

Appendix A16

Sub-€100,000 denomination bonds under the EEA Prospectus Directive and retail cascade legends

Appendix A16 - Sub-€100,000 denomination bonds under the EEA Prospectus Directive and retail cascade legends

Parties should consider the impact of the MiFID II product governance regime on the ICMA pro forma retail cascade legends for prospectuses and base prospectuses set out below. Information 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/>.

September
2018

The ICMA language set out below may require amendment in due course to reflect the UK's withdrawal from the European Union and/or the full implementation of the Prospectus Regulation in July 2019.

September
2018

Speed Read

1.1 Parties to a primary bond issue may find it helpful to:

September
2015

- (a) generally think of offers of the bonds as being '**PD-exempt**' or '**PD non-exempt**' rather than 'wholesale' or 'retail' – as some low denomination bonds may not be intended for general retail distribution;
- (b) consider '**who**' will be authorised by the issuer to offer using its prospectus, '**where**' (i.e. in what countries) and '**when**' (i.e. during what period) - if the issuer prepares a prospectus to enable some 'PD non-exempt' offers;
- (c) bear in mind that any offers not covered by the issuer's prospectus will have to be 'PD-exempt' (unless the relevant offeror prepares its own prospectus);
- (d) limit passporting to those countries where 'PD non-exempt' distribution is specifically targeted;
- (e) notify the market of as much relevant information on the 'who', 'where' and 'when' of the offer at an earlier stage of the book building process, for example by using an appropriate form of screen announcement (see examples in paragraph 3.1 below); and
- (f) include an appropriate retail cascade legend in the prospectus or base prospectus (see paragraphs 4.1 – 4.4 below).

However, parties should be mindful of the need to comply with specific national laws and regulation concerning PD offers, e.g. the Austrian "Notification to the issue calendar".

Background

Introduction

2.1 Following the implementation of the amended Prospectus Directive ("PD"), there has been a discernable trend for debt securities to be issued in Europe in denominations of €100,000 or above. Public offers (as defined in the PD) of bonds with a denomination of €100,000 and above are exempt from the requirement to publish a prospectus pursuant to Art. 3(2) (a) of the PD.

September
2015

2.2 Other notable exemptions from the prospectus requirement include offers (i) to qualified investors, (ii) to fewer than 150 natural or legal persons per EEA country, and (iii) involving a minimum total consideration of €100,000 per investor. *September 2015*

2.3 Whilst high denomination bonds continue to be prevalent, there are a number of debt securities issued in Europe in denominations below €100,000. This guidance note sets out some considerations that may assist firms in determining their approach to offerings in such circumstances. *September 2015*

Terminology

2.4 A practice has arisen whereby bonds with a minimum denomination of less than €100,000 are referred to as 'retail' and bonds with a denomination of €100,000 and above are referred to as 'wholesale'. However, it is quite possible that bonds with a minimum denomination of less than €100,000 may not be intended for distribution to retail investors, but rather that such bonds only be distributed using one or more exemptions under the PD. Referring instead to debt securities as offerable on a 'PD-exempt' or 'PD non-exempt' basis may help to clarify issuer and offeror intentions. *September 2015*

Third party offers

2.5 If a bond with a minimum denomination of less than €100,000 is issued on a PD non-exempt basis, then offers will be made in the relevant EEA jurisdiction(s) on the basis of an up-to-date prospectus, approved for low denomination offers, and where relevant, passported under the PD. In practice, offerors other than the relevant issuer and manager(s) ("**third party offerors**") may wish to offer in the EEA on the basis of the issuer's prospectus. Whether or not this is possible will depend on a combination of: *September 2018*

- (a) who – the parties specifically authorised to offer on the basis of the prospectus pursuant to the consent given according to Annex XXX of the PD implementing Regulation; for example, this could be persons individually specified by the issuer or the person responsible for drawing up the prospectus including, initial order book allottees, persons of a defined class or even specified to be 'anyone' otherwise authorised by law to offer securities;
- (b) where – in which EEA jurisdictions the up-to-date prospectus has been approved and published, and into which EEA jurisdictions it has been passported (if applicable); and
- (c) when – the length of the period during which the issuer will keep its approved/passported prospectus up to date for offers to be made,

all in accordance with the consent given in the prospectus or Final Terms, in compliance with Annex XXX of the PD implementing Regulation referring to Art. 20a of the PD.

(l) agrees and accepts that [the Guarantor and] the [Managers/*insert any other relevant parties*] will, pursuant to the [Contracts (Rights of Third Parties) Act 1999], be entitled to enforce those provisions of the contract between the Issuer and the financial intermediary, formed upon acceptance by the financial intermediary of the Issuer's offer to use of the Prospectus with its consent in connection with the relevant Non-exempt Offer, which are, or are expressed to be, for their benefit, including the agreements, representations, warranties, undertakings and indemnity given by the financial intermediary pursuant to the Authorised Offeror Terms;

(m) [*INSERT ISSUER/MANAGERS' PREFERRED GOVERNING LAW AND JURISDICTION PROVISIONS;*]

(n) [*INSERT ISSUER/MANAGERS' PREFERRED INDEMNITY PROVISION;*] and

(o) [*CONSIDER INCLUDING A PROVISION RELATING TO SUSPENSION OF OFFERS DURING THE OFFER PERIOD IF A SUPPLEMENT IS PUBLISHED.*]

[Tailor the Authorised Offeror Terms as necessary for each deal]

The financial intermediaries referred to in [paragraphs (ii), (iii) and (iv)] above are together referred to herein as the “**Authorised Offerors**”.

Any Authorised Offeror falling within paragraph (iv) above who wishes to use this Prospectus in connection with a Non-exempt Offer as set out above is required, for the duration of the Offer Period, to publish on its website the Acceptance Statement.

Option 2 – Stand alone prospectus – Specific consent

Issuer's consent to the use of its prospectus by an Authorised Offeror – individual consent approach (i.e. where only specified financial intermediaries in any jurisdiction are to have consent) – (to be included on the inside front cover of the Prospectus or in a separate section of the Prospectus (for example under “Important Legal Information”)):

September
2018

Consent

The Issuer consents to the use of this Prospectus in connection with any Non-exempt Offer of [securities] in any of the Non-exempt Offer Jurisdictions during the period commencing from [*specify date*] to [*specify time/date*] (the “**Offer Period**”)^{12 13} by:

September
2015

- (i) the Managers;
- (ii) [*specify names of financial intermediaries*]; and
- (iii) any other financial intermediary appointed after the date of this Prospectus and whose name is published on the website of the Issuer¹⁴ (*specify website details*) and identified as an Authorised Offeror in respect of the Non-exempt Offer (together with the financial intermediaries specified in (ii) above, the “**Authorised Offerors**”)¹⁵.

Neither the Issuer nor, for the avoidance of doubt, any of the [Managers]/[Dealers]) has any responsibility for any of the actions of any Authorised Offeror, including compliance by an Authorised Offeror with applicable conduct of business rules or other local regulatory requirements or other securities law requirements in relation to such offer.

An Investor intending to acquire or acquiring any [securities] from an Authorised Offeror will do so, and offers and sales of the [securities] to such Investor by an Authorised Offeror will be made, in accordance with any terms and other arrangements in place between that Authorised Offeror and such Investor including as to price, allocations and settlement arrangements (the “Terms and Conditions of the Non-exempt Offer”). The Issuer will not be a party to any such arrangements with such Investor and, accordingly, this [Base] Prospectus does not[, [and any Final Terms] will not,] contain such information. The Terms and Conditions of the Non-exempt Offer shall be provided to such Investor by that Authorised Offeror at the time the offer is made. None of the Issuer or, for the avoidance of doubt, any of the [Managers]/ [Dealers] or other Authorised Offerors has any responsibility or liability for such information.

Notes

1. *Where the UKLA is approving the prospectus and offers of securities with minimum denominations of less than €100,000 (or equivalent) other than to qualified investors only are contemplated or the securities will be admitted to trading on a regulated market (or segment of a regulated market) which is marketed at retail investors, for example the London Stock Exchange’s ORB market, the prospectus must be prepared in accordance with UKLA Technical Note 632.1. This may involve (i) including the retail cascade legend in a separate section of the prospectus; and (ii) including a brief explanation of the retail cascade legend in a box at the beginning of the retail cascade legend.*

2. *Suggested generic definition of the Prospectus Directive in all documents as follows:*

September
2018

“Prospectus Directive” means Directive 2003/71/EC (as amended or superseded) and includes any relevant implementing measure in each Relevant Member State.

3. *The UKLA requires the defined term “Non-exempt Offer” to be renamed “Public Offer”. This is confusing as the definition of “Public Offer” in FSMA/VPD is much wider and extends beyond the offers that are being referred to here. We are not aware of other competent authorities taking the same approach. The UKLA will require the wording in square brackets to be replaced with wording such as the following (together with any other consequential changes throughout the legends):*

September
2015