be relevant, bearing in mind historic ICMA concerns (outlined in various prior editions of this Quarterly Report) around the residual ambiguity of the purpose (and related liability) of the PRIIPs key information document (KID) and around the mandatory use of simplistic and potentially confusing synthetic risk indicators.

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Primary Markets

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Prospectus Directive

On 18 February 2015, the European Commission launched a consultation on the next review of the Prospectus Directive (PD), with a deadline for comments of 13 May 2015. The PD review has been identified as a priority for early action under Capital Markets Union (CMU). As such, the general context of the review is a desire to reduce barriers to accessing the capital markets and to encourage growth.

The review is broad in scope and identifies a number of issues with the current PD regime. The general objective is "to reform and reshape the current prospectus regime in order to make it easier for companies to raise capital throughout the EU and to lower the associated costs, while maintaining effective levels of consumer and investor protection". In line with the CMU project, there is also a particular focus on how the prospectus regime applies to SMEs.

The Commission's Consultation Paper raises some fundamental questions about the current PD regime. An introductory section queries whether the principle of requiring a prospectus whenever securities are offered to the public or admitted to trading is still valid and the costs of preparing a prospectus. The "issues for discussion" are then divided into four other categories.

(i) *When a prospectus is needed:* This section discusses the current exemption thresholds and considers whether an additional exemption could be created for tap issues. There is a particular focus on the exemption in Article 3(2) for prospectuses relating to securities with a denomination of €100,000, with respondents being asked for views on whether such threshold is detrimental to liquidity in corporate bond markets. The general focus seems to be allowing a larger number of offers to be made without a PD-compliant prospectus. However, this section also considers whether the PD regime should be widened to include admission to trading on an MTF.

(ii) *The information a prospectus should contain:* This section also seems to focus on reducing burdens on issuers generally, with questions on (among other things) making the incorporation by reference mechanism more flexible and whether prospectuses need to include information that has already been made available under the Transparency Directive or be supplemented to include information that has been disclosed pursuant to the Market Abuse Directive. However, this section also discusses whether a length limit should be imposed on prospectuses or certain sections of the prospectus, which is likely to be impractical.

(iii) *How prospectuses are approved:* This section discusses whether approval processes across Member States can be streamlined further, extending the base prospectus facility, the tripartite prospectus regime, home Member State determination for debt issues, moving to an all-electronic system for filing and publishing prospectuses and equivalence of third-country prospectus regimes.

(iv) *Final questions:* This section is a "sweep-up" of other areas that the Commission is required to address

“The PD review has been identified as a priority for early action under Capital Markets Union.

in this review of the PD and asks respondents for views on whether there are any other areas that could add flexibility to the prospectus framework and facilitate the raising of capital or areas that could cause the prospectus framework to insufficiently protect investors.

As reported in previous editions of this Quarterly Report, the implementation of the last PD review caused significant uncertainty for issuers and lead managers (and is ongoing even now with ESMA still considering Level 2 measures under the Omnibus II Directive). It was therefore felt that the Commission should take a restrictive approach to its next review of the PD in order to allow a period of regulatory stability for the primary markets. However, the Consultation Paper appears to suggest an ambitious and open approach to this PD review. As such, there appears to be a welcome opportunity to address some fundamental aspects of the PD with a view to reducing burdens for issuers while appropriately protecting investors.

Nevertheless, a key point to bear in mind in any consideration of changes to the PD is the importance of protecting the existing, efficient, large and liquid wholesale debt market in Europe. Applying changes to the PD in a way which would have an adverse effect on the functioning of the wholesale market should be avoided.

Mindful of the above, ICMA's response is likely to have three aspects, namely: (i) to encourage the Commission's proposals that relate to the reduction of burdens; (ii) to argue against some of the less helpful suggestions made in the Consultation Paper; and (iii) to suggest additional areas for consideration that could help to reduce burdens and align with the CMU initiative.

The first aspect (encouraging the reduction of burdens) includes supporting a more flexible approach to incorporation by reference and a review of the need for a prospectus in the context of secondary market offers. It also includes agreeing with the suggestion that the somewhat arbitrary €100,000 threshold between “wholesale” and “retail” disclosure should be removed with the current “wholesale” disclosure regime applying to all prospectuses for debt securities. This suggestion would be based on a reconfiguration of retail investor protection to place more focus on regulatory tools other than disclosure (for example, MiFID intermediation) on the basis of evidence that suggests that retail investors do not read prospectuses and misunderstand shorter disclosure.

The second aspect (arguing against certain suggestions) includes disagreeing with the extension of scope of the PD to MTFs (on the basis that MTFs give valuable flexibility for wholesale issuers and it is not necessarily a problem that they each apply different rules) and arguing against the imposition of a length limit on prospectuses (on the basis that this will not necessarily make prospectuses easier to understand for investors and there may be serious concerns for issuers from a liability perspective if such a limit were to be introduced).

The third aspect (raising additional considerations that could reduce burdens) may include suggesting that the provision relating to what a prospectus needs to contain should be amended or reinterpreted to mean that a prospectus for vanilla debt securities only needs to contain the information that an investor needs to assess risks to payment and repayment on the bond. This could result in a significant reduction in the length and cost of prospectuses.

Generally, it will be interesting to see how the proposals for the next PD review develop. A significant reduction in burdens for issuers under the PD is likely to be achieved more successfully if it is complemented by plans to modify other legislation (such as MiFID) to achieve appropriate levels of protection for retail investors. It is hoped that regulators will take the opportunity that CMU presents in order to achieve this goal.

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