

Ministry of Finance  
Swedish Government Offices  
Jakobsgatan 24  
Stockholm  
Sweden



(Submitted by e-mail to [fi.remissvar@regeringskansliet.se](mailto:fi.remissvar@regeringskansliet.se))

21 May 2021

Dear Sir/Madam,

**Regellättnader på värdepappersmarknaden och några frågor om referensvärden – Fi2021/01679**  
(Rule relief in the securities market and some questions about reference values)

The International Capital Market Association (ICMA) welcomes the opportunity to submit its response to the above consultation, which is in Annex 1 to this letter.

ICMA promotes well-functioning cross-border capital markets, which are essential to fund sustainable economic growth. It is a not-for-profit membership association with offices in Zurich, London, Paris and Hong Kong, serving around 600 member firms in 60 countries. Among its members are private and official sector issuers, banks, broker-dealers, asset managers, pension funds, insurance companies, market infrastructure providers, central banks & law firms. It provides industry-driven standards and recommendations, prioritising four core fixed income market areas: primary, secondary, repo & collateral and sustainable finance. ICMA works with regulatory and governmental authorities, helping to ensure that financial regulation supports stable and efficient capital markets. [www.icmagroup.org](http://www.icmagroup.org)

This response is primarily drafted on behalf of ICMA's primary market constituency comprised of underwriters that lead-manage cross-border syndicated bond issuance transactions throughout Europe and beyond. This constituency deliberates principally through:

- the [ICMA Primary Market Practices Committee](#), which gathers the heads /senior members of such lead-managers' syndicate desks; and
- the [ICMA Legal and Documentation Committee](#), which gathers the heads / senior members of such lead-managers' legal documentation / transaction management teams.

ICMA would be pleased to discuss its response at Ministry of Finance's convenience.

Yours faithfully,

A handwritten signature in black ink, appearing to read 'R. Ewing', with a stylized flourish at the end.

**Ruari Ewing**  
Senior Director, Primary Markets  
[ruari.ewing@icmagroup.org](mailto:ruari.ewing@icmagroup.org)  
+44 20 7213 0316

## Annex 1 Response

1. ICMA understands from the consultation that the Ministry of Finance intends to implement the MiFID product governance (PG) alleviation of the EU's Capital Market Recovery Package (CMRP - [Directive \(EU\) 2021/338](#)) on a narrower basis than the EU-level text, as set out in the table below.

Consultation proposal	Informal English translation	Directive (EU) 2021/338
12 a §  Kraven i 11 och 12 §§ gäller inte om  1. den tillhandahållna investeringstjänsten avser <u>obligationer med en            make-whole-klausul</u> , eller  2. [...].	12 a §  The requirements in §§ 11 and 12 do not apply if  1. the investment service provided relates <u>to bonds            with a make-whole clause</u> , or  2. [...].	Article 1(3)  An investment firm shall be exempted from the requirements set out in the second to fifth subparagraphs of Article 16(3) and in Article 24(2), where the investment service it provides relates <u>to bonds with no other            embedded derivative than a make-            whole clause</u> or [...].

2. In this respect, the EU-level text provides that PG will not apply to: (i) bonds without any embedded derivative and (ii) bonds with only a make-whole clause embedded derivative. As a make-whole clause merely compensates for an issuer call option feature (whereby an issuer is entitled to redeem a bond early, leaving investors with re-investment risk), it would make sense that bonds without an issuer call option feature (and thus not needing a compensating make-whole clause) also be outside the scope of PG. (Some ICMA Quarterly Report commentary on the development of the EU-level text is set out in Annex 2 for information.)
3. However, the consultation proposal would only exclude bonds with make-whole clauses, leaving within Swedish PG scope: (i) more complex bonds without such a clause (which is understandable) and (ii) non-complex bonds without such a clause (which seems strange). Furthermore, an extremely complex structured product with multiple embedded derivatives could be made to fall outside the Swedish PG regime by merely adding an issuer call option together with a related make-whole clause (after all this provision is merely an issuer option that does not have to be used or even intended to be used).
4. Distinctly regarding market practice for syndicated international bond issuance (2019 EMEA turnover of circa \$2.2 trillion in new capital raising<sup>1</sup>), it seems likely that partial alleviation of PG scope fragmented across Europe<sup>2</sup> (seemingly at odds with the EU's CMU project) will result in the market acting as if the EU CMRP had not been adopted at all. This is because international bond syndicates gather banks from multiple jurisdictions, who gravitate to the highest common denominator in terms of regulatory compliance. In this respect, the conceptually flawed nature of the PG regime has been significantly mitigated through the 'ICMA1' and 'ICMA2' approaches to PG compliance (see the [ICMA Quarterly report coverage](#) of ICMA's May 2015 response to the European Commission's MiFID review consultation).
5. Swedish implementation should therefore be aligned with the EU-level text.

<sup>1</sup> Source: Dealogic 2019 full-year EMEA DCM volume.

<sup>2</sup> ICMA understands a few EU jurisdictions other than Sweden may also be contemplating a narrower application than the EU-level text.

## Annex 2

### ICMA Quarterly Report commentary on CMRP text development

#### [Fourth Quarter 2020 edition](#)

#### **The CMRP: MiFID II/R product governance**

On 24 July, as part of its [Capital Markets Recovery Package](#) (CMRP), the European Commission published a [proposal for amendments to MiFID](#) that inter alia touches on the scope of MiFID II/R's product governance (PG) regime. The Commission's proposal in this respect is for "corporate bonds with make-whole clauses" to be excluded from the regime, with the Commission separately acknowledging a "need [for this] to be complemented by a clear rule" that a make-whole provision does not of itself make such corporate bond instruments "packaged" under PRIIPs.

There has indeed been substantial debate about whether instruments with certain terms (make-whole provisions notably) are indeed packaged and so require a KID (if being made available to EEA retail investors), or whether they are part of the simpler, non-packaged, universe of instruments not so subject (see inter alia #3-7 in ICMA's [September 2018 response](#) to an FCA consultation, the ESAs' [19 July 2018 letter](#) under "callable" and BaFin's [22 August 2019 statement](#) at #4). Since all MiFID II/R instruments are anyway within scope of the PG regime, a different debate has previously occurred in that respect. That is whether the PG regime should apply at all to bonds (or at least "non-complex" bonds if more legislatively expedient) and also that applying it to professional investors seems pointless practically (see inter alia ICMA's [15 May response](#) to the Commission's MiFID review consultation reported at pages 37-38 of the [2020 Third Quarter edition](#) of this Quarterly Report).

An explanation for the Commission's proposal to exclude corporate bonds with make-whole clauses from the PG regime might then be that it is a stepping-stone to a matching exclusion from the PRIIPs regime. In this respect, however, it would seem illogical not also to exclude even simpler products from the scope of the PG regime (bearing in mind also that such instruments can be sold on an execution-only basis, with PG target market definitions thus being arguably inconsequential). One might thus provide that the PG regime excludes non-complex instruments (an established MiFID concept and thus expedient), together with any instruments that would be non-complex but for the inclusion of a make-whole clause. One could even exclude, on a more conceptual and less instrument-specific basis, any instruments that would be non-complex but for the inclusion of terms that do not affect (adversely) the instrument's expected return (ie the contractual right to return of principal consistent with, or more than, the original amount invested and, if applicable, a contractual right to regular payments of interest that are not deferrable). It is intrinsic that such instruments raise no additional risks that are difficult to understand.

At the time of writing, EU Member States were reportedly also debating potentially widening the Commission's proposed exclusion. And the European Parliament's rapporteur had suggested, in his [draft report](#) (at amendments #3-#5 on pages 7-9), that the scope of the PG regime exclude inter alia non-complex bonds admitted to regulated markets, equivalent markets and MTFs. This would however leave out bonds with make-whole clauses, since callable bonds are characterised as complex under ESMA's [February 2016 Guidelines on Complex Debt Instruments and Structured Deposits](#).

ICMA will continue to follow and, as appropriate, engage in this dossier as it develops.

**First Quarter 2021 edition****The CMRP: MiFID II/R product governance**

Further to coverage in the [2020 Fourth Quarter edition](#) of this Quarterly Report (on pages 37-38), the European Council, Parliament and Commission reached a consensus in Capital Markets Recovery Package (CMRP) trilogue on amendments to MiFID, including to the scope of the product governance regime. The Council published a [Confirmation of the Final Compromise Text](#) on 15 December 2020.

The trilogue process reconciled the Council's [19 October common position](#) and the Parliament's [25 November amendments](#), as well as the Commission's initial [27 July proposal](#). The amendments to the scope of MiFID's product governance regime are set out in Article 1(2)(b) (inserting a new make-whole clause definition into MiFID Article 4(1)) and in Article 1(3) (inserting a new Article 16a into MiFID), and also commented in Recital 4. (Article 2a also provides for a review of product governance by 31 July 2021.)

These amendments exclude from the scope of the product governance regime (technically the exclusion is from the requirements of MiFID Articles 16(3)#2-#5 and 24(2)) both:

- bonds (not just "corporate" bonds) with no other embedded derivative than a make-whole clause (as defined); and
- financial instruments marketed or distributed exclusively to eligible counterparties.

The exclusion is narrower than some of ICMA's previous exclusion suggestions:

- instruments that would be non-complex but for the inclusion of terms that do not adversely affect the expected return (see the [2020 Fourth Quarter edition](#) of this Quarterly Report on page 37) or even all bonds (see the [2020 Third Quarter edition](#) of this Quarterly Report on page 37);
- professional investors, including under the existing technical categories such as denominations of €100,000 or more, etc (see the [2020 Third Quarter edition](#) of this Quarterly Report on page 38).

The exclusion is nonetheless significant (as well as being wider than the Commission's original proposal to exclude just corporate bonds having a make-whole clause), though industry will still need to digest the final drafting in terms of working out the full implications. In any case, however, the exclusion's impact as an alleviation will be limited in the absence of the scope of the PRIIPs regime being similarly narrowed.

The Parliament and the Council will now be called upon to adopt the amendments formally without further discussion, possibly in February 2021 (after the usual legal-linguistic revision of the text). EU Member States would be required to implement the relevant amendments into national law (MiFID being a Directive and not a Regulation) within nine months from their entry into force (on the 20th day following Official Journal publication).