

The EU and UK Prospectus Regulations

Introduction

ICMA has been closely involved in the development of a regulatory regime for prospectuses in Europe since its inception. Our aim is to protect and promote the efficiency and smooth functioning of the market for new international bond issues.

Currently both the EU and UK are considering changes to their prospectus regimes. This article summarises the status of the two reviews and key concerns for the international bond markets. It also discusses regulatory developments relating to sustainability disclosures in the context of new bond issues.

The EU regime

Originally the EU Prospectus Directive and now the EU Prospectus Regulation, the EU prospectus regime has already been through several iterations and amendments. Following a [targeted consultation](#) earlier this year, market participants are now waiting to see how the European Commission proposes to amend the EU Prospectus Regulation again. The amendments are expected to be published as part of an initiative known as the Listing Act, which is also expected to include proposed amendments to other regulation relating to the listing of securities in the EU such as the Market Abuse Regulation (MAR), MiFID, the Transparency Directive and the Listing Directive.

The European Commission's review of the EU Prospectus Regulation has been launched under the [Capital Markets Union 2020 Action Plan](#), Action 2, [supporting access to public markets](#). The Commission states that it "plans to adopt a legislative proposal ... that cuts the red tape for companies, in particular SMEs, wanting to raise funds on EU public markets, while preserving market integrity and investor protection. The proposal will critically assess the rules applicable to companies going through a listing process and companies already listed on EU public markets."

The targeted consultation on the Listing Act appeared to have a strong equity focus, but the forthcoming amendments are expected to impact upon bond markets. The key points from ICMA's [response](#) to the European Commission's targeted consultation of February 2022 are set out in the blue box.

Key points from ICMA's response to European Commission targeted consultation on a Listing Act

1. The EU's primary bond markets currently function efficiently, particularly in the wholesale space. The regulatory environment for listing wholesale bonds in the EU is considered to be reasonably well-calibrated, although is perceived to place more emphasis on investor protection than ensuring access to finance for bond issuers.
2. Given the well-functioning nature of wholesale primary bond markets currently, many ICMA members would welcome only necessary adjustments to the EU Prospectus Regulation. However, some more ambitious proposals to increase flexibility for bond issuers could also be considered. In any event, the base prospectus format, wholesale disclosure regime and flexibility for bond issuers to choose their home Member State under the EU Prospectus Regulation work well and must be retained. Similarly, the public offer exemptions and application to securities to be admitted to a regulated market (but not MTFs) provide important flexibility.
3. In relation to MAR, the broad scope (namely its application to securities listed on regulated markets, MTFs and OTFs), the definition of "inside information", obligations relating to insider lists and the market soundings regime are considered problematic or disproportionate.
4. Changes to the listing-related requirements under MiFID, Transparency Directive and Listing Directive are, on balance, not considered to be necessary at this time.
5. There is scope to develop a pan-EU retail bond market, but regulation is only one factor among various other commercial and market drivers. Constructing an appropriate regulatory regime would require a holistic consideration of various regulatory tools and incentives. The situation is similar for SME issuer access to public bond markets, where investors tend to need more (rather than less) information about the issuer. While challenges exist in both the retail and SME contexts, they should be considered separately given retail investors are less likely to be able to assess and bear the increased risks associated with investing in SME bonds.

In addition to the responses it receives to its targeted consultation on the Listing Act, the European Commission is also likely to take into account the results of ESMA's [peer review](#) of prospectus scrutiny and approval procedures by NCAs. The [peer review report](#) was published in July 2022 and indicates that there is a wide variety of approaches taken by NCAs in the scrutiny and approval of prospectuses, and that some of these divergences may impact issuers' ability to raise capital. It seems likely that this headline outcome is relevant primarily for issuers of shares, noting that most issuers of bonds are able to choose their "home Member State" for prospectus approval purposes and will often choose a home Member State with a NCA that has appropriate experience and expertise in scrutinising and approving non-equity prospectuses. Indeed, as indicated in ICMA's response to the European Commission's targeted consultation on the Listing Act, ICMA members' experience is that there is alignment in the way national competent authorities assess draft prospectuses for non-equity securities. Nonetheless, ESMA's peer review report highlights areas of divergence and makes policy recommendations that provide interesting insight into potential areas of focus for the European Commission, ESMA and NCAs in the future, for example relating to the length of prospectuses, risk factor disclosure, prospectus summaries and prospectus comprehensibility.

In terms of the timing for next steps, the European Commission was originally expected to publish a legislative proposal in Q3 2022, but its website now makes reference to publication in the second half of 2022.

The UK regime

In the UK, the current UK Prospectus Regulation is a close mirror image of the EU Prospectus Regulation, on-shored, with relatively minor amendments, at the end of the Brexit implementation period at the end of 2020. Under the European Union (Withdrawal) Act 2018, the UK Prospectus Regulation and related detailed rules that derive from EU law have a status equivalent to statute and can only be amended via an Act of Parliament.

In July, the UK Government introduced the [Financial Services and Markets Bill](#). The Bill is intended to implement the UK's [Future Regulatory Framework Review](#) and is the start of a multi-year review of UK financial services regulation inherited from the EU. The overarching ambition is to have a more agile regime in which the regulators, notably the FCA and PRA, have increased powers to set and change rules.¹

In relation to the UK Prospectus Regulation, the Bill will allow the current regime inherited from the EU to be revoked and replaced with a new regime comprised of (i) high level fundamental laws that will sit in statute and (ii) powers for

the FCA to make detailed regulations. Going forwards, the FCA will therefore be able to amend the detailed rules quickly, either to correct errors or to deal with changed circumstances, without requiring primary legislation.

This more flexible regime is considered broadly to be welcome. In addition, ICMA was pleased to see in the [outcome](#) of the review of the UK Prospectus Regulation published by HM Treasury on 1 March 2022 that some of the key suggestions that ICMA made in its [response](#) to the UK Prospectus Regulation [consultation](#) will be taken forward. For example, ICMA was pleased to see that HM Treasury intends to set the threshold for the exemption from the UK public offer regime based on minimum denominations at £50,000, and not £100,000. This was a key concern for international bond market participants, noting that bonds with the commonly-used €100,000 minimum denomination would meet the current EU Prospectus Regulation threshold but would not meet a UK regulatory threshold if it were to be set at £100,000. ICMA had emphasised this point in its engagement with HM Treasury; and is pleased to see this concern addressed.

Whilst the general approach for the future UK prospectus regime is known and the wheels for change have been set in motion with the publication of the Financial Services and Markets Bill, the precise impact of the changes for international bond markets are still to be seen. The impact will depend in large part on how the FCA exercises the significant powers that will be granted to it. As described in the [outcome](#) of the review of the UK Prospectus Regulation, these powers will include specifying if and when a prospectus is required, what a prospectus should contain, whether it needs to be reviewed and approved prior to publication and other detailed rules currently contained within the UK prospectus regime. It is anticipated that the FCA will consult upon the exercise of these expanded powers in due course.

Outside the review of the UK Prospectus Regulation, the FCA is currently reviewing the effectiveness of UK primary markets and published a [Discussion Paper](#) in May. This followed [Consultation Paper CP21/21](#) to which ICMA [responded](#) in September 2021. The Discussion Paper was primarily related to equity markets. In relation to debt securities, the FCA noted that disclosure requirements are predominantly set under the UK Prospectus Regulation and further action in this area should be taken in parallel to future reforms of that regime. Similarly, the [UK Secondary Capital Raising Review](#) (which was accepted in full in the UK Chancellor's [Mansion House speech](#) of 19 July 2022) appears to be primarily focused on reforming the UK's equity capital markets. Some of the recommendations relating to shares could become relevant for debt securities, depending on how they are taken forward, and ICMA intends to monitor developments in this area.

1. In September 2022, the UK Government also introduced the [Retained EU Law \(Revocation and Reform\) Bill](#), known as the Brexit Freedoms Bill. Whilst this Bill's revocation of all retained EU laws on 31 December 2023 will not apply to the UK Prospectus Regulation, there may be aspects of the Bill that impact interpretation of the UK prospectus regime.

What will EU/UK Prospectus Regulation divergence mean for markets?

As policy makers and regulators in the EU and UK adjust their regimes, the rules for prospectuses in the EU and the UK are likely to diverge. The impact of this divergence for wholesale international bond markets will depend in large part on the scope of the two regimes and how the exemptions from it are structured.

Importantly, companies and other issuers will wish to continue to offer their bonds to institutional investors on a pan-European basis as they do currently: ie without needing two prospectuses (one for the EU regime and one for the UK regime). What this means for the regulations is that the “public offer” exemptions from the two regimes need to be at least as wide as they are now. There is currently no indication that the exemptions will be narrowed in either the EU or UK. This is something that ICMA will continue to monitor closely.

In addition, any form of change to regulation (even that which is deregulatory in nature) brings costs for industry in the year it is introduced because market participants need to spend time understanding the amendments and adapting their policies and procedures accordingly. *Many ICMA members will now be facing implementation costs on two fronts (ie from both the EU and UK), rather than one.* It is therefore even more important that the changes to the EU and UK prospectus regimes are appropriately calibrated and do not introduce unnecessary or disproportionate costs for companies and other borrowers seeking to access finance in the international bond markets.

ICMA will continue to monitor the proposed adjustments to the two regimes and discuss with members and policy makers the potential impact for the international bond markets.

What about sustainability disclosures in bond prospectuses?

The question of sustainability disclosures in prospectuses for new bond issues continues to be an area of focus for ICMA members. A previous ICMA Quarterly Report [article](#) summarised some of the considerations.

So far there have been no specific amendments to the EU or UK Prospectus Regulations related to environmental, social or governance aspects of a bond issuer’s business or for sustainable bonds.² However there have been a number of related regulatory developments.

In relation to disclosure requirements for sustainable bonds, the EU Green Bond Standard is currently making its way through the EU legislative process and could include specific disclosure requirements for new bonds issued within the scope of that regulation. See further the Sustainable Finance section of [the Q3 2022 ICMA Quarterly Report](#).

In the UK, the FCA published [Primary Market Bulletin 41](#) and [Feedback Statement FS 22/4 on ESG integration in UK capital markets](#) in June 2022. In these publications, the FCA:

- encouraged issuers of “use of proceeds” debt instruments to consider voluntarily applying or adopting relevant industry standards, such as the Principles and Guidelines that ICMA has developed for green, social, and sustainability bonds;
- reminded issuers, their advisors and other relevant market participants of their existing obligation to ensure any advertisement is not inaccurate or misleading, and is consistent with the information contained in the prospectus; and
- encouraged issuers and their advisors to consider verifiers’ and assurance providers’ expertise and professional standards, and to engage with second party opinion (SPO) providers and verifiers who adhere to appropriate standards of professional conduct, such as ICMA’s Guidelines for External Reviewers.

Of particular interest to ICMA’s primary market members is the second item noted above and the related FCA statement that “where bond frameworks form part of a communication that relates to an offer or admission of securities, they are likely to be advertisements for the purposes of the prospectus regime, so must comply with the Prospectus Regulation and the Prospectus RTS Regulation”.

Whilst this is not understood to indicate that current disclosure practices for green, social or sustainability bonds need to change, ICMA’s primary market members have noted the FCA’s statements and concern that, occasionally, the language used in green, social and sustainability bond frameworks could be considered more definitive than the relevant sections in the prospectus and that the FCA is monitoring activities in this area.

More generally, several global, regional and national initiatives related to corporate sustainability reporting and disclosures are under way or being implemented. These could be relevant for bond issuers outside of the sustainable bond market, as well as issuers of sustainable bonds. ICMA has been tracking and responding to relevant consultations

2. With the exception of Recital 7 of Regulation (EU) 2021/337 amending the EU Prospectus Regulation which highlights environmental, social and governance (ESG) matters as increasingly important and calls on the European Commission to assess whether it is appropriate to integrate sustainability-related information in the EU Prospectus Regulation and assess whether it is appropriate to make a legislative proposal in order to ensure coherence with sustainability objectives and the comparability of sustainability-related information across EU financial services law.

in this area as reported in the Sustainable Finance section of this Quarterly Report.

ICMA will continue to discuss with its members the developing regulatory landscape and market practice in this area.



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