

PRIIPs and the Debt Capital Markets. Practical Considerations for DCM Practitioners.

Introduction

Regulation (EU) No. 1286/2014¹ on key information documents for packaged retail and insurance-based investment products (PRIIPs) (the “**Regulation**”) entered into force on 29 December 2014. Its provisions will apply directly in all EEA Member States² from 1 January 2018.

The Regulation introduces a pre-contractual disclosure regime for packaged retail and insurance-based investment products (“**PRIIPs**”), with the aim of helping retail investors to understand and compare the key features and risks of PRIIPs.

The key obligations established pursuant to the Regulation are:

- > an entity that falls within the definition of a “PRIIP manufacturer” will be required to produce a “key information document” (a “**KID**”) and publish it on its website before a PRIIP is made available to retail investors;
- > any person advising retail investors in relation to a PRIIP or selling them a PRIIP must provide those investors with the KID in good time before they are bound by any contract or offer relating to the PRIIP;
- > a PRIIP manufacturer must regularly review and update the KID; and
- > a PRIIP manufacturer and the person advising on or selling the PRIIP must establish appropriate complaint and redress procedures for retail investors.

This note considers the implications of the Regulation on the primary issuance of bonds and, in particular, steps that market participants may wish to consider to prevent their transactions from being within the scope of the Regulation.

¹ Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2014] OJ L352.

² References in this note to “**Member States**” are to the Member States of the European Union and the European Economic Area (the “**EEA**”).

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Scope of the Regulation

The obligations under the Regulation only apply where the investment product in question constitutes a PRIIP and is marketed, distributed and/or sold to one or more retail investors.

The defined product scope is such that a number of products that would ordinarily be considered to be “plain vanilla” and not “packaged” products may fall within the scope of the Regulation if they are marketed, offered, distributed and/or sold to a retail investor. There are two key elements to take into account in determining whether a product will be caught by the Regulation; first, is the product “packaged” and, secondly, is it being “made available to retail”?

What is a PRIIP?

The term “packaged retail and insurance-based investment product” or “**PRIIP**” captures any product that is:

- > a packaged retail investment product (a “**PRIP**”); and/or
- > an insurance-based investment product.

Insurance-based investment products are outside the scope of this note.

A “**PRIP**” is defined in the Regulation as “*an investment...where, regardless of the legal form of the investment, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor.*”³

The definitions are broad, economic-based and, while the Regulation expressly identifies certain products to which it does *not* apply, it does not expressly identify or list the types of products that are in scope.

The European Commission (the “**Commission**”) and the European Supervisory Authorities (the “**ESAs**”)⁴ have confirmed that they will not provide any more precise guidance on what will be in or out of scope. This has been deferred to the national competent authorities which may provide such guidance in due course. The Financial Conduct Authority in the UK (the “**FCA**”) is expected to publish a policy statement on PRIIPs in the first half of 2017, however we do not anticipate that this will provide further guidance on product scope.

What do we know about the scope in relation to plain vanilla bonds?

The Regulation itself contains (in Article 2) certain exceptions from, and clarifications to, the application of the Regulation, including an exception in Article 2(2)(c) for “*deposits other than structured deposits*”. For this purpose,

³ Article 4(1) of the Regulation.

⁴ The European Supervisory Authorities are comprised of the European Banking Authority (“**EBA**”), the European Insurance and Occupational Pensions Authority (“**EIOPA**”) and the European Securities and Markets Authority (“**ESMA**”).

“structured deposits” has the meaning given to it in MiFID II⁵ at point (43) Article 4(1). That is, broadly, a deposit for which the payment of interest or any premium is determined according to a formula which is linked to certain factors, such as an index (other than an interest rate index such as EURIBOR or LIBOR).

Although the exception in Article 2(2)(c) refers to deposits only, it is difficult to envisage fixed rate bonds that redeem at par with no other special features coming within the scope of the PRIIP definition as there would typically be no “... *exposure to reference values or to the performance of one or more assets ...*”.

The case may be less clear in respect of floating rate notes. However, for those that redeem at par and which pay interest at a rate equal to LIBOR, EURIBOR (or some other interest rate benchmark) plus a spread, although the amount payable to investors is subject to fluctuation, it is arguable that these products should not be treated as PRIIPs either, as it would be inconsistent to treat floating rate bonds as PRIIPs but not floating rate deposits.

Statements from the Commission and ESAs at a workshop in July 2016 were also consistent with this view. They considered there should be no obligation to produce a KID in the case of products with a fixed or floating rate of interest.

Even so, these statements should be interpreted narrowly as the ESAs' Discussion Paper on KIDs for PRIIPs of November 2014⁶ indicates that, whilst the MiFID II definition of a structured deposit excludes variable rate deposits which are “directly” linked to an interest rate index (e.g. EURIBOR), those deposits which contain caps and/or have returns which are linked in a non-linear way to the underlying interest rate, should, in the view of the ESAs, be treated as falling within the scope of the Regulation.

In relation to products where the payments are only exposed to the fluctuation of a reference value or asset in limited circumstances, such as on an early redemption, the safer view is that such products are also intended to be captured by the definition of PRIIP. Examples of such investments include securities with a make-whole amount payable on early redemption (for example, a spens clause with an amount linked to treasury, Gilt or bund rates) notwithstanding that such securities may pay a fixed rate coupon and par at maturity.

Further exceptions to the Regulation that will be of interest to debt capital markets practitioners include exceptions for non-equity securities issued by a Member State or one of their regional or local authorities, by public international bodies of which one or more Member States are members or by the European Central Bank or by the central banks of the Member States. Debt securities

⁵ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments [2014] OJ L173/349 (“**MiFID II**”).

⁶ See 1.6.2 Products within the scope of the PRIIPs Regulation.

unconditionally and irrevocably guaranteed by a Member State or by one of a Member State's regional or local authorities are also excluded.⁷

The characterisation of a seemingly plain vanilla bond as a PRIIP will therefore depend on the precise terms of the bond itself. The lack of clarity around the definition of a PRIIP and the consequences which flow from any mischaracterisation may lead issuers – particularly those who only wish to target wholesale investors – to avoid the need for complicated and uncertain analysis on each issue altogether, by targeting their issues towards non-retail investors only. Manufacturers and/or persons advising on, or selling, products which could potentially be “packaged” in circumstances where no KID will be produced would therefore need to consider steps to prevent bond issuances from being made available to retail investors.

Who are “retail investors” for the purpose of the Regulation?

The Regulation defines a “retail investor” as:

- > any person classified as a “retail client” under MiFID II (i.e. a client who is not a professional client⁸); and
- > any person classified as a “customer” under the IMD⁹ (where that person would not also qualify as a professional client under MiFID II).

Note:

The definition of “retail” under the Regulation is not aligned with the definition of “retail” under the Directive 2003/71/EC (the “Prospectus Directive”) regime for debt issuances. Accordingly, bonds which are considered “wholesale” under the Prospectus Directive (i.e. bonds with denominations of at least EUR100,000) could still be “retail” (and potentially fall within the definition of a PRIIP) under the Regulation. Whether a product is “retail” for the purpose of PRIIPs depends upon the regulatory classification of the potential investors.

What would be the practical implications of restricting the investor base to MiFID II non-retail?

As debt issues listed on the regulated market will be regarded as “wholesale” under the Prospectus Directive provided that they are structured with a minimum denomination of at least EUR100,000 (which permits an issuer to benefit from the alleviated disclosure regime for wholesale only issuance), market participants are, in most cases, unused to having to consider the regulatory categorisation of potential investors. A move to categorising the investor base will require more sophisticated internal controls for primary

⁷ Article 2(2)(d) of the Regulation.

⁸ Article 4.(1)(10) and 4.(1)(11) of MiFID II. MiFID II introduces certain changes to the classification of a “retail client” which will potentially mean that a wider set of investors will need to be provided with the KID. For example, local public authorities and municipalities are classified as “retail clients” under MiFID II, albeit with the ability to request to “opt up” to elective professional client status.

⁹ Directive 2002/92/EC of the European Parliament and the Council of 9 December 2002 on insurance mediation [2003] OJ L913 (the “IMD”).

distributors, including, for example, additional diligence on the order book for the primary distribution. MiFID II will introduce, from 3 January 2018, a new product governance regime (see “*What is product governance?*”) which will require investment firms in the EEA to categorise their end client and determine a product’s compatibility with the chosen distribution strategy and identified target market. Market participants will therefore be required, in any event, to implement internal controls based upon product and investor base categorisation in accordance with MiFID II for this purpose. Given this, the introduction of a PRIIPs restriction based upon investor categorisation may not create a significant additional compliance burden in most cases.

When is a PRIIP “made available” to retail investors?

A KID is required whenever a PRIIP is “made available” to retail investors. This captures the marketing, offer and sale of a PRIIP as well as the entering into of a bilateral contract in relation to a PRIIP with a retail investor.

Those involved in a primary issue, including the issuer, the underwriters and initial investors (if and when they on-sell) will all be “making the issue available” and, accordingly, will be concerned to ensure that they remove retail investors from the distribution, where no KID is being prepared.

Affected parties

As the Regulation applies where a PRIIP is made available to retail investors, anyone issuing or advising on, or selling, a PRIIP must comply with the Regulation. The primary obligation to prepare a KID falls on the manufacturer. The Regulation offers no guidance as to the meaning of “manufacturer” in this context but the Recitals to the Regulation provide a non-exhaustive illustrative list of types of manufacturers. In most cases, the manufacturer will be the issuer but there may be some circumstances, particularly if there is more than one entity involved in the design and structuring and/or issuance of the PRIIP (unlikely in the case of a plain vanilla bond), or where the issuer is an SPV, where some further analysis will be needed.

In addition to the obligations imposed upon the manufacturer, any entity selling, or advising on, a PRIIP has a distinct and separate obligation to provide retail investors with the KID before selling a PRIIP to them, and to establish appropriate complaint and redress procedures for retail investors.

As a result, issuers and those underwriting and selling products which, if offered to retail investors, would be PRIIPs will be affected by the Regulation and will be concerned to ensure either (a) that the relevant product is not made available to retail investors or (b) where it is so made available, that a KID is produced by the manufacturer and kept up to date.

What is product governance?

“**Product governance**” is an umbrella term covering requirements relating to the design, approval, marketing and ongoing management of investment products, which will be imposed on investment firms which manufacture and distribute such products, to ensure that those firms act in their clients’ best interests.

MiFID II introduces a new product governance regime, as part of its investor protection framework, with product governance requirements set out chiefly in Article 16(3) and Article 24(2) of **MiFID II** (and Articles 9 and 10 of the **MiFID II Delegated Directive**). ESMA has published draft guidelines on product governance, which focus on target market assessment, and are expected to be finalised in the first half of this year.

In the UK, the FCA has published the draft rules to implement the regime in a new FCA Handbook Chapter entitled PROD, as detailed in Appendix 1 to the **FCA Consultation Paper CP16/29**.

Manufacturers and distributors are required to comply with applicable product governance requirements, in a way that is “**appropriate and proportionate**”, taking into account, among other things, the target market for the product.

The product governance rules apply irrespective of the categorisation of the end client.

Why not prepare a KID?

A manufacturer is obliged to draw up and publish a KID prior to a PRIIP being made available to retail investors. The KID must be a short, concisely-written document¹⁰ the contents of which will be precisely prescribed to provide key information about the investment product to which it relates. The KID will need to include a summary risk indicator and performance scenarios, among other elements. The PRIIP manufacturer will also be required regularly to review the KID and revise and republish it as necessary. The cost of preparation and of the ongoing review of the KID will need to be factored into any determination of costs for the issue of such products.

A PRIIPs manufacturer will also need to consider its potential liability for any relevant KID. The manufacturer will potentially incur civil liability where the KID is misleading, inaccurate or inconsistent when compared with the relevant parts of the legally binding, pre-contractual and contractual documents or where it is inconsistent with the form and content requirements prescribed for the KID. The PRIIPs manufacturer will also need to consider the potential effectiveness of any risk factors, disclaimers, limitation clauses and other contractual clauses in both pre-contractual and contractual documents. A retail investor may claim damages for loss against the manufacturer, resulting from its reliance on the KID, in accordance with national law. The manufacturer will therefore be potentially exposed to different civil liability regimes in relevant Member States.

It seems likely that most DCM participants will wish to avoid the additional cost and liability implied by falling within the scope of the Regulation. This will need to be weighed up against any marketing or pricing advantage arising from not excluding MiFID II retail clients/IMD customers.

Grandfathering

The Regulation does not include any express grandfathering provisions. However, the activities giving rise to the requirement to produce/provide a KID would need to occur after the date of application of the Regulation for them to be within its scope. Accordingly, it will be hard to argue that issuers and underwriters participating in the primary distribution of a bond during 2017 and which concludes prior to the date of application of the Regulation (1 January 2018) are, for the purpose of the Regulation, making the bonds available to retail investors.

The Regulation states, in Article 5, that the PRIIP manufacturer must draw up a KID wherever a PRIIP is made available to retail. In addition, Article 13 requires that a person advising on, or selling, a PRIIP shall provide retail investors with the KID in good time before those retail investors are bound by any contract or offer relating to that PRIIP.

If, as in the example above, the relevant offer concludes prior to 1 January 2018 but after that date a third party wants to offer or sell the relevant security

¹⁰ Article 6(4) and Article 8 of the Regulation.

to a MiFID retail client/IMD customer, that third party, if the security is a PRIIP, would need to comply with Article 13 of the Regulation and provide the relevant retail investor(s) with a KID. However, as in this example, there is no KID, the third party cannot offer or sell to the retail investor without breaching Article 13. Provided that the issuer does not make the security available to retail investors itself, the issuer will not be in breach of the Regulation.

Secondary market trading

Secondary market activities in relation to existing securities after 1 January 2018 are outside the scope of this note but should be analysed additionally in light of the above. Parties advising on or selling bonds that are, or could potentially be, PRIIPs will need to implement separate measures covering the distribution of such products to MiFID II retail clients/IMD customers after the primary distribution. Any such measures would need to apply to all such bonds outstanding as at 1 January 2018 and not just those issued during 2017.

Manufacturers of products that, following 1 January 2018, are, or could be, PRIIPs will need to ensure they are not themselves making a PRIIP available to retail investors in circumstances where they will not prepare a KID. The fact that there will be no KID for such product should be significant protection in itself to protect the manufacturer from the consequences of any third party concluding a sale of such product with a retail investor in breach of Article 13. This is on the basis that an unlawful act by a third party, over which the issuer has no control, should not amount to the product being "made available" to retail by the issuer without a KID in contravention of the Regulation. However, this is an evolving area and issuers and those involved in primary issuance will probably wish to add to this protection additional measures designed to minimise the risk of distribution of products that are issued without a KID to retail (see "*What measures can market participants consider in order to remain outside of the scope of the Regulation?*" below).

What measures can market participants consider in order to remain outside of the scope of the Regulation?

Given the uncertainties around what may or may not constitute PRIIPs, where the issuer will not prepare a KID, the issuer and underwriters would be advised to consider:

- > the inclusion of appropriate selling restrictions and legends in relevant documentation (including marketing materials, prospectuses and other contractual, offer and disclosure documentation);
- > their compliance processes and procedures (including process and procedures relating to marketing, marketing documentation, sales and publication activities) to ensure that the product is not made available to, or accessible by, a retail investor; and

- > their arrangements and agreements with distributors and other intermediaries (including possible inclusion of appropriate restrictions and representations in relevant distribution agreements).

Such measures will assist issuers and underwriters in preventing such bonds being “made available” to EEA retail investors without a KID in contravention of the Regulation.

The remainder of this note will go on to consider the inclusion of appropriate selling restrictions and legends in relevant documentation.

Selling restrictions and legends

The International Capital Market Association (“**ICMA**”) has developed suggested language to be included in documentation for vanilla bonds issued by in-scope issuers¹¹ that may or may not constitute PRIIPs, where the issuer will not prepare a KID. The suggested language consists of:

- > Programme options: consisting of (i) Option 1 - for use where all issues under the programme are intended to be sold to non-retail investors only; and (ii) Option 2 - for use where flexibility is required for (1) “non-packaged” issues under a programme to be sold to retail investors and/or (2) “packaged” issues under a programme with a KID to be sold to retail investors; and
- > Standalone language.

See Appendix 1 for the ICMA materials.

MTN Programmes

Issuers updating MTN programmes from 1 January 2017 may wish to consider taking action now, given that in most cases such programmes will remain valid for issuance after 1 January 2018.

Issuers will need to form a view now as to whether to include the PRIIPs selling restrictions and legends in their programme documentation and, if so, whether to choose Option 1 or Option 2 from the ICMA’s suggested drafting below.

Option 1

This option introduces a new selling restriction into a programme to apply to all offers concluded on or after 1 January 2018. It also includes a draft legend to be inserted on the front cover of the Base Prospectus and for the pro-forma Final Terms to apply from 1 January 2018.

One clear advantage of Option 1 is that it allows an issuer to avoid having to undertake an issue-by-issue analysis of whether a particular product is a PRIIP.

¹¹ Debt securities issued by EEA Member States or one of their regional or local authorities, public international bodies of which one or more EEA Member States are members, by the European Central Bank or by the central banks of the Member States, and securities unconditionally and irrevocably guaranteed by a Member State or by a Member State’s regional or local authorities are excluded from the scope of the PRIIPs Regulation.

As outlined above, this determination can be far from straightforward. An issuer may well be reluctant to determine that a product is not “packaged” and, for that reason, does not require a KID. Instead, the need for a KID can be avoided through a combination of measures (see “*What measures can market participants consider in order to remain outside of the scope of the Regulation?*” above) including the imposition of restrictions on offers and sales to retail investors. Hardwiring the restrictions into a programme also avoids the risk of “operator error” on an issue-by-issue basis, something which may be particularly important on more actively-used programmes.

In selecting Option 1, market participants will need to consider: (i) whether they have procedures in place to police a restriction based on investor classification rather than solely on the current EUR100,000 minimum denomination, (which may be practically more complex for market participants to manage and monitor on an ongoing basis) and (ii) whether the definition of retail client/customer under MiFID II and IMD excludes potential investors who may be important to the success of the distribution strategy. However, given the current Prospectus Directive public offer restrictions (to be amended by the new prospectus regulation in due course) and the direction of travel of MiFID II and the new product governance regime, quare whether these will represent any meaningful disadvantage, particularly from January 2018. See “*What is product governance?*” above for further discussion of product governance.

As described above, the Regulation does not envisage any grandfathering. However, in our view, the activities giving rise to the requirement to produce a KID would need to occur after the date of application of the Regulation for them to be caught. Accordingly, the new regime should not apply to issuers and underwriters participating in the primary distribution of a bond in 2017 where the relevant activities will be completed prior to 1 January 2018 (in the absence of any ongoing market-making obligation for the underwriters). In our view, it is therefore not necessary to include the new selling restrictions or legends in relation to primary distribution completed prior to the application of the Regulation. Delayed application of the new selling restrictions will also give market participants time to develop appropriate internal processes and procedures to ensure compliance with the new restrictions. In addition, implementing PRIIPs selling restrictions, and the inclusion of additional legends, now in relation to such new transactions distributed prior to 1 January 2018 would be inconsistent with the restrictions applicable to other previously-issued securities which will also be outstanding as at 1 January 2018.

Finally, as Option 1 (unlike Option 2) contemplates that there will be no retail distribution at all, it could be useful in demonstrating that a lighter product governance regime is appropriate under the proposed MiFID II product governance regime (see “*What is product governance?*”) above.

Option 2

This gives an issuer the flexibility to make a determination on an issue-by-issue basis as to whether a bond, on its terms, would be “packaged” for the purposes of the Regulation and therefore maintain a potentially wider investor base where the relevant parties are sufficiently comfortable that an issuance is not “packaged”.

This additional flexibility may be considered desirable but, as described above, it implies risks for the manufacturer, and potentially the underwriters, if the determination is made incorrectly post 1 January 2018 without a KID being available. As noted above, there is a lack of clarity on the meaning of “packaged” for the purpose of the Regulation and it is unlikely that an issuer will be able to make this determination with any degree of confidence except in the most straightforward of cases. Further, also as noted above, there may be limited additional investor base benefits given the expected Prospectus Regulation restrictions, when balanced against the potential benefits of being able to demonstrate an exclusively non-retail target market for the purpose of applying the MiFID II product governance regime proportionately.

Accordingly, the incorporation of this flexibility may have limited value but entail risk if particular care is not taken in the drafting of the final terms for a given issuance.

However, (i) if a programme only provides for the issuance of fixed or floating rate notes which redeem at par and, in the case of floating rate notes, pay interest at a rate equal to LIBOR or EURIBOR (or some other interest rate benchmark) plus spread with no other features such as redemption at make-whole, caps or floors, or (ii) if such issues are expected to be the most common type of issuance under the programme, or (iii) if it is a programme which is used only infrequently, then an issuer and underwriter(s) may be able to get comfortable with this approach if sufficient controls are implemented for decision-making at the time of each issue.

Standalone Bonds

Consistent with the approach recommended above in relation to MTN Programmes, our view is that the ICMA draft selling restrictions and legends should be included in standalone bond documentation for bonds issued after 1 January 2018 (and, if applicable, those issued towards the end of 2017 where distribution will not be completed until after 1 January 2018).

Conclusion

Market practice in relation to the Regulation continues to evolve. As there is no clear definition of what constitutes “packaged” for the purposes of the Regulation, manufacturers and other market participants involved in the primary issuance of bonds will need to consider a variety of measures to restrict the availability of such bonds to retail investors in circumstances where no KID

is produced. The inclusion of selling restrictions and legends will be one of a number of measures that issuers and underwriters will need to consider for MTN Programme and standalone bond documentation, on the basis of the arguments summarised in this note. This decision cannot be taken in isolation and market participants will need to consider this alongside the development of appropriate measures to comply with the (new) MiFID II product governance regime as well as anticipated amendments to the Prospectus Directive when it is replaced by the new Prospectus Regulation.

Appendix 1

Draft: 22 February 2017

PRIIPs – ICMA DRAFT SELLING RESTRICTIONS AND LEGENDS

INTRODUCTION

The PRIIPs Regulation is due to apply from 1 January 2018. The suggested language set out below has been developed for vanilla bonds issued by in-scope issuers¹ that may or may not constitute “packaged” products under the PRIIPs Regulation where the issuer will not prepare a KID². As such, the general approach envisages a restriction on sales and marketing to retail investors in the EEA that would apply from 1 January 2018. Suggested legends are also set out below, which are intended to complement the selling restriction from 1 January 2018, but can also be considered for inclusion in documentation prior to 1 January 2018.

The inclusion of selling restrictions and legends in relevant documentation is only one measure of a range of measures that issuers and underwriters may wish to take to prevent such bonds being made available to EEA retail investors without a KID in contravention of the PRIIPs Regulation.

This language has been developed now to assist market participants in their compliance with the PRIIPs Regulation when it applies. However, the PRIIPs Regulation is a complex piece of legislation and a full understanding of its implications for the vanilla bond market is still evolving. In addition, market participants’ understanding of the MiFID II product governance regime, which will apply from 3 January 2018 and could have an impact on language in vanilla bond prospectuses, is still developing. In light of this an issuer may, in a programme context, choose not to amend its programme documentation to cater for the PRIIPs Regulation now, but it is highly likely that it would then need to amend such documentation once market understanding has developed and before it commences an offer of securities that will conclude on or after 1 January 2018.

¹ Debt securities issued by EEA Member States or one of their regional or local authorities, public international bodies of which one or more EEA Member States are members, by the European Central Bank or by the central banks of the Member States and securities unconditionally and irrevocably guaranteed by a Member State or by a Member State’s regional or local authorities are excluded from the scope of the PRIIPs Regulation.

² Although Option 2 below may be used where an issuer has prepared a KID, the assumption is that it will be unusual for an issuer of vanilla bonds to prepare a KID. If an issuer will prepare a KID for a particular issuance, it is likely that other language will need to be included in the relevant documentation in addition to the Option 2 language (for example, a representation that, as manufacturer, the issuer has prepared the KID in accordance with the PRIIPs Regulation).

OVERVIEW OF SUGGESTED LANGUAGE

	Programme Option 1	Programme Option 2	Standalone
Selling Restriction	<p>Include a new “no EEA retail” restriction applicable to offers concluded on or after 1 January 2018</p> <p>AND</p> <p>Retain existing EEA Prospectus Directive (PD) restriction applicable to offers concluded before 1 January 2018³ (if needed).</p>	<p>As per Option 1,</p> <p>BUT with language allowing the new “no EEA retail” restriction applicable to offers concluded on or after 1 January 2018 to be “switched off” for individual drawdowns in the final terms/pricing supplement (e.g. where the issue is “non-packaged”)</p> <p>AND Retain existing PD restriction (if needed) to apply where new “no EEA retail” restriction is “switched off” on or after 1 January 2018 (as well as for offers concluded before 1 January 2018, as per Option 1).</p> <p>Also include a new provision in the pro forma final terms/pricing supplement allowing such “switch off”.</p>	<p>For offers concluded before 1 January 2018, retain existing PD restriction (if needed).</p> <p>For offers concluded on or after 1 January 2018, parties to consider whether to include a new “no EEA retail” restriction.</p>
Legend in Base Prospectus/ Prospectus/ Offering Circular	<p>Include a new “no EEA retail from 1 January 2018” legend.⁴</p>	<p>As per Option 1,</p> <p>BUT include a reference to legend in final terms/pricing supplement.</p>	<p>For offers concluded before 1 January 2018, parties to consider whether to include new “no EEA retail from 1 January 2018” legend.</p> <p>For offers concluded on or after 1 January 2018, parties to consider whether to include new “no EEA retail” legend.</p>
Legend in pro forma final terms/ pricing supplement	<p>Include new “no EEA retail from 1 January 2018” legend in square brackets.⁵</p>	<p>As per Option 1.</p>	<p>N/A</p>

³ There is no need to: (a) include references to the selling restriction applying from 1 January 2018; or (b) retain any existing PD restriction, in base prospectuses/offering circulars dated on or after 1 January 2018.

⁴ There is no need to include a date reference in base prospectuses/offering circulars dated on or after 1 January 2018.

⁵ There is no need to include a date reference (and, for Option 1 only, square brackets) in pro forma final terms/pricing supplements in base prospectuses/offering circulars dated on or after 1 January 2018.

Legend in Final Terms/ Pricing Supplement	<p>For offers concluded before 1 January 2018, parties to consider whether to include new "no EEA retail from 1 January 2018" legend.</p> <p>For offers concluded on or after 1 January 2018, include new "no EEA retail" legend.</p>	<p>As per Option 1 for offers concluded before 1 January 2018.</p> <p>For offers concluded on or after 1 January 2018, the new "no EEA retail" legend should be included unless the new "no EEA retail" restriction has been switched off (and therefore sales to EEA retail investors are possible).</p>	<p>N/A</p>
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SUGGESTED LANGUAGE**PROGRAMME OPTION 1****BLANKET PROHIBITION ON MARKETING AND SALES TO EEA RETAIL INVESTORS FROM 1 JANUARY 2018****Selling Restriction*****Prohibition of Sales to EEA Retail Investors***

[From 1 January 2018, each]/[Each]⁶ Dealer has represented and agreed, and each further Dealer appointed under the Programme will be required to represent and agree, that it has not offered, sold or otherwise made available and will not offer, sell or otherwise make available any Notes which are the subject of the offering contemplated by [the / this] [Offering Circular / Prospectus] as completed by the Final Terms [(or Pricing Supplement, as the case may be)]⁷ in relation thereto to any retail investor in the European Economic Area. For the purposes of this provision:

- a) the expression "retail investor" means a person who is one (or more) of the following:
 - i. a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU (as amended, "MiFID II"); or
 - ii. a customer within the meaning of Directive 2002/92/EC (as amended, the "Insurance Mediation Directive"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or
 - iii. not a qualified investor as defined in Directive 2003/71/EC (as amended, the "Prospectus Directive")⁸; and
- b) the expression "offer" includes the communication in any form and by any means of sufficient information on the terms of the offer and the Notes to be offered so as to enable an investor to decide to purchase or subscribe the Notes⁹.

⁶ Use the first option (including the date reference) in base prospectuses/offering circulars dated earlier than 1 January 2018. Use the second option (with no date reference) in base prospectuses/offering circulars dated 1 January 2018 or later.

⁷ Include this language where the base prospectus/offering circular includes a pro forma pricing supplement.

⁸ The three limbs and paragraph (b) have been included to ensure it is clear how both the PD public offer regime (for securities with a denomination of less than EUR 100,000 or equivalent) and the PRIIPs Regulation are being addressed.

⁹ Because a PD selling restriction is not required where the programme contains a blanket prohibition on the issue of notes with a denomination of less than EUR 100,000 or equivalent, paragraphs (a)(iii) and (b) (which relate to the PD public offer regime) do not need to be included where the programme contains such blanket prohibition.

[Prior to 1 January 2018 [*continue with existing PD public offer selling restriction*]]¹⁰

Legend

Legend for:

- *front cover/inside front cover of base prospectus/offering circular;*
- *front of pro forma final terms/pricing supplement;*
- *front of Final Terms/Pricing Supplement for offers concluded on or after 1 January 2018; and*

front of Final Terms/Pricing Supplement for offers concluded before 1 January 2018 at the option of the parties.

[PROHIBITION OF SALES TO EEA RETAIL INVESTORS – The Notes are not intended[, from 1 January 2018,]¹¹ to be offered, sold or otherwise made available to and[, with effect from such date,]¹² should not be offered, sold or otherwise made available to any retail investor in the European Economic Area ("EEA"). For these purposes, a retail investor means a person who is one (or more) of: (i) a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU ("MiFID II"); (ii) a customer within the meaning of Directive 2002/92/EC ("IMD"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or (iii) not a qualified investor as defined in Directive 2003/71/EC (as amended, the "Prospectus Directive")¹³. Consequently no key information document required by Regulation (EU) No 1286/2014 (the "PRIIPs Regulation") for offering or selling the Notes or otherwise making them available to retail investors in the EEA has been prepared and therefore offering or selling the Notes or otherwise making them available to any retail investor in the EEA may be unlawful under the PRIIPs Regulation.]¹⁴

¹⁰ Do not include this language where (a) the base prospectus/offering circular is dated 1 January 2018 or later; or (b) the programme contains a blanket prohibition on the issue of notes with a denomination of less than EUR 100,000 or equivalent.

¹¹ Do not include this date reference in (1) base prospectuses/offering circulars dated 1 January 2018 or later and pro forma final terms/pricing supplements contained in such base prospectuses/offering circulars or (2) final terms/pricing supplements for offers concluded on or after 1 January 2018.

¹² Do not include this date reference in (1) base prospectuses/offering circulars dated 1 January 2018 or later and pro forma final terms/pricing supplements contained in such base prospectuses/offering circulars or (2) final terms/pricing supplements for offers concluded on or after 1 January 2018.

¹³ Because a PD selling restriction is not required where the programme contains a blanket prohibition on the issue of notes with a denomination of less than EUR 100,000 or equivalent, the third limb of the definition of retail investor (which relates to the PD public offer regime) does not need to be included where the programme contains such blanket prohibition.

¹⁴ Square brackets around this legend are only required in pro forma final terms/pricing supplement in base prospectuses/offering circulars dated earlier than 1 January 2018.

PROGRAMME OPTION 2**PROHIBITION ON MARKETING AND SALES TO EEA RETAIL INVESTORS FROM 1 JANUARY 2018 WITH OPTION TO SWITCH OFF PROHIBITION IN FINAL TERMS FOR (1) “NON-PACKAGED” ISSUES UNDER PROGRAMME TO BE SOLD TO EEA RETAIL AND/OR (2) “PACKAGED” ISSUES UNDER PROGRAMME WITH A KID TO BE SOLD TO EEA RETAIL****Selling Restriction***In base prospectus:****Prohibition of Sales to EEA Retail Investors***

[From 1 January 2018, unless]/[Unless]¹⁵ the Final Terms [(or Pricing Supplement, as the case may be)]¹⁶ in respect of any Notes specifies the “Prohibition of Sales to EEA Retail Investors” as “Not Applicable”, each Dealer has represented and agreed, and each further Dealer appointed under the Programme will be required to represent and agree, that it has not offered, sold or otherwise made available and will not offer, sell or otherwise make available any Notes which are the subject of the offering contemplated by [the / this] [Offering Circular / Prospectus] as completed by the Final Terms [(or Pricing Supplement, as the case may be)]¹⁷ in relation thereto to any retail investor in the European Economic Area. For the purposes of this provision:

- a) the expression "retail investor" means a person who is one (or more) of the following:
 - i. a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU (as amended, "MiFID II"); or
 - ii. a customer within the meaning of Directive 2002/92/EC (as amended, the "Insurance Mediation Directive"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or
 - iii. not a qualified investor as defined in Directive 2003/71/EC (as amended, the "Prospectus Directive")¹⁸; and
- b) the expression an “offer” includes the communication in any form and by any means of sufficient information on the terms of the offer and the

¹⁵ Use the first option (including the date reference) in base prospectuses/offering circulars dated earlier than 1 January 2018. Use the second option (with no date reference) in base prospectuses/offering circulars dated 1 January 2018 or later.

¹⁶ Include this language where the base prospectus/offering circular includes a pro forma pricing supplement.

¹⁷ Include this language where the base prospectus/offering circular includes a pro forma pricing supplement.

¹⁸ The three limbs and paragraph (b) have been included to ensure it is clear how both the PD public offer regime (for securities with a denomination of less than EUR 100,000 or equivalent) and the PRIIPs Regulation are being addressed.

Notes to be offered so as to enable an investor to decide to purchase or subscribe the Notes¹⁹.

[[Prior to 1 January 2018, and from that date if]/[If]²⁰ the Final Terms [(or Pricing Supplement, as the case may be)]²¹ in respect of any Notes specifies “Prohibition of Sales to EEA Retail Investors” as “Not Applicable”, each Dealer has represented and agreed [*continue with existing PD public offer selling restriction*]]²²

In final terms/pricing supplement:

Prohibition of Sales to EEA Retail Investors: [Applicable/Not Applicable²³]

(If the offer of the Notes is concluded prior to 1 January 2018, or on and after that date the Notes clearly do not constitute “packaged” products, “Not Applicable” should be specified. If the offer of the Notes will be concluded on or after 1 January 2018 and the Notes may constitute “packaged” products and no KID will be prepared, “Applicable” should be specified.)

Legend

Legend for:

- *front cover/inside front cover of base prospectus/offering circular;*
- *front of pro forma final terms/pricing supplement;*

¹⁹ Because a PD selling restriction is not required where the programme contains a blanket prohibition on the issue of notes with a denomination of less than EUR 100,000 or equivalent, paragraphs (a)(iii) and (b) (which relate to the PD public offer regime) do not need to be included where the programme contains such blanket prohibition.

²⁰ Use the first option (including the date reference) in base prospectuses/offering circulars dated earlier than 1 January 2018. Use the second option (with no date reference) in base prospectuses/offering circulars dated 1 January 2018 or later.

²¹ Include this language where the base prospectus/offering circular includes a pro forma pricing supplement.

²² A PD selling restriction is not required where the programme contains a blanket prohibition on the issue of notes with a denomination of less than EUR 100,000 or equivalent.

²³ If on or after 1 January 2018 a KID may be produced for a particular issue under the programme and the issuer may want to restrict its obligation to update the KID to a certain period of time, consider also including the following option: “Not Applicable [from [specify date] until [specify date or a formula such as “the Issue Date” or “the date which falls [] Business Days thereafter”], in which case the selling restriction and legend wording will also need to be amended to reflect the fact that they will apply outside of the time period specified as “Not Applicable” in the final terms/pricing supplement.

- *front of Final Terms/Pricing Supplement for offers concluded on or after 1 January 2018 if the Notes potentially constitute “packaged” products and no KID will be prepared or the issuer wishes to prohibit offers to EEA retail investors for any other reason; and*
- *front of Final Terms/Pricing Supplement for offers concluded before 1 January 2018 at the option of the parties.*

[[IMPORTANT – EEA RETAIL INVESTORS]²⁴ / [PROHIBITION OF SALES TO EEA RETAIL INVESTORS]²⁵ - [If the Final Terms [(or Pricing Supplement, as the case may be)]²⁶ in respect of any Notes includes a legend entitled "Prohibition of Sales to EEA Retail Investors", the]²⁷/[The]²⁸ Notes are not intended[, from 1 January 2018,]²⁹ to be offered, sold or otherwise made available to and[, with effect from such date,]³⁰ should not be offered, sold or otherwise made available to any retail investor in the European Economic Area ("EEA"). For these purposes, a retail investor means a person who is one (or more) of: (i) a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU ("MiFID II"); (ii) a customer within the meaning of Directive 2002/92/EC ("IMD"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or (iii) not a qualified investor as defined in Directive 2003/71/EC (as amended, the "Prospectus Directive")³¹. Consequently no key information document required by Regulation (EU) No 1286/2014 (the "PRIIPs Regulation") for offering or selling the Notes or otherwise making them available to retail investors in the EEA has been prepared and therefore offering or selling the Notes or otherwise making them available to any retail investor in the EEA may be unlawful under the PRIIPs Regulation.]³²

²⁴ To be included with the legend on the front cover/inside front cover of base prospectus/offering circular.

²⁵ To be included with the legend on the front of the final terms/pricing supplement.

²⁶ Include this language where the base prospectus/offering circular includes a pro forma pricing supplement.

²⁷ To be included with the legend on the front cover/inside front cover of base prospectus/offering circular.

²⁸ To be included with the legend on the front of the final terms/pricing supplement.

²⁹ Do not include this date reference in (1) base prospectuses/offering circulars dated 1 January 2018 or later and pro forma final terms/pricing supplements contained in such base prospectuses/offering circulars or (2) final terms/pricing supplements for offers concluded on or after 1 January 2018.

³⁰ Do not include this date reference in (1) base prospectuses/offering circulars dated 1 January 2018 or later and pro forma final terms/pricing supplements contained in such base prospectuses/offering circulars or (2) final terms/pricing supplements for offers concluded on or after 1 January 2018.

³¹ Because a PD selling restriction is not required where the programme contains a blanket prohibition on the issue of notes with a denomination of less than EUR 100,000 or equivalent, the third limb of the definition of retail investor (which relates to the PD public offer regime) does not need to be included where the programme contains such blanket prohibition.

³² Square brackets around this legend are only required in pro forma final terms/pricing supplement in base prospectuses/offering circulars.

STANDALONE**PROHIBITION ON MARKETING AND SALES TO EEA RETAIL INVESTORS FROM 1 JANUARY 2018****Selling Restriction³³*****Prohibition of Sales to EEA Retail Investors***

Each Manager has represented and agreed that it has not offered, sold or otherwise made available and will not offer, sell or otherwise make available any Notes to any retail investor in the European Economic Area. For the purposes of this provision:

- a) the expression "retail investor" means a person who is one (or more) of the following:
 - i. a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU (as amended, "MiFID II"); or
 - ii. a customer within the meaning of Directive 2002/92/EC (as amended, the "Insurance Mediation Directive"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or
 - iii. not a qualified investor as defined in Directive 2003/71/EC (as amended, the "Prospectus Directive")³⁴; and
- b) the expression "offer" includes the communication in any form and by any means of sufficient information on the terms of the offer and the Notes to be offered so as to enable an investor to decide to purchase or subscribe the Notes³⁵.

Legend

Legend for front cover/inside front cover of prospectus/offering circular³⁶

PROHIBITION OF SALES TO EEA RETAIL INVESTORS – The Notes are not intended[, from 1 January 2018,]³⁷ to be offered, sold or otherwise made

³³ This selling restriction should be included in prospectuses/offering circulars relating to offers that will be concluded on or after 1 January 2018 where the parties wish to restrict sales to EEA retail investors (for example, because the securities are "packaged" and the issuer will not prepare a KID). Otherwise, the existing PD public offer selling restriction should be used, if needed.

³⁴ The three limbs and paragraph (b) have been included to ensure it is clear how both the PD public offer regime (for securities with a denomination of less than EUR 100,000 or equivalent) and the PRIIPs Regulation are being addressed.

³⁵ Because a PD selling restriction is not required for issues of notes with a denomination of EUR 100,000 (or equivalent) or more, paragraphs (a)(iii) and (b) (which relate to the PD public offer regime) do not need to be included for issues of notes with a denomination of EUR 100,000 (or equivalent) or more.

³⁶ For standalone prospectuses/offering circulars relating to offers that will be concluded before 1 January 2018, parties to consider whether to include this legend.

For standalone prospectuses/offering circulars relating to offers concluded on or after 1 January 2018, include this legend where the parties wish to restrict sales to EEA retail investors (for example, because the securities are "packaged" and the issuer will not prepare a KID).

³⁷ Do not include this date reference in standalone prospectuses/offering circulars relating to offers that will be concluded on or after 1 January 2018.

available to and[, with effect from such date,]³⁸ should not be offered, sold or otherwise made available to any retail investor in the European Economic Area ("EEA"). For these purposes, a retail investor means a person who is one (or more) of: (i) a retail client as defined in point (11) of Article 4(1) of Directive 2014/65/EU ("MiFID II"); or (ii) a customer within the meaning of Directive 2002/92/EC ("IMD"), where that customer would not qualify as a professional client as defined in point (10) of Article 4(1) of MiFID II; or (iii) not a qualified investor as defined in Directive 2003/71/EC (as amended, the "Prospectus Directive")³⁹. Consequently no key information document required by Regulation (EU) No 1286/2014 (the "PRIIPs Regulation") for offering or selling the Notes or otherwise making them available to retail investors in the EEA has been prepared and therefore offering or selling the Notes or otherwise making them available to any retail investor in the EEA may be unlawful under the PRIIPs Regulation.

³⁸ Do not include this date reference in standalone prospectuses/offering circulars relating to offers that will be concluded on or after 1 January 2018.

³⁹ Because a PD selling restriction is not required for issues of notes with a denomination of EUR 100,000 (or equivalent) or more, the third limb of the definition of retail investor (which relates to the PD public offer regime) does not need to be included for issues of notes with a denomination of EUR 100,000 (or equivalent) or more.

Key contacts

For further information, please contact:

HONG KONG

William Liu

Partner

Tel: (+852) 2901 5257

Email: william.liu@linklaters.com

Hwang Hwa Sim

Partner

Tel: (+852) 2842 4103

Email: hwang_hwa.sim@linklaters.com

Michael Ng

Partner

Tel: (+852) 2842 4172

Email: michael.ng@linklaters.com

Jonathan Horan

Partner

Tel: (+852) 2901 5318

Email: jonathan.horan@linklaters.com

Terence Lau

Partner

Tel: (+852) 2842 4182

Email: terence.lau@linklaters.com

SINGAPORE

Kevin Wong

Partner

Tel: (+65) 6692 5733

Email: kevin.wong@linklaters.com

Phillip Hall

Counsel

Tel: (+65) 6692 5737

Email: phillip.hall@linklaters.com

Author: Catherine Wade, Kym Bavcevic-Ikeda

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Linklaters LLP
One Silk Street
London EC2Y 8HQ

Telephone (+44) 20 7456 2000
Facsimile (+44) 20 7456 2222

Linklaters.com