23 September 2021

ICMA RESPONSE TO UK HM TREASURY CONSULTATION ON THE UK PROSPECTUS REGULATION[1]

Key points

- ICMA members' overarching concern is to ensure that the currently well-functioning and efficient pan-European primary wholesale bond market is not disrupted or subjected to unnecessary additional or disproportionate costs. HM Treasury's proposed approach does not give rise to these concerns immediately, although much will depend on the precise approach taken with respect to exemptions from the public offer regime and the approach taken in relation to "wholesale" disclosure for bonds admitted to trading on UK markets.

- Importantly, bond issuers will wish to continue to issue wholesale bonds on a pan-European basis with minimal (or no) additional burdens. As such, it is important that HM Treasury and the FCA consider how any changes to the UK prospectus regime are likely to impact upon issuers that currently rely either on exemptions under the EU Prospectus Regulation or exemptions under the UK Prospectus Regulation. In the bond market, the most heavily used exemption under both the EU and UK Prospectus Regulations is currently the €100,000 minimum denomination exemption. The implications of re-stating the UK threshold in sterling for pan-European bond offerings will therefore require careful consideration.

- It will also be important that issuers seeking admission to trading on the London Stock Exchange can continue to prepare "wholesale" disclosure where relevant. We look forward to engaging with the FCA on the wholesale disclosure regime and, in particular, the current approach of allowing wholesale disclosure where bonds have a minimum denomination of €100,000. This is an important issue for bond market participants.

- We also look forward to engaging further with HM Treasury and with the FCA on other improvements that could be made to the current regime that would make it work even more efficiently for international bond markets. These include refinements to the "necessary information" test, the definition of "public offer", the rules relating to supplements and withdrawal rights; as well as an ability to incorporate by reference "future" financial information.

Overall approach

Question 1: Do you agree with our overall approach to reforming the UK prospectus regime?

1. ICMA members' overarching concern is to ensure that the currently well-functioning and efficient pan-European primary wholesale bond market is not disrupted or subjected to unnecessary additional or disproportionate costs.

[1] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/999771/Consultation_on_the_UK_prospectus_regime.pdf

2. Currently, issuers incorporated in the UK, the EEA or elsewhere in the world are easily able to offer wholesale bonds to investors established both in the UK and in the EEA without requiring two different prospectuses (both a prospectus approved by the FCA under the UK Prospectus Regulation and a prospectus approved by an EEA competent authority under the EU Prospectus Regulation). This is because issuers can rely on public offer exemptions contained within either or both the UK Prospectus Regulation and the EU Prospectus Regulation, which broadly mirror each other. By way of example, the following structures are common:

- An issuer incorporated in Australia has a base prospectus for an MTN programme approved by the FCA under the UK Prospectus Regulation (allowing notes issued under the programme to be admitted to trading on the Main Market of the London Stock Exchange, a UK regulated market). The issuer wants to offer a series of bonds under the programme to investors located in both the EEA and the UK. It can offer bonds to investors in the UK relying on its UK prospectus[2] or exemptions under the UK Prospectus Regulation and it can offer bonds to investors in the EEA relying on exemptions under the EU Prospectus Regulation. In both cases, it will typically rely on the high denomination exemption in Article 1(4)(c).

- An issuer incorporated in Italy has a prospectus approved by the Central Bank of Ireland under the EU Prospectus Regulation, for a standalone admission of bonds to trading on Euronext Dublin (an EEA regulated market). The issuer wants to offer the bonds to investors located in both the EEA and the UK. It can offer bonds to investors in the EEA relying on its EEA prospectus[3] or exemptions under the EEA Prospectus Regulation and it can offer bonds to investors in the UK relying on exemptions under the UK Prospectus Regulation. In both cases, it will typically rely on the high denomination exemption in Article 1(4)(c).

- An issuer incorporated in the US has an admission particulars reviewed by the London Stock Exchange under the rules of the International Securities Market (ISM) for a standalone admission of bonds to the ISM (a UK MTF). The issuer wants to offer the bonds to investors located in both the EEA and the UK. It can offer bonds to investors in the EEA relying on exemptions under the EU Prospectus Regulation and it can offer bonds to investors in the UK relying on exemptions under the UK Prospectus Regulation. In both cases, it will typically rely on the high denomination exemption in Article 1(4)(c).

3. Importantly, bond issuers will wish to continue to issue wholesale bonds on a pan-European basis with minimal (or no) additional burdens. As such, it is important that HM Treasury and the FCA consider how any changes to the UK prospectus regime are likely to impact upon issuers that currently rely either on exemptions under the EU Prospectus Regulation or exemptions under the UK Prospectus Regulation. For example, it would be unfortunate if the UK public offer exemptions for bonds were narrowed such that issuers could no longer easily make a public offer of bonds on an exempt basis across both the EU and UK as they do now. See further our response to Question 13 below.

4. Separately, it would also be unfortunate if issuers seeking admission to trading on the London Stock Exchange became subject to UK retail-style disclosure requirements in circumstances

[2] In particular, the issuer would be able to make non-exempt or "public" offers of bonds to UK investors if the FCA-approved base prospectus is a "retail" base prospectus.

[3] In particular, the issuer would be able to make a non-exempt offer of bonds to EEA investors if the EEA approved prospectus is a "retail" prospectus and has been approved in or passported to the jurisdictions in which the EEA investors are located.

where that would not have been required under the current UK Prospectus Regulation (and where retail-style disclosure is not required under the EU Prospectus Regulation).[4]

5. HM Treasury's proposed approach does not give rise to these concerns immediately, although much will depend on the precise approach taken with respect to exemptions from the public offer regime and the approach taken in relation to "wholesale" disclosure for bonds admitted to trading on UK markets. One way to preserve the smooth functioning of the pan-European wholesale market for new bond issues would be to continue to align the exemptions and thresholds for (lighter) wholesale disclosure[5] ("wholesale disclosure thresholds") in the two prospectus regimes. An alternative way would be to ensure that the UK public offer exemptions are wider than the EU public offer exemptions and the UK wholesale disclosure thresholds are lower than EU wholesale disclosure thresholds. This would give issuers the choice of issuing debt that is exempt from, or qualifies for wholesale disclosure under, both the EU and UK regimes; or issuing debt that is subject to the EU regime and/or retail disclosure under the EU regime but exempt from, or qualifies for wholesale disclosure under, the UK regime.

6. As a general matter, we agree that a more agile regime in the UK is likely to be beneficial and we agree that it is sensible for the FCA to have the power over much of the detail of the regime given the FCA's significant knowledge and expertise in this area. It will be important that the FCA continues to be resourced appropriately and consults the market in relation to any changes it is planning to introduce (not only in relation to the initial changes that may be required following this consultation but also going forward more generally). We look forward to engaging with the FCA in due course, in particular on the wholesale disclosure requirements to be included in the FCA Handbook, and with HM Treasury and the FCA more generally in terms of how these proposals would impact the bond market. As indicated elsewhere in this response, in some cases it is unclear exactly how the proposals would apply to the bond market and in particular how they would apply to debt programmes.

Question 2: Do you agree with the key objectives that we are seeking to achieve?

7. We broadly agree with the four objectives set out in paragraph 2.6 of the consultation paper.

8. We note that Objective 1 to remove the disincentives that currently exist for companies to issue securities to wider groups of investors could potentially be relevant to the development of a UK retail bond market. We discussed this in our response to the UK Listing Review (see *Development of a suitable regulatory framework for a UK retail bond market*, page 7 – 8) and will also discuss this in our response to Questions 103 – 105 of HM Treasury's Wholesale Markets Review (due 24 September 2021).

9. We support Objective 2 on simplifying regulation and removing the duplications that currently exist and Objective 4 on making regulation in this area more agile and dynamic provided that there is appropriate consultation in advance of any changes.

10. In relation to Objective 3 on improving the quality of information investors receive, we think it is important that UK authorities bear in mind that different categories of investors (e.g. retail vs

[4] We anticipate, based on the answer to Q15 contained within the FCA's response to the European Commission's Consultation on the Review of the Prospectus Directive in 2015, that this is not an approach that the FCA would favour.

[5] This includes applying the "wholesale" annexes in the EU and UK Prospectus Regulation Delegated Regulation (to the extent retained in the UK regime) and not preparing a summary for issues of "wholesale" only debt securities.

professional) in different types of products (e.g. equity securities vs retail debt securities vs wholesale debt securities) may have different needs, and disclosure should be considered in the context of the overall securities markets regulatory framework and the various tools available to policy makers and regulators. See further our response to Question 6.

<u>The new FCA powers on admissions to regulated markets</u>

Question 3: Do you have any views on the underlying purpose of a prospectus when seeking admission to a regulated market?

11. As a general matter, it is difficult to comment on the proposed statement of purpose without knowing exactly how the statement will be used. For example, the statement of purpose makes reference to some elements of the general prospectus disclosure test, but not all of them (in particular materiality is omitted). To the extent that the statement of purpose is intended to inform the interpretation of the "necessary information" test for prospectuses related to admission to a regulated market, we think this would be problematic. In particular, we note that the statement of purpose could be interpreted as implying a more subjective disclosure standard (i.e. relating to an individual potential investor's needs) than the current "necessary information" test set out in Article 6 of the UK Prospectus Regulation that is interpreted as an objective test (i.e. relating to a reasonable investor). An objective disclosure standard is very important and any departure from that would be very problematic from the perspective of issuers and underwriters.

12. We also note that the statement of purpose works for potential investors in the primary market, but not potential investors in the secondary market (because the prospectus will not be updated throughout the life of the security). As mentioned by HM Treasury in paragraph 3.14 of the consultation paper, investors in the secondary market will be informed by issuers' ongoing disclosure.

13. We query whether the reference to the "public" is strictly necessary and whether it risks causing confusion between the proposed separate admission to trading and public offer regimes. We wonder if it is sufficient to refer simply to "available free of charge" in order to avoid any possible confusion.

Question 4: Do you agree the FCA should have discretion to set rules on when a further issue prospectus is required?

14. We agree that the FCA should have discretion to establish rules or exemptions equivalent to the current Article 1(5) or to extend them. Debt issuers currently make use of the existing exemptions under Article 1(5), including Article 1(5)(a) and Article 1(5)(b) (which is relevant for convertible and exchangeable bonds). It will be important that these existing exemptions continue to be available and work appropriately for debt securities.

Question 5: Do you agree the Government should grant the FCA sufficient discretion to be able to recognise prospectuses prepared in accordance with overseas regulation in connection with a secondary listing in the UK?

15. We agree that the FCA should be granted this discretion. Whilst most bonds will have a single listing, it may be helpful for some issuers to have the option to have a secondary listing in the UK if they wish to do so.

16. It is important that this recognition should extend to issuers incorporated anywhere in the world including the UK (and not just to issuers incorporated in the jurisdiction of the primary listing).

17. This recognition will be more helpful if it can be used in an efficient way (for example, via a notification from the issuer to the FCA, rather than an approval process by the FCA or a process requiring the production of a summary document). The current exemption under Article 1(5)(j) of the UK Prospectus Regulation is of some limited help, but an alternative system would be preferable. In particular, the contents requirements of a summary document under Article 1(5)(j), which reflect exactly the contents requirements of a summary under Article 7, are problematic. For example, they appear to relate to the initial offer/admission of the securities (which may have occurred in the distant past) rather than a secondary listing of the securities on a UK regulated market. They also appear to require an issuer to include information relating to a public offer (for example, the conditions and timeline for an investment) which could be confusing or misleading as a public offer is not taking place. They also require a wholesale debt issuer to include key financial information which is not generally a requirement for prospectuses for wholesale debt.

18. In terms of which overseas regulations benefit from this, there is general support among ICMA members for the outcomes-based approach described in HM Treasury's Guidance Document for the UK's Equivalence Framework for Financial Services. We also believe the FCA would need to consider different markets within jurisdictions individually. For example, rules and standards for admission to trading on an overseas regulated market may be very different to the rules and standards for admission to trading on an overseas MTF, even within the same jurisdiction.

19. We look forward to discussing how this regime could work most effectively with the FCA, in particular for bonds issued under programmes. As mentioned in paragraph 15 above, secondary listings are not common for bonds. However, an issuer may have a base prospectus approved by, e.g., an EU competent authority for admission to an EU regulated market, but want to list one tranche of debt securities under that programme on the London Stock Exchange's main market. This would not be a secondary listing as described in the consultation paper, but it would be interesting to understand how this would be treated. If the FCA is given discretion to recognise prospectuses prepared in accordance with overseas regulation in connection with a secondary listing, it should presumably be possible for them also to recognise overseas base prospectuses in the context of a primary listing of a new tranche of debt securities under a programme. We note that there is a separate deference mechanism proposed for public offers by overseas companies.

Prospectus content and ancillary provisions

Question 6: Do you agree with our approach to the 'necessary information test'?

20. We agree that it is sensible to retain in statute an overall standard of preparation for a prospectus and to base it on the existing necessary information test. From the perspective of the bond market, there are two key related points:

    a. It would be helpful if the drafting of the necessary information test were to make it clearer that the information that is required in the context of debt securities is information related to an issuer's credit.

    b. We agree that limb (d) relating to the €100,000 minimum denomination threshold can be removed from the statutory necessary information test if this does not alter the current interpretation of the test on the basis that limb (b) relating to the "type of securities" already indicates that the necessary information may vary depending on whether the securities are wholesale debt securities, retail debt securities or another type of security, as alluded to in paragraph 4.11 of the consultation paper. However, to the extent that the FCA intends to amend the existing disclosure requirements for different types of securities in the FCA Handbook, it will then be very important that the FCA considers carefully and consults the market on how best to implement a disclosure regime that does not introduce unnecessary or disproportionate costs for issuers of wholesale bonds.

    We discuss these two points further below.

21. In addition, we note that the separate standard for further issues set out in Article 14 of the UK Prospectus Regulation (that HM Treasury is minded not to take forward in the new regime) is rarely used from a bond market perspective. This is likely due to the requirement for a concise summary of the relevant information disclosed under MAR over the past 12 months and the fact that the regime is not perceived as granting any significant alleviation for issuers of debt securities. Such issuers are also familiar and comfortable with the "standard" disclosure regime.

Refining the necessary information test to focus on credit

22. ICMA has previously noted that, in the context of a prospectus for a new issue of bonds, the necessary information test should be interpreted as requiring information related to the issuer's credit (i.e. its ability to repay its indebtedness and pay any interest)[6].

23. The FCA acknowledged that information related to an issuer's credit was the relevant test for the information be included in a bond prospectus in its response to the European Commission on the Review of the Prospectus Directive in 2015.[7] More recently, in its Primary Market Technical Note

[6] See pages 52 – 53 of ICMA's response to the European Commission's consultation on the Review of the Prospectus Directive, May 2015 and paragraphs 13 – 17 of ICMA's response to the UK Listing Review, December 2020.

[7] See page 13 of the FCA response to European Commission Consultation on the Review of the Prospectus Directive, May 2015: "For example the necessary information in a bond deal would be that information that would enable an investor to assess the ability of the issuer to repay its indebtedness."

on Disclosures in relation to ESG matters, including climate change[8], the FCA indicated alignment with this interpretation by noting that climate-related risks and opportunities may need to be disclosed if they are "financially material" and highlighted in its prior consultation paper[9] that International Accounting Standard (IAS) 1 clarifies that "items are material if they could individually or collectively influence the economic decisions that users make on the basis of financial statements.".

24. The interpretation of Article 6 as requiring information relating to the issuer's credit in a bond context is important because it provides a clear, objective test for the information that issuers need to include in their prospectus, which helps issuers to produce prospectuses that are easier to read and understand for investors and contain only the information that investors actually need.

25. While bond market participants generally interpret the necessary information test in the UK and EU Prospectus Regulations in this way, the drafting could be made clearer. As a consequential change, the Annexes to the UK Prospectus Regulation Delegated Regulation (to the extent they are retained by the FCA) would need to be revised, either by deleting the extraneous requirements or preferably by including a general provision stating that the disclosure items in the Annexes are needed only to the extent they are necessary to meet the necessary information test.

€100,000 minimum denomination threshold for wholesale disclosure and summary exemption

26. Currently, debt securities with a minimum denomination of €100,000 or more qualify for lighter ("wholesale") disclosure standards and benefit from an exemption to prepare a prospectus summary. We note that the FCA and others have previously argued that this €100,000 denomination threshold potentially distorts debt capital markets and should be reviewed.

27. For bond issuers, the €100,000 minimum denomination threshold is practical and easy to apply, and many find it attractive for that reason. It also aligns with the exemptions in Article 1(4)(c) of the EU Prospectus Regulation and Article 1(4)(c) of the UK Prospectus Regulation, which are widely used for pan-European wholesale debt offerings, as discussed in paragraph 2. Following the introduction of the EU PRIIPs Regulation and the MiFID II product governance regime in 2018, many issuers also regard a high minimum denomination as a useful tool (used in conjunction with other practices) to ensure that their bonds are not distributed to retail investors. Indeed, the open FCA CP21/23 on the UK PRIIPs regime proposes that a financial instrument is not "made available" to a retail investor if it is only offered and marketed to professionals and ECPs and has a minimum denomination of £100,000 or equivalent[10].

28. However, some institutional investors have commented previously[11] that the €100,000 minimum denomination threshold can give rise to practical difficulties in allocating bonds across portfolios. This concern seemed to be related primarily to bonds governed by certain EU laws (e.g. French

[8] FCA Primary Market Technical Note 801.1: Disclosures in relation to ESG matters, including climate change, December 2020

[9] FCA CP 20/3: Proposals to enhance climate-related disclosures by listed issuers and clarification of existing disclosure obligations, March 2020

[10] ICMA is responding separately to FCA CP 21/23 on the UK PRIIPs regime. We note that the introduction of a requirement for a minimum denomination of £100,000 for an exemption under the UK PRIIPs Regulation would seem to be inconsistent with any removal of denomination-related disclosure alleviations under the UK Prospectus Regulation.

[11] Notably in the context of the review of the EU Prospectus Directive in 2015.

law, German law) that cannot have a minimum denomination of €100,000 and integral multiples of €1,000 in excess thereof up to and including €199,000 (sometimes described as "€100k+€1k") and so can only be traded in multiples of €100,000.

29. There were also some suggestions that the €100,000 minimum denomination threshold hampers secondary market liquidity. It is not clear whether this concern is valid, noting that the ESMA EU Securities Markets 2020 Annual Statistical Report states that the average trade size for corporate bonds in 2019 was €2.5m[12] and we are not aware that trade sizes in the UK market are significantly different.

30. Another concern with the €100,000 minimum denomination threshold is that it hinders retail investors' access to bonds. We consider this to be a valid point. ICMA outlined considerations related to the development of a suitable regulatory framework for a UK retail bond market in its response to the UK Listing Review and will also discuss this in our response to Questions 103 – 105 of HM Treasury's Wholesale Markets Review (due 24 September 2021). An important point to note is that any steps taken to develop a UK retail bond market would need to be approached in a way that does not impact upon the current smooth functioning of the pan-European wholesale bond market, as discussed further below.

31. Noting the various drivers for bond issuers to use a high minimum denomination and the fact that the EU Prospectus Regulation continues to include a €100,000 minimum denomination threshold for wholesale disclosure and the prospectus summary exemption, the FCA will need to consider carefully and consult upon any changes to the current approach under the UK Prospectus Regulation on this point. If the €100,000 minimum denomination threshold were to be removed, there are likely to be significant concerns if this results in retail disclosure standards and a requirement for a prospectus summary being applied across the board, including for bonds aimed at wholesale investors only[13].

32. If the FCA is minded to remove the threshold, we believe that one of the following options would be more appropriate:

    a. applying a wholesale disclosure regime to all bonds and utilising other more appropriate regulatory tools (such as financial intermediation (e.g. financial advice) and possibly schemes similar to the FSCS deposit protection scheme) to protect UK retail investors; or

    b. continuing to apply a differentiated wholesale disclosure regime and exemption from the prospectus summary requirement (to the extent it is retained) for bonds aimed at wholesale investors based on a "qualified investor only" regime. This latter option was introduced alongside the €100,000 minimum denomination regime in the EU Prospectus Regulation and took effect in 2019. We understand there has been limited take-up of this "qualified investor only" option given the continued availability of the €100,000 minimum denomination exemption and the additional drivers for using that (see paragraph 27 above).

[12] See *Executive Summary*, page 5

[13] We anticipate, based on the answer to Q15 contained within the FCA's response to the European Commission's Consultation on the Review of the Prospectus Directive in 2015, that this is not an approach that the FCA would favour.

33. We look forward to engaging with the FCA on this important topic for the bond market in due course.

Question 7: Do you agree the FCA should have discretion to set out rules on the review and approval of prospectuses?

34. We agree that the FCA should have discretion in this area.

35. We also agree with the statement in paragraph 4.21 of the consultation paper that approval of prospectuses prior to publication is important. In relation to the separate but related question in paragraph 4.22 of the consultation paper regarding whether the FCA should review the prospectus prior to approval and publication, we consider that the review of prospectuses by a relevant body before admission to trading (or a public offer) takes place is important. It benefits issuers and investors alike by providing certainty.

Question 8: Do you have any comments on what ancillary powers the FCA will need in order to ensure admissions of securities to Regulated Markets function smoothly? (See list of potential powers in Annex A.)

36. We have three specific comments on the list of ancillary powers set out in Annex A and more general comments related to prospectus content and supplements.

Comments on proposed ancillary powers

37. First, we think that the FCA may also require powers related to setting the length of validity of prospectuses (currently contained in Article 12 of the UK Prospectus Regulation).

38. Second, we do not believe the FCA would need powers in relation to withdrawal rights in the context of prospectuses related to admission to trading only. This follows the existing market interpretation and ESMA's statement that withdrawal rights do not apply in this context[14]. To the extent that the current statutory provisions relating to supplements are retained (which we assume would be relevant for the public offer regime but not the admission to trading regime), we think it will be important that they are clarified such that it is clear that withdrawal rights do not arise in the case of an exempt public offer where the prospectus relates to admission to trading only.

39. Third, in relation to FCA powers relating to publication arrangements, some ICMA members have noted that the requirement for issuers to publish prospectuses seems unnecessary given that the FCA itself publishes prospectuses and they are available via the National Storage Mechanism. However, we are also aware that investors value highly ease of access to information. As a related matter, the current requirement for prospectuses to remain publicly available for at least 10 years (current Article 21(7)) seems rather arbitrary (given bonds will have a range of maturities, many of which will be shorter than 10 years) and does not acknowledge that prospectuses are not updated throughout the life of the security. A more sensible approach might be to require bond prospectuses to be publicly available for the term of the security and to acknowledge that prospectuses are not updated after admission to trading and investors should look to disclosures made under continuing obligation requirements for up-to-date information.

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[14] See paragraphs 238 and 268 of ESMA's Final Report on Draft Regulatory Technical Standards under the EU Prospectus Regulation.

Comments on prospectus content and supplement requirements

40. As a more general matter, we think there are a number of changes that could be made to the current rules relating to prospectus content and supplements that could be improved. These will be for the FCA to consider in due course, but could potentially also be relevant for the provisions that will be retained in statute.

41. *Facilitating the use of periodic disclosures for the purposes of new issue disclosure: incorporation by reference of future financial information:* As outlined in our response to the UK Listing Review, a useful (and simple) amendment would be to permit future (as well as past) financial information to be incorporated by reference into prospectuses. This approach is permitted under the London Stock Exchange's International Securities Market Rulebook[15] and in other jurisdictions such as the US[16]. In order to ensure that the information incorporated into a prospectus does not become too difficult to track, the option to incorporate by reference future financial information should not be "open-ended" and should not replace the need for a base prospectus to be updated annually. It could, though, be used to limit the need for base prospectuses to be supplemented during the year, thus avoiding additional costs for issuers.

42. *Supplements to a base prospectus:* Also as outlined in our response to the UK Listing Review, it would be helpful if the UK prospectus regime were to be clarified to:

    a. allow supplements to be used to include additional, or amend existing, securities note information in a base prospectus (e.g. to add provisions allowing an issuer to issue green, social, sustainability or sustainability-linked bonds, a change of control provision or provisions related to index-linked securities to a base prospectus that did not previously include these provisions); and

    b. allow issuers to prepare a supplement to include additional information, voluntarily, which is not "significant" within Article 23 of the UK Prospectus Regulation. This might include information which is not "significant" but may, nevertheless, either be deemed to be important for investors (such as securities codes or ambiguities in certain terms) or simply be revisions which may not be "significant" or "material" but which an issuer may wish to make.

Forward looking information

Question 9: Do you agree with our proposed change to the prospectus liability regime for forward looking information?

43. This change is likely to be relevant primarily for issuers of equity securities but may also be helpful for issuers of debt securities in certain cases. We agree with the proposed change.

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[15] See Section 2, item 2, in the London Stock Exchange International Securities Market Rulebook.

[16] In the United States, the phrase used to describe incorporation by reference of future information is "forward incorporation by reference". This is governed by Rule 411 under the Securities Act of 1933, as amended and Rule 12b-23 under the Securities Exchange Act of 1934, as amended.

44. We note that, where securities are distributed cross-border, issuers will also take into consideration the potential liability that could arise in other jurisdictions as well as the UK. However, we do not consider this to be a reason for the UK not to pursue its proposed approach.

Question 10: Do you think that our proposed changes strike the right balance between ensuring that investors have the best possible information, and investor protection?

45. As noted above, this change is likely to be relevant primarily for issuers of equity securities. However, it seems likely to strike the right balance between ensuring that investors have the best possible information and investor protection.

<u>Junior markets</u>

Question 11: Which option for addressing companies admitted to MTFs do you favour and why?

46. The primary focus of the proposals for MTFs appears to be equity securities as the two UK MTFs for debt securities, namely the London Stock Exchanges' International Securities Market (**ISM**) and the London Stock Exchange's Professional Securities Market (**PSM**), are not mentioned. In particular, the different regimes[17] that apply to these two markets currently are not discussed. We nevertheless understand that the two broad options that HM Treasury outlines would apply to these markets.

47. We have no strong view on whether Option 1 (simple exemption from s85(1)) or Option 2 (exemption from s85(1) plus a new MTF admission prospectus) is pursued, but we note the importance of retaining the flexibility that is currently afforded to issuers admitting securities to the ISM in particular and ensuring that Option 2 would not imply any additional burdens for issuers seeking admission to trading on the ISM. HM Treasury appears to envisage this in paragraph 6.15 of the consultation paper.

<u>The scope of the UK's public offering rules</u>

General comments

48. We broadly agree with HM Treasury's proposal to exempt companies that are admitted to trading on stock markets of various types from controls on the public offerings of securities, as noted in paragraphs 2.15 and 7.1 of the consultation paper. ICMA has previously highlighted that there should not be a requirement to produce a prospectus for secondary market offers of securities listed on a regulated market or an exchange-regulated market (reflecting the position in practice related to secondary market activity via screen-based trading in securities)[18].

[17] Notably that FCA approved listing particulars (the content requirements for which are aligned with the content requirements for prospectuses) are required for admission to the PSM but not for the ISM. For an admission to the ISM, admission particulars reviewed by the London Stock Exchange are required and the content requirements for these are significantly more flexible than the content requirements for prospectuses. This means that for issuers of debt securities that choose a UK MTF, the ISM is preferred over the PSM.

[18] See pages 63 - 64 of ICMA's response to the European Commission's consultation on the Review of the Prospectus Directive, May 2015 and ICMA's response to the UK Listing Review, December 2020.

49. It would be helpful to explore how the proposed exemption will apply in the context of non-UK stock markets, which we discuss further below in response to Questions 16 and 17.

50. A related point to note is that the current definition of "public offer" is broad enough to capture communications that are not contractual. By its nature, a prospectus is a lengthy and detailed document which is suitable for the time that an offer of securities is being made by or for an issuer to a person who might accept that offer and form a contract in respect of those securities. If the public offer definition was restricted to communications that are capable of forming a contract, announcements at an earlier stage would still be regulated because the advertisement and financial promotion regimes would be applicable to them. COBS also contains investor protection provisions requiring all information, including marketing communications, addressed by an investment firm to clients or potential clients to be fair, clear and not misleading. Requiring an approved prospectus to be published in relation to pre-contractual communication is therefore unnecessary. The regime in place in the UK prior to the implementation of the EU Prospectus Directive did not have this issue. For example, under the UK Public Offers of Securities Regulations 1995 (SI 1995/1537), a person was regarded as offering securities if, as principal "(a) he makes an offer which, if accepted, would give rise to a contract for the issue or sale of the securities by him or by another person with whom he has made arrangements for the issue or sale of the securities; or (b) he invites a person to make such an offer"; but not otherwise.

51. We agree that HM Treasury should be given the power to vary the exemptions to the public offer rules by means of secondary legislation, as outlined in paragraph 7.17 of the consultation paper. We anticipate that any variation of the exemptions in secondary legislation would be preceded by a market consultation.

52. As a final general comment, we anticipate that HM Treasury will wish to consider streamlining the public offer regime into one statute to avoid the complexity and potential for inconsistency that arises as a result of the provisions currently being spread across FSMA and the onshored UK Prospectus Regulation. Among other things, this would deduplicate the cornerstone obligations of the prospectus regime that are currently set out in both FSMA and the UK Prospectus Regulation. An example of the potential for complexity and inconsistency of the current approach is the EUR 8 million public offer exemption referenced in the consultation paper as stemming from Article 3(2)(b) of the Prospectus Regulation. Whilst section 86 of FSMA currently sets this threshold at EUR 8 million, the exclusion in Article 1(3) has been retained and may therefore cause confusion as it sets the threshold at EUR 1 million over a 12-month rolling period.

[*Note: The question numbers in the body of the consultation paper do not match the question numbers set out in the annex to the consultation paper from this point onwards. The following ICMA responses use the numbers set out in the annex to the consultation paper.*]

Question 12: Do you agree there should be a new exemption from the public offer rules for offers directed at existing holders of a company's securities?

53. We have no objection to the proposed new exemption although suspect that it is likely to be relevant primarily for equity issuers. We assume that this is not aimed at the issue of securities resulting from the conversion or exchange of other securities as this is not mentioned in the consultation paper.

Question 13: Do you agree we should retain the 150 person threshold for public offers of securities and the 'qualified investors' exemption? Do you have any comments on whether they operate effectively?

54. *150 person exemption:* This exemption is not used heavily in the bond market, but is nevertheless considered to be useful and may be used in conjunction with other exemptions. We therefore agree that this exemption should be retained.

55. *"Qualified investors" exemption:* This exemption needs to be retained. It is used heavily in the context of US unlisted private placements issued pursuant to the US Securities Act Section 4(a)(2) exemption. Securities in these transactions are typically unlisted, have low denominations and are distributed predominantly to US Institutional Accredited Investors. There may also be some European distribution and market participants will typically rely on the qualified investor exemption for this.

56. Outside of the scenario described above, this exemption is used less frequently in the bond market than the €100,000 minimum denomination exemption. This is because the €100,000 minimum denomination exemption has traditionally been perceived as being more straight-forward to operate in practice than the qualified investor exemption because it relies on a hard-wired feature of the bond as opposed to the behaviour of distributors in categorising investor clients and ensuring that only qualified investors are targeted.

57. *€100,000 minimum denomination exemption:* We understand that HM Treasury does not intend to remove this exemption but intends to re-state it in sterling.

58. We welcome the retention of this exemption as it is perceived by bond issuers to be the most practicable exemption to operate and it is relied upon heavily in practice at the moment the most frequently used exemption in the bond market. Retaining it will also help to facilitate bond issuers' ability to structure an exempt offering on a pan-European basis (including where bonds are unlisted or not listed on a UK exchange).

59. To the extent that the €100,000 minimum denomination exemption is retained but re-stated in sterling as envisaged in paragraph 7.18 of the consultation paper, we suggest that consideration be given to how this will interact with the equivalent exemption under the EU Prospectus Regulation. Prevailing exchange rates mean that a bond with a €100,000 or $100,000 minimum denomination would fall short of any UK exemption for bonds with a minimum denomination of £100,000. Consequently, issuers of wholesale euro denominated bonds would likely issue those bonds with a minimum denomination of €200,000 in order to benefit from both the €100,000 public offer exemption under the EU prospectus regime and a £100,000 public offer exemption under the UK prospectus regime. (Currently, issuers of wholesale US dollar denominated bonds will typically issue those bonds with a minimum denomination of $200,000 in order to benefit from the public offer exemptions and disclosure alleviations under both the EU and UK prospectus regimes that are based on a €100,000 minimum denomination.)

60. Assuming that it is not palatable to retain euro denominated thresholds in UK legislation, the most straightforward way to handle this would be to reduce the threshold under the UK regime to £50,000 or equivalent in alternative currencies such that a bond with a minimum denomination of €100,000 or $100,000 would qualify for the UK public offer exemption.

61. A £50,000 minimum denomination exemption would still seem high enough to demarcate an issue as "wholesale" rather than "retail" and may be perceived by institutional investors to be more attractive in terms of their ability to allocate bonds across their different portfolios. To the extent that this option were to be pursued, then it would be sensible for any minimum denomination threshold introduced for the purposes of the UK PRIIPs regime to align with it[19].

62. Another option might be to set different thresholds for issuances in certain key non-sterling currencies alongside the sterling threshold (e.g. €100,000 and $100,000), which could be varied from time to time by HM Treasury in secondary legislation as envisaged in paragraph 7.16 of the consultation paper. However, this would be a more complicated option than setting the threshold at £50,000 or equivalent in alternative currencies.

Question 14: Does the exemption for employees, former employees, directors and ex-directors work effectively?

63. We are not aware of this exemption being used in the bond market and so express no view on this question.

Public offerings by private companies

Question 15: Which option for accommodating the right of private companies to offer securities to the public do you favour?

64. This is not an area of focus for ICMA members and so we express no view on this question.

Public offers by overseas companies

Question 16: Which of the options above do you prefer? (Please state reasons)

65. We understand the proposals in Chapter 9 of the consultation paper would apply to issuers of securities admitted to overseas exchanges, regardless of whether they are incorporated in the UK or overseas. We agree that it would be sensible for any proposals for issuers with securities admitted to overseas markets apply equally regardless of whether they are incorporated in the UK or overseas.

66. Of the three options outlined in the consultation paper, we are minded to support Option 2 (a new deference mechanism) on the basis that it could facilitate offers of bonds that are listed on non-UK regulated markets and non-UK MTFs to UK investors. This said, many such offers of bonds may already benefit from one of the public offer exemptions that HM Treasury proposes to retain such as the qualified investor or high minimum denomination exemptions.

[19] As noted above, the FCA proposes in FCA CP 21/23 on the UK PRIIPs regime that one of the requirements for an exemption from the scope of the UK PRIIPs regime is that debt securities have a minimum denomination of £100,000. ICMA is responding to that consultation.

Question 17: Do you have any further thoughts or considerations over how a new deference mechanism (Option 2) should operate?

67. We broadly agree with HM Treasury’s initial views set out in paragraphs 9.16 – 9.18 of the consultation paper, namely that a deference mechanism should consist of: a jurisdictional assessment considering the adequacy of the relevant regulation, rules, process and systems and arrangements for cooperation; notification to the FCA; and equal access to information for UK investors.

68. Please also see our response to Question 5 in relation to the recognition of overseas prospectuses for admission purposes, in particular our suggestion that the UK authorities would need to consider different markets within jurisdictions individually. For example, rules and standards for admission to trading on an overseas regulated market may be very different to the rules and standards for admission to trading on an overseas MTF, even within the same jurisdiction.