

# Appendix A12a

## Product governance (MiFID II) language



# Appendix A12a - Product governance (MiFID II) language

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March 2020

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## Part I – Introduction

- 1.1** The following language may be used by underwriters adopting the “ICMA1” or “ICMA2” approaches to product governance under MiFID II. Further background information on these approaches to product governance is available on the ICMA MiFID II/R in primary markets webpage: <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-topics/mifid-ii-r-in-primary-markets/>. March 2020
- 1.2** **This language is appropriate for use by EEA and UK underwriters during the transition period in effect pursuant to the EU - UK Withdrawal Agreement. It may require amendment after the end of such transition period. For further information, ICMA members and Handbook subscribers can contact ICMA staff (LegalHelpdesk@icmagroup.org).** March 2020
- 1.3** This language includes a reference to “as amended” in legislative definitions (e.g. “Directive 2014/65/EU (as amended, “**MiFID II**”)). The reference to “as amended” may not be required if this concept is included in a general interpretation provision or definition elsewhere in the relevant document. March 2020

## Part II – Language for MTN programme documentation

This language should be included near the beginning of a programme offering circular (whether wholesale or retail). *March 2020*

**MIFID II product governance / target market** – The Final Terms in respect of any Notes (or Pricing Supplement, in the case of Exempt Notes)<sup>1</sup> will include a legend entitled “MiFID II Product Governance” which will outline the target market assessment in respect of the Notes and which channels for distribution of the Notes are appropriate. Any person subsequently offering, selling or recommending the Notes (a “**distributor**”) should take into consideration the target market assessment; however, a distributor subject to [Directive 2014/65/EU (as amended, “**MiFID II**”)/MiFID II] is responsible for undertaking its own target market assessment in respect of the Notes (by either adopting or refining the target market assessment) and determining appropriate distribution channels. *March 2020*

A determination will be made in relation to each issue about whether, for the purpose of the MiFID Product Governance rules under EU Delegated Directive 2017/593 (the “**MiFID Product Governance Rules**”), any Dealer subscribing for any Notes is a manufacturer in respect of such Notes, but otherwise neither the Arranger nor the Dealers nor any of their respective affiliates will be a manufacturer for the purpose of the MiFID Product Governance Rules. *March 2020*

*The following legend should be included at the top of the form of final terms for **wholesale/high denomination** Prospectus Regulation compliant programme offering circulars<sup>3</sup>* *March 2020*

*This legend is the “ICMA1” (professional investors and eligible counterparties (ECPs) only) legend.* *March 2020*

**<sup>4</sup>MiFID II product governance / Professional investors and ECPs only target market** – Solely for the purposes of [the/ each] manufacturer’s product approval process, the target market assessment in respect of the Notes has led to the conclusion that: (i) the target market for the Notes is eligible counterparties and professional clients only, each as defined in [Directive 2014/65/EU (as amended, “**MiFID II**”)/MiFID II]; and (ii) all channels for distribution of the Notes to eligible counterparties and professional clients are appropriate. [*Consider any negative target market.*]<sup>5</sup> Any person subsequently offering, selling or recommending the Notes (a “**distributor**”) should take into consideration the manufacturer[’s/s’] target market assessment; however, a distributor subject to MiFID II is responsible for undertaking its own target market assessment in respect of the Notes (by either adopting or refining the manufacturer[’s/s’] target market assessment) and determining appropriate distribution channels.] *March 2020*

The following legends should be included at the top of each of the forms of final terms for **retail / low denomination** Prospectus Regulation compliant programme offering circulars

March 2020

These legends are the "ICMA1" (professional investors and eligible counterparties (ECPs) only) legend and "ICMA2" (retail) legend.

March 2020

**[<sup>6</sup>MIFID II product governance / Professional investors and ECPs only target market**

March 2020

– Solely for the purposes of [the/ each] manufacturer's product approval process, the target market assessment in respect of the Notes has led to the conclusion that: (i) the target market for the Notes is eligible counterparties and professional clients only, each as defined in [Directive 2014/65/ EU (as amended, "**MiFID II**")][MiFID II]; and (ii) all channels for distribution of the Notes to eligible counterparties and professional clients are appropriate. [*Consider any negative target market.*]<sup>5</sup> Any person subsequently offering, selling or recommending the Notes (a "**distributor**") should take into consideration the manufacturer[s/s'] target market assessment; however, a distributor subject to MiFID II is responsible for undertaking its own target market assessment in respect of the Notes (by either adopting or refining the manufacturer[s/s'] target market assessment) and determining appropriate distribution channels.]

**OR**

**[<sup>7</sup>MIFID II product governance / Retail investors, professional investors and ECPs target market**

March 2020

– Solely for the purposes of [the/each] manufacturer's product approval process, the target market assessment in respect of the Notes has led to the conclusion that: (i) the target market for the Notes is eligible counterparties, professional clients and retail clients, each as defined in [Directive 2014/65/EU (as amended, "**MiFID II**")][MiFID II]; **EITHER** <sup>8</sup>[and (ii) all channels for distribution of the Notes are appropriate[, including investment advice, portfolio management, non-advised sales and pure execution services]<sup>9</sup>] **OR** <sup>10</sup>[(ii) all channels for distribution to eligible counterparties and professional clients are appropriate; and (iii) the following channels for distribution of the Notes to retail clients are appropriate - investment advice[, / and] portfolio management[, / and] non-advised sales ][and pure execution services], subject to the distributor's suitability and appropriateness obligations under MiFID II, as applicable]. [*Consider any negative target market.*]<sup>5</sup> Any person subsequently offering, selling or recommending the Notes (a "**distributor**") should take into consideration the manufacturer[s/s'] target market assessment; however, a distributor subject to MiFID II is responsible for undertaking its own target market assessment in respect of the Notes (by either adopting or refining the manufacturer[s/s'] target market assessment) and determining appropriate distribution channels[, subject to the distributor's suitability and appropriateness obligations under MiFID II, as applicable]<sup>11</sup>.]

*The following legend should be included at the top of any form of pricing supplement in programme offering circulars<sup>3</sup>* *March 2020*

**4[MIFID II product governance / target market - [appropriate target market legend to be included]]** *March 2020*

*The following wording is a form of language to be considered for inclusion in programme / dealer agreements and the form of subscription agreement to address the obligation in MiFID II Delegated Directive Art 9.8.<sup>12</sup> This language may need to be amended depending on the facts of the relevant offering and/or the specific product governance functions being carried out.* *March 2020*

*Language for programme / dealer agreements<sup>13</sup>* *March 2020*

Each of the Dealers agrees that a determination will be made in relation to each issue about whether, for the purpose of the MiFID Product Governance rules under EU Delegated Directive 2017/593 (the “**MiFID Product Governance Rules**”), any Dealer subscribing for any Notes is a manufacturer in respect of such Notes, but that, otherwise, neither the Arranger nor the Dealers nor any of their respective affiliates will be a manufacturer for the purpose of the MIFID Product Governance Rules.

*March 2020*

*Language for the form of subscription agreement<sup>14</sup>* *March 2020*

Solely for the purposes of the requirements of Article 9(8) of the MIFID Product Governance rules under EU Delegated Directive 2017/593 (the “**Product Governance Rules**”) regarding the mutual responsibilities of manufacturers under the Product Governance Rules[.]

*March 2020*

(a) [each of] [the Issuer [, the Guarantor[s]]<sup>15</sup> and]<sup>16</sup> the [[Joint] Lead Manager[s]/[identify Manager(s) who is/are deemed to be MiFID manufacturer(s)]<sup>17</sup> ([each a] [the] “**Manufacturer**” [and together “the **Manufacturers**”])] [acknowledges to each other Manufacturer that it] understands the responsibilities conferred upon it under the Product Governance Rules relating to each of the product approval process, the target market and the proposed distribution channels as applying to the Notes and the related information set out in the [Final Terms/Pricing Supplement/announcements] in connection with the Notes[; and

*March 2020*

(b) the [Managers] [and the/, the][ Issuer[ and the Guarantor[s]]<sup>18</sup> note the application of the Product Governance Rules and acknowledge the target market and distribution channels identified as applying to the Notes by the Manufacturer[s] and the related information set out in the [Final Terms/Pricing Supplement/ announcements] in connection with the Notes.]

*March 2020*

## Part III – Language for standalone issuance documentation

*The following language should be included near the beginning of a **wholesale/high denomination** offering circular.* March 2020

*This is the “ICMA1” (professional investors and eligible counterparties (ECPs) only) legend.* March 2020

**MIFID II product governance / Professional investors and ECPs only target market** – Solely for the purposes of [the/ each] manufacturer’s product approval process, the target market assessment in respect of the Notes has led to the conclusion that: March 2020

(i) the target market for the Notes is eligible counterparties and professional clients only, each as defined in [Directive 2014/65/EU (as amended, “**MiFID II**”)] [MiFID II]; and (ii) all channels for distribution of the Notes to eligible counterparties and professional clients are appropriate. [*Consider any negative market.*]<sup>6</sup> Any person subsequently offering, selling or recommending the Notes (a “**distributor**”) should take into consideration the manufacturer[’s/s’] target market assessment; however, a distributor subject to MiFID II is responsible for undertaking its own target market assessment in respect of the Notes (by either adopting or refining the manufacturer[’s/s’] target market assessment) and determining appropriate distribution channels.

*The following language should be included near the beginning of a **retail/low denomination** offering circular.* March 2020

*This is the “ICMA2” (retail) legend.* March 2020

**MiFID II product governance / Retail investors, professional investors and ECPs target market** – Solely for the purposes of [the/ each] manufacturer’s product approval process, the target market assessment in respect of the Notes has led to the conclusion that: (i) the target market for the Notes is eligible counterparties, professional clients and retail clients each as defined in [Directive 2014/65/EU (as amended, “**MiFID II**”)] [MiFID II]; **EITHER** <sup>8</sup>[and (ii) all channels for distribution of the Notes are appropriate[, including investment advice, portfolio management, non-advised sales and pure execution services]<sup>9</sup> **OR** <sup>19</sup>(ii) all channels for distribution to eligible counterparties and professional clients are appropriate; and (iii) the following channels for distribution of the Notes to retail clients are appropriate - investment advice[, / and] portfolio management[, / and] [non-advised sales] [and pure execution services][, subject to the distributor’s suitability and appropriateness obligations under MiFID II, as applicable]. [*Consider any negative market.*]<sup>6</sup> Any person subsequently offering, selling or recommending the Notes (a “**distributor**”) should take into consideration the manufacturer[’s/s’] target market assessment; however, a distributor subject to MiFID II is responsible for undertaking its own target market assessment in respect of the Notes (by either adopting or refining the manufacturer[’s/s’] target market assessment) and determining appropriate distribution channels[, subject to the distributor’s suitability and appropriateness obligations under MiFID II, as applicable]<sup>19</sup>. March 2020

*The following language is a form of language to be considered for inclusion in subscription agreements to address the obligation in MiFID II Delegated Directive Art 9.8.<sup>12</sup> This language may need to be amended depending on the facts of the relevant offering and/or the specific product governance functions being carried out.*

March 2020

“Solely for the purposes of the requirements of Article 9(8) of the MIFID Product Governance rules under EU Delegated Directive 2017/593 (the “**Product Governance Rules**”) regarding the mutual responsibilities of manufacturers under the Product Governance Rules[;]

March 2020

(a) [each of] [the Issuer [, the Guarantor[s]]<sup>20</sup> and]<sup>16</sup> the [[Joint] Lead Manager[s]/[identify Manager(s) who are deemed to be MiFID manufacturer(s)]<sup>21</sup> ([each] [the] a “Manufacturer” [and together “the Manufacturers”]) [acknowledges to each other Manufacturer that it] understands the responsibilities conferred upon it under the Product Governance Rules relating to each of the product approval process, the target market and the proposed distribution channels as applying to the Notes and the related information set out in the [Prospectus/announcements] in connection with the Notes]; and

March 2020

(b) the [Managers] [and the/, the][Issuer[ and the Guarantor[s]]<sup>22</sup> note the application of the Product Governance Rules and acknowledge the target market and distribution channels identified as applying to the Notes by the Manufacturers and the related information set out in the [Prospectus/announcements] in connection with the Notes.”]

March 2020

## Part IV – Language for new issue announcements

*The following language may be used in new issue announcements relating to an offer where the “ICMA1” (professional investors and eligible counterparties (ECPs) only) approach to product governance has been used.*

March 2020

**MiFID II professionals/ECPs-only [/ No PRIIPs KID]<sup>23</sup> –** Manufacturer target market (MiFID II product governance) is eligible counterparties and professional clients only (all distribution channels). [No PRIIPs key information document (KID) has been prepared as not available to retail in EEA or UK.]<sup>24</sup>

March 2020

*The following language may be used in new issue announcements relating to a **retail/low denomination** offer where the “ICMA2” (retail) approach to product governance has been used.*

March 2020

**MiFID II retail investors, professional investors and ECPs target market** – Manufacturer target market (MiFID II product governance) is eligible counterparties and professional clients (all distribution channels) and also retail clients ([all / suitability- or appropriateness-based]<sup>25</sup> distribution channels).

March 2020



## Part V – Language for trading screens

*The following language may be used on third party market / trading screens relating to an offer where the “ICMA1” (professional investors and eligible counterparties (ECPs) only) approach to product governance has been used.* March 2020

MiFID II professionals/ECPs-only [ / No PRIIPs KID]<sup>23</sup> March 2020

*The following language may be used in new issue announcements relating to a **retail/low denomination** offer where the “ICMA2” (retail) approach to product governance has been used.* March 2020

MiFID II retail investors [(subject to suitability/appropriateness)]<sup>19</sup>, professional investors and ECPs target market March 2020

## Part VI – Notes

- 1. If the programme includes a specific reference to Drawdown Prospectus, this should be reflected here.* March 2020
- 2. Consider including “may” for a programme with a non-MiFID issuer and non-MiFID guarantor(s) to cater for circumstances where the managers in relation to the Notes are also not subject to MiFID and therefore there are no MiFID manufacturers.* March 2020
- 3. This wording applies whether or not the programme follows PRIIPs option 1 (prohibition on sales to retail in the EEA always applies) or PRIIPs option 2 (there is flexibility to turn the prohibition on sales to retail in the EEA off if the Notes are not packaged or a KID is produced). See further Appendix A13.* March 2020
- 4. The brackets around this legend should only be retained in the form of final terms or pricing supplement, as applicable, if “may” has been included in the language to be set out near the beginning of the offering circular. As indicated in note 2 above, the legend may not be necessary for a programme with a non-MiFID issuer and non-MiFID guarantor(s) if the managers in relation to the Notes are also not subject to MiFID and therefore there are no MiFID manufacturers.* March 2020
- 5. The “ICMA1” and “ICMA2” approaches envisage that a negative target market will be unlikely. At the time of the programme establishment/update consider what types of bonds may be issued and whether the flexibility to include a negative target market may be needed for relevant issuance. Note that a programme which only envisages vanilla issuance is unlikely to require a negative target market placeholder. If a negative target market is deemed necessary, wording along the following lines could be included: “The target market assessment indicates that Notes are incompatible with the needs, characteristic and objectives of clients which are [fully risk averse/have no risk tolerance or are seeking on-demand full repayment of the amounts invested].”* March 2020

- |     |  |            |
|-----|--|------------|
| 6.  | <i>This legend is applicable if following the “ICMA1” (professional investors and eligible counterparties (ECPs) only) target market approach.</i>   | March 2020 |
| 7.  | <i>This legend is applicable if following the “ICMA2” retail approach which would only be the case in relation to a low denomination issue and for bonds which are not ESMA complex or certain ESMA complex bonds only (as explained in the “ICMA2” paper available on the ICMA MiFID II/R in primary markets webpage: <a href="https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-topics/mifid-ii-r-in-primary-markets/">https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-topics/mifid-ii-r-in-primary-markets/</a>).</i> | March 2020 |
| 8.  | <i>Include for bonds that are not ESMA complex.</i>  | March 2020 |
| 9.  | <i>This list may not be necessary, especially for bonds that are not ESMA complex where all channels of distribution may be appropriate. It reflects the list used in the examples in the ESMA Guidelines.</i>   | March 2020 |
| 10. | <i>Include for certain ESMA complex bonds. This list may need to be amended, for example, if advised sales are deemed necessary. If there are advised sales, a determination of suitability will be necessary. In addition, if the Notes constitute “complex” products, pure execution services are not permitted to retail without the need to make the determination of appropriateness required under Article 25(3) of MiFID II.</i>  | March 2020 |
| 11. | <i>If the Notes constitute “complex” products, pure execution services are not permitted to retail without the need to make the determination of appropriateness required under Article 25(3) of MiFID II. If there are advised sales, a determination of suitability will be necessary.</i>   | March 2020 |
| 12. | <i><u>MiFID II Delegated Directive</u>, Art.9.8: “[MiFID] firms, where they collaborate, including with entities which are not authorised and supervised in accordance with [MiFID II] or third-country firms, [...] [are] to outline their mutual responsibilities in a written agreement.”</i>   | March 2020 |
| 13. | <i>It is suggested that this paragraph is included as a new sub-clause under the “Status of the Dealer / Arranger” (or equivalent) clause.</i>   | March 2020 |
| 14. | <i>This form of language may also be included in a dealer confirmation and dealer accession letter (for a note issue) where no subscription agreement is being entered into.</i>   | March 2020 |
| 15. | <i>Include a reference to any guarantor that is a MiFID regulated entity and that may collaborate on the creation, development, issue and/or design of an issue of Notes under the programme.</i>  | March 2020 |
| 16. | <i>Include a reference to the issuer where the issuer is a MiFID regulated entity.</i>   | March 2020 |

17. *This should be completed on a note issue with the names of all entities deemed to be MiFID manufacturers in the relevant note offering. This should be considered on a case by case basis and will vary depending on the facts of the relevant offering/which entities are collaborating with the issuer in the creation, development, issue and/or design of the Notes which (as described in the ESMA Technical Advice of 19 December 2014) includes entities “advising corporate issuers on the launch of the new securities”. In some cases (for example where the Joint Lead Managers are the entities substantively collaborating with the Issuer), it may be appropriate for the Joint Lead Managers to be considered the co-manufacturers.* March 2020
18. *Include a reference to the issuer and/or any guarantor(s) here where such references may not be included in the first sentence on a note issue (e.g. because the issuer and/or any guarantor(s) are not MiFID regulated entities and may not recognise themselves as manufacturers and therefore falling within the scope of the first sentence).* March 2020
19. *Include for certain ESMA complex bonds.* March 2020
20. *Include a reference to any guarantor that is a MiFID regulated entity and that has collaborated on the creation, development, issue and/or design of the bonds.* March 2020
21. *This should include all entities deemed to be MiFID manufacturers in the relevant note offering. This should be considered on a case by case basis and will vary depending on the facts of the relevant offering/which entities are collaborating with the issuer in the creation, development, issue and/or design of the bonds which (as described in the ESMA Technical Advice of 19 December 2014) includes entities “advising corporate issuers on the launch of the new securities”. In some cases (for example where the Joint Lead Managers are the entities substantively collaborating with the Issuer), it may be appropriate for the Joint Lead Managers to be considered the co-manufacturers.* March 2020
22. *Include a reference to the issuer and/or any guarantor(s) here where such references are not included in the first sentence (e.g. because the issuer and/or any guarantor(s) are not MiFID regulated entities and do not recognise themselves as manufacturers and therefore falling within the scope of the first sentence).* March 2020
23. *Do not include the reference to “No PRIIPs KID” in relation to an issue of bonds that clearly falls outside the scope of the PRIIPs Regulation. For other legends relating to the PRIIPs Regulation, see Appendix A13.* March 2020
24. *Do not include the final sentence for issues of bonds that clearly fall outside the scope of the PRIIPs Regulation.* March 2020
25. *Include the latter option for certain EMSA complex bonds.* March 2020

