UK prospectus regime: ICMA response to FCA engagement papers

On 29 September 2023, ICMA submitted a response to the FCA on the engagement papers that it had published in May and July 2023 on the new UK prospectus regime. HM Treasury had published a near final version on 11 July of a draft statutory instrument (SI), The Financial Services and Markets Public Offers and Admissions to Trading Regulations 2023 (11 July near-final version), which sets out a new regime for public offers and admissions to trading on UK public markets, including for when a prospectus will be required in the UK. ICMA submitted technical comments on the draft SI on 21 August (see above article). For more on the FCA's engagement process with market participants on the new prospectus regime as set out in the draft SI (ahead of it being finalised), see the previous report on the FCA engagement process on the proposed new prospectus regime on page 26 of the Third Quarter 2023 edition of this Quarterly Report.

The FCA has published six engagement papers on:

- Paper 1: Admission to trading on a regulated market.
- Paper 2: Further issuances of equity on regulated markets.
- Paper 3: Protected forward-looking statements.
- Paper 4: Non-equity securities.
- Paper 5: Public offer platform.
- Paper 6: Primary MTFs.

In its response on the engagement papers, ICMA focussed on:

- institutional offerings of non-equity securities on regulated markets;
- sustainable finance;
- Protected forward-looking statements;
- primary MTFs; and
- retail offerings of non-equity securities.

Overview of ICMA response

ICMA welcomed the opportunity to engage with the FCA in advance of a formal consultation on the new rules expected in 2024. ICMA has appreciated the FCA's openness to hearing feedback from the market as a part of this engagement process.

The FCA noted in its papers that the current UK debt capital market regime works well and does not need a major overhaul. In the new regime, the FCA intends to maintain the *status quo* but look for opportunities to make improvements. Ensuring no new burdens but only improvements are added to the UK debt capital market regime will help to facilitate the international competitiveness of the UK economy (including in particular the financial services sector), which is one of the FCA's new objectives under section 25 of the Financial Services and Markets Act 2023.

Institutional offerings of non-equity securities on regulated markets

ICMA supports the FCA's objective of maintaining the *status quo* or making incremental changes that would help facilitate the efficient issuance and documentation of institutional bond offerings. In light of that, ICMA made comments, including on:

- *Scope:* Technical comments given to ensure that money market instruments are exempted from admission prospectus requirements (as is currently the case), and that the SSA admission carve-outs are not limited to UK entities only.
- *Single standard of disclosure for bonds:* Welcoming the proposal to adopt one standard of bond disclosure in the prospectus regime which is based on the existing wholesale disclosure annexes. Summary sections should not be mandatory but remain voluntary, as they are under the current wholesale disclosure regime.
- *Incorporation by reference:* Supporting permitting the incorporation by reference of future information into base prospectuses. However, incorporation by reference (of past or future information) should not be made mandatory.
- *Base prospectus supplement regime:* Base prospectus supplement regime should be more flexible in terms of the types of changes that can be made via a supplement.
- *Withdrawal rights:* Urging the FCA to maintain the *status quo* in relation to withdrawal rights not arising in the context of admission-only prospectuses for wholesale non-equity securities in the new prospectus regime. ICMA gave some technical comments as to how this could be achieved in the new regime.
- *Validity and public availability of prospectus:* Keeping the length of validity for a prospectus at maximum 12 months and changing the current 10-year public availability requirement to the shorter of 10 years or redemption.
- *Financial information requirements in prospectus:* Reiterating points made previously that some financial statement requirements are too prescriptive or onerous. See Annexe A of the response for further detail.
- *Voluntary prospectuses:* Supporting issuers retaining the right to publish a voluntary prospectus, which should be approved by the FCA to give them official status as prospectuses.
- *Annexes subject to necessary information test:* advocating that information items in the disclosure annexes only need to be disclosed to the extent they meet the necessary information test.
- *Follow-on issuances:* advocating keeping to the UK prospectus regime *status quo*, but the FCA should continue to monitor potential EU changes to fungible

issuance thresholds in case an alignment of the relevant thresholds may be desirable if the EU thresholds were to change in the future. ICMA also queried whether a simplified prospectus for follow-on offerings would be used much due to the relative ease of issuing follow-on debt under final terms under a base prospectus or doing a repeat stand-alone offering after first issuance.

- *Exemption from disclosure:* FCA rules should reflect the current omission from disclosure exemptions in the UK Prospectus Regulation (Article 18).
- *Equivalence/approval for regulated market admission prospectuses:* The FCA should provide a process for non-UK prospectuses to be approved or deemed equivalent.
- *Universal Registration Documents (URDs):* Supporting keeping the URD as it is used by some EU issuers to issue retail and wholesale debt in the UK.
- *Responsibility for prospectus:* supporting keeping the current statutory liability regime in respect of responsibility for prospectuses.
- *Structured finance:* no further differentiation between types of non-equity is needed other than what is already in PR Annex 17, which is based on whether debt is linked to an underlying asset.
- *Professional Securities Market (PSM):* No objection to the PSM being closed to new listings; support existing securities remaining listed under transitional provisions.

Sustainable finance

In terms of the questions posed by the FCA in relation to sustainable finance, highlights of ICMA's comments include:

- *ESG disclosures:*
- Currently, ICMA does not advocate alignment of ESG debt prospectus disclosure with future UK corporate reporting requirements as the current necessary information test for determining what is disclosed in a prospectus works well and requires relevant ESG disclosure to be included when appropriate.
- Certain aspects of UK corporate reporting apply only to equity and should not be extended to debt as this would likely impact the attractiveness of the UK as a listing venue for debt securities. (See *ESG Disclosure for New Bond Issues*, ICMA Quarterly Report article, July 2021.*)*
- In the future, it may be appropriate to consider aligning prospectus disclosure with future annual report disclosure, when the issuer's applicable corporate reporting regime has been amended to require sustainability/ESG reporting, and the systems and data which enable such reporting are well-established. This area is evolving, so the FCA should wait to make changes to disclosure requirements.
- *No mandatory inclusion of sustainable framework:* ICMA strongly advocates that there be no requirement for the mandatory inclusion of an issuer's sustainable finance framework in a prospectus (nor mandatory references to such framework or hyperlinks to it) for issuances of sustainable bonds. Issuers should retain the flexibility to include summary information about or from a framework in the prospectus as necessary on each transaction in accordance with existing disclosure requirements. (For a summary of current practice, see ICMA Quarterly Report article: *European Prospectus Disclosure for Green, Social and Sustainability Bonds*.)
- *Use of proceeds bonds disclosure standard:* For Use of proceeds bonds, ICMA supports following option 2 (fuller disclosure, as described in FCA Paper 4, paragraph 61), so long as the list of disclosure requirements is not too prescriptive.
- *Sustainability-linked bonds (SLBs) disclosure standard:* For SLBs, ICMA supports following the option 1 standard (as described in FCA Paper 4, paragraph 59) for now. The list of disclosure items proposed in option 2 (FCA Paper 4, paragraph 62) is more subjective and may be challenging for issuers to prepare. This area is evolving, and as ESG transition plans become more prevalent, some of this information may become more appropriate to include in the future.

Protected forward-looking statements

The new UK prospectus regime will have a concept of protected forward-looking statements (PFLS) to encourage issuers to include forward-looking statements in their prospectuses. This regime will be more relevant in the equity context, but in the debt context it could be relevant for sustainability/climate related information and particularly for the disclosure requirements that may be developed for SLBs. ICMA's comments included:

- *Alignment with US forward-looking statement safe harbour:* ICMA urged the FCA to adopt a PFLS regime that is as similar as possible to the US forward-looking statement safe harbour regime which has been in place for some time and is well understood by the market.
- *Recklessness standard provides sufficient limits:* ICMA considers that the recklessness standard set out in the draft SI itself (ie no false or reckless statements allowed as a condition of the reduced liability regime) provides sufficient limits to the regime while allowing it to remain flexible and not unduly prescriptive.
- *Location of legend for PFLS:* In terms of administrative burden, it would be preferable to have just a legend upfront in the disclosure document without having to denote something as a PFLS every time it appears in a document. It would be preferable not to have to include all the PFLS in one section, but to have the PFLS be included where appropriate in the prospectus which would aid overall comprehension.

- *Historical estimates:* ICMA requested that the FCA extend PFLS status to historical as well as forward-looking estimates. See Annexe B of the response for more detail.

Primary MTFs

As the International Securities Market (ISM) is the only primary MTF that is commonly used for admission of institutional debt securities in the UK**,** ICMA limited its response to issues relevant to the ISM/non-retail MTFs.

- *Withdrawal rights:* ICMA requested that the FCA maintain the *status quo* of withdrawal rights not applying to exempt offerings on primary MTFs, or at the very least, withdrawal rights should not be extended to Qualified Investor (QI)-only MTFs where wholesale debt is listed.
- *Advertising regime*: ICMA has previously noted its concerns about difficulties with the current advertising regime. ICMA strongly urged the FCA not to extend the advertising regime to MTFs, or at the least not to non-retail MTFs. (See ICMA's comments on near-final HMT SI (21 August 2023), paras 8(A)-(B)).

Retail offerings of non-equity securities

Although ICMA's main response is focused on institutional debt offerings, Annexe C to the response sets out some comments about the FCA's retail offering proposals as they relate to debt offerings. Annexe C discusses, among other things:

- Historic drivers that have disincentivised retail bond supply.
- Three possible contexts that might arise for potential retail investor participation.
- Potential transactional approaches to retail inclusion.
- Proposed UK prospectus regime characteristics relevant to retail inclusion.

ICMA looks forward to engaging further with the FCA about the comments in the response.

@ **Contact: Miriam Patterson**
miriam.patterson@icmagroup.org