

MiFID II Product Governance (PG) and Euro Commercial Paper (ECP)

Introduction

1. As outlined in the draft ICMA paper entitled *“The MiFID II product governance (PG) and Packaged retail investment and insurance products Regulation (PRIIPs) regimes – January 2018: An approach for the Eurobond markets” (ICMA1)*¹, the PG regime differentiates between *“manufacturers”* and *“distributors”* of financial instruments.
2. MiFID II persons that *“create, develop, issue and/or design financial instruments, including when advising corporate issuers on the launch of new financial instruments”*² are *“manufacturers”* for PG purposes, whereas MiFID II persons that *“offer or sell”*³, or *“offer or recommend”*⁴, financial instruments are *“distributors”* for PG purposes.
3. The status of an ECP dealer as a *“manufacturer”* or *“distributor”* for PG purposes will depend on the particular facts. An ECP dealer might conclude that its role does not extend to *“manufacturing”* where its activities are limited to offering and selling ECP to investors on the basis of an ECP issuer’s indication of the terms on which it is willing to issue ECP or an investor’s indication of the terms on which it is willing to buy ECP.
4. ECP dealers may also provide market colour to issuers from time to time, such as information on general clearing levels of a peer group and market conditions. Depending on the facts, this may not be viewed as bringing an ECP dealer within the definition of *“manufacturer”* (for example where those discussions are general in nature, do not constitute advice and/or do not relate to the terms and considerations associated with a particular issuance of ECP).
5. Depending on the facts, acting as arranger for an ECP programme may also not be viewed as bringing an investment firm within the definition of *“manufacturer”* for issuance under the programme given the typically administrative nature of the role. However, this may not be the case in relation to issuances under the programme where the arranger is acting as a dealer and where it provided specific structuring or design advice to the issuer in the context of the programme establishment or update such that it may be viewed as having created, developed or designed the issuance or advised the issuer on the launch of it.⁵
6. If an **ECP dealer** concludes that it is a *“distributor”* and not a *“manufacturer”* for PG purposes, it may not consider it necessary to make any changes to ECP documentation for its PG compliance purposes⁶, other than perhaps the inclusion of the following *“inadvertent manufacturer”* language in the Information

¹ Available on the [ICMA MiFID II/R in primary markets webpage](#).

² See [MiFID II Delegated Directive](#), Recital 15.

³ See [MiFID II Delegated Directive](#), Recital 15.

⁴ See [MiFID II](#) Art.16.3#6 and [MiFID II Delegated Directive](#), Art.10.1.

⁵ Arrangers of ABCP programmes may view their role in a similar way although, as noted above, the analysis will depend on the particular facts of the relevant programme and activities being carried out by the arranger.

⁶ Language relating to the PRIIPs Regulation will need to be considered separately. For example, the PRIIPs Regulation might be relevant in the context of an ABCP programme or an ECP programme that provides for index-linked notes to be issued under it.

Memorandum⁷ and Dealer Agreement⁸ at the time of the next programme update. This will be relevant regardless of whether the issuer and any guarantor are MiFID II firms or not.

Suggested form of “inadvertent manufacturer” legend for Information Memorandum

“Solely by virtue of appointment as Arranger or Dealer, as applicable, on this Programme, neither the Arranger nor the Dealers nor any of their respective affiliates will be a manufacturer for the purpose of EU Delegated Directive 2017/593.”

Suggested form of “inadvertent manufacturer” language for Dealer Agreement

“Each of the Issuer[, the Guarantor[s]] and the Dealers agree that solely by virtue of appointment as Arranger or Dealer, as applicable, on this Programme, neither the Arranger nor the Dealers nor any of their respective affiliates will be a manufacturer for the purpose of EU Delegated Directive 2017/593.”

7. If this approach is followed, the ECP dealer will need to consider a bespoke solution for meeting its PG target market disclosure and co-manufacturer agreement obligations (for example, using the suggested language set out in ICMA1) when it considers itself to be a manufacturer for a specific ECP issuance.
8. Separately, a MiFID II firm that is an ECP **issuer** (and therefore a “manufacturer”) or guarantor (where it considers itself to be a “manufacturer”) may also wish to include a legend in relevant documentation relating to its target market assessment in line with the approach set out in the ICMA1 paper.⁹ Such legend could be included in the Information Memorandum at the time of the next ECP programme update and/or in bilateral communications (e.g. one-way letters) with ECP dealers and any other distributors.

Suggested form of product governance legend to be considered by ECP issuers/guarantors that are MiFID II firms where none of the ECP dealers consider themselves to be a manufacturer [Note: language in blue underline shows the changes from the ICMA1 standalone legend]

“**MIFID II product governance / Professional investors and Eligible Counterparties only target market** – Solely for the purposes of the [Issuer’s]/[Guarantor’s][s’]/[Issuer’s and Guarantor’s][s’] product approval process in respect of a particular [Note] issue, the target market assessment in respect of any of the [Notes] to be issued off [this programme][insert details of ECP programme] 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. Any person subsequently offering, selling or recommending the [Notes] (a “distributor”) should take into consideration the [Issuer’s]/[Guarantor’s][s’]/[Issuer’s and Guarantor’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

⁷ This language could be inserted in the inside front cover in the “Important Notice” section.

⁸ This language could be inserted as a new sub-clause under clause 2.2 (The Uncommitted Programme) if the ICMA form of ECP Dealer Agreement is used.

⁹ A MiFID II issuer and any MiFID II guarantor that considers itself to be a “manufacturer” may also wish to consider whether any changes to documentation are required in light of [MiFID II Delegated Directive](#) 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.”

[Issuer's]/[Guarantor's][s']/[Issuer's and Guarantor's][s'] target market assessment) and determining appropriate distribution channels.”