

Retail cascades - the UKLA announcement in List! 16

In List! 16¹, the UKLA published an announcement entitled "*Retail debt cascades*". This note summarises our understanding of the nature of the retail cascade referred to in the List! announcement and sets out some suggested language for inclusion in prospectuses to satisfy the requirement set out in the List! announcement. It also describes how the List! announcement applies in the context of a drawdown under a programme.

It is not intended as legal advice and it is for issuers and their advisers to decide how to comply with the legal requirements applicable to, and how to structure, a particular transaction. In addition, this note does not deal with local laws which may be applicable in countries where the securities may be offered, such as conduct of business rules or other consumer protection legislation. It has been discussed with, but not approved by, the UKLA.²

Concept of retail cascade

"Retail cascade" is a term denoting one of the prevailing methods of non-exempt retail distribution of debt securities.

It involves the issuer selling the securities to investment banks underwriting the issue who, in turn, sell them to retail distributors, thereby creating a distribution chain. Over a period of time ranging from several days to several months, which frequently extends beyond the issue date of the securities, the retail distributors then sell the securities to their clients at prices that may vary from sale to sale, reflecting market conditions at the time of sale.

Solution proposed in List! announcement

With reference to Article 23.4 of the Prospectus Directive Regulation, as the List! article points out, an issuer may in appropriate cases use this derogation to omit information on the offers by the managers to the retail distributors as required by the Annex V/5 (or XII/5) of the Prospectus Directive Regulation. Despite this omission, such offers may in principle remain covered by the approved prospectus where the retail distributors making them are acting in association with the issuer. Detailed information relating to such offers can be omitted under Article 23.4 in those cases where the information is not known or cannot reasonably practicably be provided at the time of the initial offer. On the other hand, where the information *is* known then, unless it is not pertinent³, it should be disclosed.

¹ See http://www.fsa.gov.uk/pubs/ukla/list_jul07.pdf

² With the exception of the annex to this note which has not been discussed with the UKLA.

³ For example, if it is known at the date of the prospectus or final terms that ABC Private Bank is going to make offers in association with the issuer, then its name and address should be included under paragraph 5.4.1 of the Regulation. However, even though the general business terms of ABC Private Bank are known, they do not need to be disclosed under paragraph 5.1.1 of the Regulation, because they are not pertinent. Equally, the initial offer price by ABC Private Bank will not be pertinent if the offer price will change frequently during the offer period and therefore need not be disclosed under paragraph 5.3.1 of the Regulation, because it will very likely not be the price at which investors will buy from ABC Private Bank.

Statement in prospectus

According to the UKLA, issuers wishing to utilise Article 23.4 should include a clear statement in the prospectus alerting investors to the need to check with the person from whom they buy securities, whether that person is authorised by the issuer to make the offer and, if not, who is responsible to such investor for the prospectus for the purposes of section 90 of the Financial Services and Markets Act 2000 ("FSMA").

The purpose of the statement is to enable an investor to establish whether, under the FSA Prospectus Rules, the issuer would be responsible, to that investor, for the prospectus under section 90 of FSMA, which the issuer will be if it has authorised the offeror to make that offer to that investor. If an offeror is not so authorised, only that offeror may be responsible for the prospectus. The statement is intended to highlight to the investor the need to check whether it can rely on the contents of the prospectus and who is legally responsible for the contents. This risk arises due to the fact that it is not possible for the prospectus to list every offeror who is taking part in the retail cascade offer. The statement does not address any other basis of liability for the information in the prospectus, in particular any liability which may otherwise arise under English common law or which may arise under the law of any other country where the securities may be offered.

The statement should be included on the front page of the prospectus (as suggested in the List! announcement). In addition, to avoid the responsibility statement (which will typically appear elsewhere in the prospectus) being misinterpreted, it may be sensible to include the following sentence immediately after the responsibility statement:

"The previous paragraph should be read in conjunction with the [th] paragraph on the first page of this prospectus."

The requirement for the statement can be met with the following language:

*"Any person (an **Investor**) intending to acquire or acquiring any securities from any person (an **Offeror**) should be aware that, in the context of an offer to the public as defined in section 102B of the Financial Services and Markets Act 2000 (**FSMA**), the Issuer may be responsible to the Investor for the [Offering Circular/Prospectus] under section 90 of FSMA, only if the Issuer has authorised that Offeror to make the offer to the Investor. Each Investor should therefore enquire whether the Offeror is so authorised by the Issuer. If the Offeror is not authorised by the Issuer, the Investor should check with the Offeror whether anyone is responsible for the [Offering Circular/Prospectus] for the purposes of section 90 of FSMA in the context of the offer to the public, and, if so, who that person is. If the Investor is in any doubt about whether it can rely on the [Offering Circular/Prospectus] and/or who is responsible for its contents it should take legal advice."*

In addition, issuers should include the following language:

"An Investor intending to acquire or acquiring any [securities] from an Offeror will do so, and offers and sales of the [securities] to an Investor by an Offeror will be made, in accordance with any terms and other arrangements in place between such Offeror and such Investor including as to price, allocations and settlement arrangements. The Issuer will not be a party to any such arrangements with Investors (other than [Dealers]) in connection with the offer or sale of the [securities] and, accordingly, this Prospectus and any Final Terms will not contain such information and an Investor must obtain such information from the Offeror."

Information to be provided to investors when the offer is made

It is the responsibility of each person making an offer to ensure that information relating to its offer that has been omitted from a prospectus under Article 23.4 is provided to investors by it at the time that offer is made.

Authorisation of offerors

Issuers contemplating using a non-exempt retail cascade method of distribution of securities will need to consider what mechanics are appropriate, to ensure that the relevant offerors know whether or not they are duly authorised by the issuer to make offers to investors.

Application of List! announcement to offering programmes

The List! announcement will be relevant in respect of those base prospectuses:

- for which the UKLA is the home Member State competent authority;
- where the programme envisages that securities with a denomination of less than EUR 50,000 (or equivalent) may be issued (“low-denomination programmes”);
- where it is intended that offers of Notes may be made on a non-exempt basis through a retail cascade and it is not reasonably practicable to include the specific information about the offer; and
- which include the wording set out above.

On the establishment or update of such a programme, the checklist submitted to the UKLA along with the base prospectus should specify in the comment box that the issuer intends to rely on Article 23.4 in respect of any drawdowns where the securities will be offered by means of a non-exempt retail cascade.

The final terms completing the base prospectus for such a drawdown should contain placeholders for all the Annex V/5 (or XII/5) information. The suggested final terms, published by ICMA in July 2007, may serve as a template for this purpose. If Article 23.4 is relied upon for a particular drawdown, the relevant placeholders should have “N/A” against them. The Annex to this note provides an illustrative example of the treatment of the Annex V.5 (or XII/5) placeholders in the final terms for a retail cascade drawdown.

When completing such a drawdown, the checklists and comment boxes contemplated by the List! announcement will not be available, because the final terms are not submitted for approval. However, it is understood that Article 23.4 will apply to drawdowns under a programme, even though it is not possible to comply with the checklist and comment box procedures.

An issuer with an existing low-denomination programme (which is not due to be updated) wishing to rely on Article 23.4 and offer securities by way of a retail cascade, will need to notify the UKLA that it seeks to rely on Article 23.4 and amend the base prospectus by way of a supplemental prospectus to include the statement above.

Where a prospectus has been passported into other Member States, the certificate of approval in relation to the passported prospectus is required, under Article 18(2) of the Prospectus Directive, to refer to any omissions of information otherwise required to be included in that prospectus. To enable this to occur in respect of the certificate of approval for the supplemental prospectus, an issuer may wish to state its intention to rely on

Article 23.4 in the covering letter to the UKLA when seeking approval of, and requesting a passport for the supplemental prospectus.

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Annex

ANNEX
Treatment of the Annex V.5 placeholders

Relevant provisions of Annex V of PD Regulation	Reference to where items are required to be disclosed in the ICMA standard form Final Terms and, where appropriate, suggested wording for use in completing the Final Terms (<i>in italics</i>)
<p>5.1 <i>Conditions, offer statistics, expected timetable and action required to apply for the offer</i></p> <p>5.1.1 Conditions to which the offer is subject.</p>	<p>ICMA Final Terms, Part B, section 10, item 2 <i>"Offers of the Notes are conditional upon their issue."</i></p>
<p>5.1.2 Total amount of the issue/offer; [if the amount is not fixed, description of the arrangements and time for announcing to the public the definitive amount of the offer.]</p>	<p>ICMA Final Terms, Part A, section 4 references the total amount of the issue. The wording contained in square brackets is N/A unless a full application process is being undertaken in relation to the issue.</p>
<p>5.1.3 The time period, including any possible amendments, during which the offer will be open and description of the application process.</p>	<p>ICMA Final Terms, Part A, section 37 (offer period) The offer period should be the period between two specified dates. <i>"An offer of the Notes may be made by the Managers [and [specify other distributors, if known and if applicable]] other than pursuant to Article 3(2) of the Prospectus Directive in [specify relevant Member State(s) - which must be jurisdictions where the Prospectus and any supplements have been passported] (Public Offer Jurisdictions) during the period from [specify date] until [specify date] (Offer Period)."</i></p> <p>ICMA Final Terms, Part B, section 10, item 3 (application process) References to application process are N/A unless a full application process is being undertaken in relation to the issue.</p>
<p>5.1.4 A description of the possibility to reduce subscriptions and the manner for refunding excess amount paid by applicants</p>	<p>ICMA Final Terms, Part B section 10, item 4 This reference is N/A unless a full application process is being undertaken in relation to the issue.</p>

Relevant provisions of Annex V of PD Regulation	Reference to where items are required to be disclosed in the ICMA standard form Final Terms and, where appropriate, suggested wording for use in completing the Final Terms (<i>in italics</i>)
<p>5.1.5 Details of the minimum and/or maximum amount of application, (whether in number of securities or aggregate amount to invest).</p>	<p>ICMA Final Terms, Part B section 10, item 5 This reference is N/A unless a full application process is being undertaken in relation to the issue.</p>
<p>5.1.6 Method and time limits for paying up the securities and for delivery of the securities.</p>	<p>ICMA Final Terms, Part B section 10, item 6 <i>"The Notes will be issued on the Issue Date against payment to the Issuer of the net subscription moneys."</i></p>
<p>5.1.7 A full description of the manner and date in which results of the offer are to be made public.</p>	<p>ICMA Final Terms, Part B section 10, item 7 This reference will be N/A unless an "up to" issue is being undertaken.</p>
<p>5.1.8 The procedure for the exercise of any right of pre-emption, the negotiability of subscription rights and the treatment of subscription rights not exercised.</p>	<p>ICMA Final Terms, Part B section 10, item 8 This reference will be N/A unless a full application process is being undertaken in relation to the issue.</p>
<p>5.2 <i>Plan of distribution and allotment</i> 5.2.1 The various categories of potential investors to which the securities are offered. If the offer is being made simultaneously in the markets of two or more countries and if a tranche has been or is being reserved for certain of these, indicate any such tranche.</p>	<p>ICMA Final Terms, Part B section 10, item 9 <i>"Offers may be made by Offerors authorised to do so by the Issuer in [insert jurisdiction where the Prospectus has been approved and published and jurisdictions into which it has been passported] to any person [insert suitability criteria, if any are deemed appropriate, pursuant to any applicable conduct of business rules]. In other EEA countries, offers will only be made pursuant to an exemption from the obligation under the Prospectus Directive as implemented in such countries to publish a prospectus."</i></p>
<p>5.2.2 Process for notification to applicants of the amount allotted and indication whether dealing may begin before notification is made.</p>	<p>ICMA Final Terms, Part B section 10, item 10 This reference will be N/A.</p>

Relevant provisions of Annex V of PD Regulation	Reference to where items are required to be disclosed in the ICMA standard form Final Terms and, where appropriate, suggested wording for use in completing the Final Terms (<i>in italics</i>)
<p>5.3 Pricing</p> <p>5.3.1 An indication of the expected price at which the securities will be offered or the method of determining the price and the process for its disclosure. Indicate the amount of any expenses and taxes specifically charged to the subscriber or purchaser.</p>	<p>ICMA Final Terms, Part B section 10, item 1 (Offer Price) ICMA Final Terms, Part B section 10, item 11 (expenses and taxes)</p> <p>These two references will be N/A, in reliance on Article 23.4 of the PD Regulation. (Note that the "Issue Price is already disclosed in the ICMA Final Terms, Part A, section 5)</p>
<p>5.4 Placing and Underwriting</p> <p>5.4.1 Name and address of the coordinator(s) of the global offer and of single parts of the offer and, to the extent known to the issuer or to the offeror, of the placers in the various countries where the offer takes place.</p>	<p>ICMA Final Terms, Part A, section 33 (Distribution) references details of Managers/Dealers and underwriting commitments. ICMA Final Terms, Part B section 10, item 12 (details of placers). Insert details of relevant retail distributors known to the issuer at the date of the final terms. If none are known as at that date, the reference will be N/A, in reliance on Article 23.4 of the PD Regulation.</p>
<p>5.4.2 Name and address of any paying agents and depository agents in each country.</p>	<p>ICMA Final Terms, Part B section 9 (Operational Information)</p>
<p>5.4.3 Name and address of the entities agreeing to underwrite the issue on a firm commitment basis, and name and address of the entities agreeing to place the issue without a firm commitment or under "best efforts" arrangements. Indication of the material features of the agreements, including the quotas. Where not all of the issue is underwritten, a statement of the portion not covered. Indication of the overall amount of the underwriting commission and of the placing commission.</p>	<p>ICMA Final Terms, Part A, section 33 (Distribution)</p>
<p>5.4.4 When the underwriting agreement has been or will be reached.</p>	<p>ICMA Final Terms, Part A, section 33 (Distribution)</p>