


MiFID II & PRIIPs – Debt primary market aspects

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ICMA background

International Capital Market Association (ICMA) formed in 1969

- Representing a broad range of capital market interests including banks, asset managers, exchanges, central banks, law firms and other professional advisers, ICMA's market conventions and standards have been the pillars of the international debt market for almost 50 years
- Circa 400 full members and 130 associate members – across 60-odd countries
- About 40 staff across Zurich (seat), London, Paris and Hong Kong

Operations

- Development / maintenance of high standards of **market practice** (inc. documentation)
- Fostering appropriate levels of **regulation** and assisting market understanding
- Educating market participants and others through formal **training and research** – ICMA Centre, University of Reading
- Facilitating **communication** (inc. between functions: business, legal, compliance) and establishing information forums and other events
- **ICMA Market Practice & Regulatory Policy department:** a dozen or so staff in London; three each in Hong Kong and Paris
- **Constituencies:** issuers (PSIF, FIIF, CIF), lead-managers (LDC, PMPC), investors (AMIC), cash/repo traders (SMPC, ERC)...

ICMA primary market dynamics

- **Lead-manager 'core' constituency** – Syndicate heads (Primary Market Practices Committee) and related (WC, Asia, Nordic, Swiss); TMG/legal/docs (Legal & Documentation Committee) and related (WC, Asia); Compliance (PDCM Compliance WG); Prospectus Regulation WG; ECP Documentation WG; Securitisation Discussion Forum; Ad-hoc topic-specific working groups. Mainly **vanilla public wholesale**, but also extending to the structured, private and retail spaces.
- **Topics** – Anything of interest to the above: Conduct (MiFID2, MAR); disclosure (PRIIPs, prospectus rules); benchmarks and LIBOR; BRRD Article 55 and contractual stays; Italy Article 129 reporting; general (CMU, FEMR/FMSB, FCA competition); ICSD processes...
- **Activities** – Group deliberations; third party liaison (authorities, other market segments, press); informal papers; consultation responses / position papers; other publications (Quarterly Report, Primary Market Handbook, ad-hoc); events/conferences; training courses; legal & regulatory helpdesks.
- **Core staff** – Ruari Ewing (+44 20 7213 0316 / ruari.ewing@icmagroup.org) and Charlotte Bellamy (+44 20 7213 0340 / charlotte.bellamy@icmagroup.org)

PRIIPs recap

Base concepts

- [L1 Regulation](#), [L2 Regulation](#), [EC PRIIPs communication](#), [ESAs Q&A](#).
- Any person manufacturing a “packaged” product, before it is “made available” to retail investors in the EEA, must publish a key information document (KID) and then regularly review it, and if needed, publish a revised KID.
- Any person advising on, or selling, such a product must provide retail investors in the EEA with the KID in good time before those retail investors are bound by any contract or offer.
- No grandfathering.

Considerations

- Borrower liability risk in producing a KID in the context of high value / flow transaction bonds (let alone keeping it up to date)?
- **Not a ‘PRIIP’?** [ICMA Quarterly Report, 2016Q4](#): “[...] there currently seems to be a market consensus that basic fixed or floating rate notes are not PRIIPs and that features such as an exotic currency, a guarantee, a put or a call would not, on their own, result in such securities being characterised as PRIIPs (to the extent made available to retail investors). However, consensus in relation to other vanilla debt securities may take some time to emerge.”
- **Not a ‘PRIIP’** (not “made available”)? Significant institutional nature of cross-border markets...

MiFID II product governance recap

Base concepts (*: on a “proportionate” basis / no grandfathering)

- L1 [MiFID II](#) Arts. 16.3/24.2 (and Recital 71); L2 [MiFID II Delegated Directive 2017/593](#) Arts. 9/10 (and Recitals 15-20); and L3 [ESMA final Guidelines](#).
- MiFID II persons that “create, develop, issue and/or design financial instruments, including when advising corporate issuers on the launch of new financial instruments” are “**manufacturers**”.
- MiFID II persons that “offer or sell”, or “offer or recommend”, financial instruments are “**distributors**” (no manufacturer link required).
- *Manufacturers must (i) identify, and communicate to distributors, a compatible target market of investors, (ii) periodically review that target market and (iii) have a written agreement where they collaborate (inc. with non-MiFID / 3rd country entities).
- *Distributors must identify their own target markets (by either adopting the manufacturer target market or refining it).

Considerations

- Vanilla underwriters? Compatibility with commoditised primary issuance’s (i) speed, (ii) multi-bank syndicates, and (iii) syndicates’ temporary retainers by borrowers? [AMAFI guidelines](#) (MiFID issuer)?
- Compatibility with independent and frictionless commoditised vanilla secondary trading and liquidity?
- Manufacturer review obligation – Limited to primary? [Swedish Finansinspektionen](#) (“Någon skyldighet att regelbundet se över det finansiella instrumentet och ta emot återrapportering från distributörer finns inte i dessa fall.”) and [AMAFI guidelines](#) (“cesse d’être Producteur dans la mesure où l’offre est terminée”). More?
- Few, ‘simple’ and enduring target market definitions? Simplest in institutional context?

ICMA1:

All bonds / Professionals only

Draft paper circulated to ICMA lead-managers and some ESMA actors (standalone context).

- **PG / PRIIPs background**
- Detailed **target market rationale** – According to all five ESMA criteria, though applying criteria 2-5 (knowledge & experience, financial situation, risk profile, objectives & needs) does not further narrow the outcome of criteria 1 (client type).

“Professional client is a client who possesses the experience, knowledge and expertise to make its own investment decisions and properly assess the risks that it incurs.”

- **‘Ringfence’** options – To support reasonable expectation in terms of professionals-only ‘targeting’ / ‘making available’.
- **PRIIPs selling restriction** (no EEA retail) – Unless clearly non-packaged. Supersedes PD selling restriction.
- **PRIIPs legend** (no EEA retail) – Unless clearly non-packaged. Long, short and very short forms.
- **PG target market legend** – Long, short and very short forms.
- **Collaboration Co-manufacturer ‘agreement’** – MiFID manufacturers (MiFID responsibilities acknowledgment) vs. other primary actors (TM acknowledgment only / no other responsibilities).

Negative target market unlikely given diversification/portfolio considerations and absent regulatory intervention.

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- Detailed **target market rationale** – According to all five ESMA criteria, though applying criteria 2-5 (knowledge & experience, financial situation, risk profile, objectives & needs) does not further narrow the outcome of criteria 1 (client type).
 - Base case / simple listed bonds – Investor understanding of published information; EU rules do not restrict bond listing if compliant with transparency obligations and ‘non-complex’ bonds can be bought execution-only outside the MiFID appropriateness regime.
 - Variant A / certain complex bonds – Include no terms affecting expected return (no additional risks that are difficult to understand), so same basis.
 - Variant B / certain official issuers (PD-exempt) – EU public policy transparency exemption (Member States publish abundant information / connection with related official bodies), so same basis.
- **PG target market legend** – Long, short and very short forms.
- **Collaboration ‘agreement’ & negative target market** – As per ICMA1.
- *PRIIPs neutral* – No PRIIPs selling restriction / legend (significant European use expected).
- *Conceptual consistency with ECM ordinary share approach.*

Programmes & latest developments

Debt programmes

- Draft paper circulated to ICMA lead-managers extrapolating ICMA1 and ICMA2 technology from standalone to programme context.
- PRIIPs 'no EEA retail' selling restriction – 'Option 1' (hardwired) vs 'Option 2' (default subject to manual drawdown 'off' switch).

Latest developments

- Potential further ICMA approaches – 'ICMA1.9', 'ICMA3' etc?
- Transaction developments – Non-MiFID manufacturer target market definitions (Asia); **PRIIPs selling restriction where clearly non-packaged** (not Option 1); Move to wholesale?
- Transitioning ICMA1/ICMA2 language through regulatory prospectus approval processes.
- ICMA1/ICMA2 misunderstandings – **ESMA full 5 criteria basis** (outcome vs rationale); PRIIPs selling restrictions superseding **PD selling restrictions**; Different **collaboration 'agreement'** actors (MiFID manufacturers vs other primary actors). **Q&A?**
- Compatibility with '5 criteria' IT system requirements (WM Daten/EMT).
- PRIIPs scope – Italy (packaged), Spain/Austria (listing vs. 'made available' but ESMA Q&A).
- Misleading KIDs – Per press coverage and [UK FCA statement](#) (and L2 vs. L1?).

Non-PG MiFID II aspects

Underwriting & placing

- General conflict provisions (L1 [MiFID II](#) Art. 23), as specifically complemented (L2 [DR 2017/565](#) Arts. 38-43 and Recitals 57-59). Allocations justification recording: L2 DR 2017/565 Art. 43 (and Recital 59) and L3 [ESMA investor protection Q&A](#) (section 6, Q3 of 2016-12-16).
- Focus on top 20% of allocations – in cash and percentage fill terms. New syndicate staff 5 years later?

Inducements / costs & charges

- Inducements – General conflict and principles/information (L1 MiFID II Arts. 23.1/24.9 and L2 [DD 2017/593](#) Art. 11). If providing **MiFID “services”** (e.g. order reception/transmission to an **investor “client”**), disclose in advance to client any fee/commission or non-monetary benefit received, **in connection with the service, from a 3rd party**.
- Costs & charges – General principles/information (L1 MiFID II Art. 24.4 and L2 DR 2017/565 Art. 50). Disclose ex-ante and annually ex-post Cs&Cs relating to services and instruments concerned, also “encompassing any third party payments”.
- UK corporate finance contact regime. Cs&Cs ongoing relationship? Roadshows. Private/bilat compliance.

Trade & transaction reporting

- Primary issuance outside public trade reporting TOTV scope ([ESMA 2015-09 Final Report](#), #278). Private transaction reporting to regulators similar TOTV scope (confusing Art.2.5 [RTS22 DR 2017/590](#) and [ESMA data reporting Q&A](#) #8 in section 15)?
- Conditional switches and hedges as Package trades ([ESMA transparency Q&A](#) - #4i in section 4).

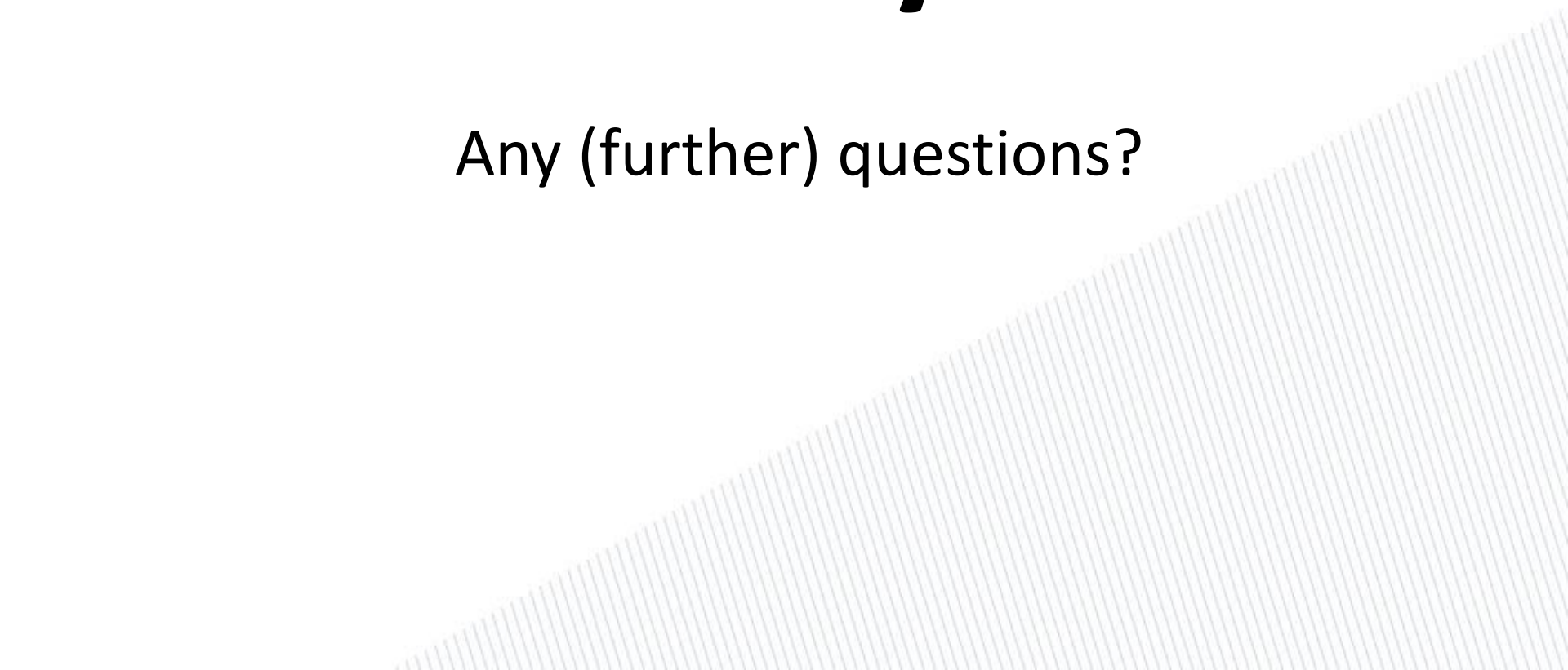
Legal entity identifiers (issuers)

- [ESMA 2017-12-20 statement](#) and ICSDs ([ICMSA Bulletin](#))

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Thank you

Any (further) questions?

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