

EUROPEAN CORPORATE DEBT PRIVATE PLACEMENT MARKET GUIDE

October 2016



Disclaimer

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Introduction

Agreement on common market standards and best practices is essential for the development of a European corporate debt private placement market. To this end, a European Corporate Debt Private Placement Joint Committee (ECPP JC)¹, coordinated by the International Capital Market Association (ICMA), released a Pan-European Corporate Private Placement Market Guide in February 2015 (the “Original Guide”) in order to support the development of the market, to build on existing practices in the bond and bank loan markets, as well as practices in other international private placement markets, and to provide a non-binding framework of best practices for European corporate debt private placement (“ECPP”) transactions.

The Original Guide evolved out of the Charter for Euro Private Placements, which was developed by the Euro PP Working Group², and was the result of a collective effort by many different market participants. The Charter for Euro Private Placements was published in March 2014 and is available at www.euro-privateplacement.com.

By the end of 2015, the ECPP market was estimated at €14 billion, doubling in size from the previous year³. An independent poll⁴ published in November 2014 indicated that 79% of investors and 76% of corporates were aware of the Original Guide and the **model transaction documentation** referred to therein (and herein), and some 50% of investors and 25% of corporates had used them, indicating that the Original Guide may have been an important contributing factor to this success.

This edition of the European Corporate Debt Private Placement Market Guide (the “Guide”) has been produced as a result of evolutions in the ECPP market, and as such, is intended to supersede, replace and update the Original Guide. It now also covers aspects of the *Schuldscheindarlehen* (SSD) market as part of the wider ECPP universe, and includes an appendix on the general principles of ECPP deal amendments.

Please note that the contents of this Guide are intended for educational purposes only and do not constitute a *pro forma* contract. It is important that each party to an ECPP transaction understands and negotiates the contractual terms of such transaction, which may vary depending on the type of ECPP, the borrower’s situation, investor requirements and market conditions, and seeks appropriate financial and legal advice.

Although intended to be a foundation for a truly European corporate debt private placement market, this edition of the Guide may be adapted, updated and supplemented as the ECPP market and corresponding practice develops throughout Europe.

¹ Formerly known as the Pan-European Private Placement Working Group.

² A French financial industry initiative bringing together corporate borrowers, investors and intermediaries and endorsed by relevant French financial industry associations. See Appendix 7 for membership of the Euro PP Working Group.

³ Source: “European Alternative Lending Markets Take An Ever-Bigger Slice Of The Cake” S&P, April 2016

⁴ Source: “Funding European business: Harnessing alternatives” Allen & Overy, November 2015.

1. Market Objectives for ECPP

The growth of the ECPP market has accelerated since the release of the Original Guide⁵. The objectives of the market and this Guide nonetheless continue to include:

Provide financing for medium-sized, rated and unrated, listed and private, companies:

A European corporate debt private placement market is expected to primarily benefit medium-sized, unrated, private or listed companies by providing medium- to long term debt finance.

Provide a source of risk diversification for investors:

Institutional investors can also enhance risk diversification and financial performance targets by investing in ECPP market borrowers. It is expected that investors in the ECPP market will seek undertakings that are similar to the contractual terms included in the borrower's other relevant senior debt documentation, if any, which would enable investors to maintain compliance with their prudential and regulatory requirements. It is further expected that the ECPP will rank *pari passu* with the borrower's other senior debt.

Set a market standard for ECPP:

A market standard for issuance processes, investor expectation and documentation, based on European and international credit market best practices and, to the extent possible, on self-regulation and adoption of industry practices, will continue to be further developed as necessary alongside recognised industry bodies.

Strengthen the identity and recognition of the ECPP market:

To ensure the credibility and robustness of a fully-fledged ECPP market, supported by a recognised benchmark of quality for European and international borrowers, bank intermediaries and investors.

Promote long-lasting and transparent market relationships:

Robust relationships between borrowers, bank intermediaries and investors is essential to the development of the ECPP market.

Contribute to the development of a European Capital Markets Union:

The development of an ECPP market is aligned to the European Union's policy objective, as expressed by the European Commission, of *"bringing about a well-regulated and integrated Capital Markets Union, encompassing all Member States by 2019 with a view to maximizing the benefits of capital markets and non-bank financial institutions for the real economy"*.⁶

⁵ S&P data as of 12 April 2016 indicates growth of private funding for companies from €6.4 billion in 2014 to €14 billion in 2015.

⁶ See further http://ec.europa.eu/finance/capital-markets-union/index_en.htm. On 23 June 2016, residents of the United Kingdom (UK) voted in a referendum that the UK should leave the European Union (EU). However, this Guide assumes that, in the absence of any contrary indicators at the time of publication, and unless otherwise agreed when the UK has completed the process of formally leaving the EU, Capital Markets Union applies equally to the UK as to the other, remaining Member States of the EU.

2. ECPP Characteristics

An ECPP is a medium or long-term debt financing transaction between a listed or unlisted company and a small number of institutional investors, based on deal-specific documentation negotiated between the borrower (the “Borrower”) and the investor(s) (the “Investor(s)”) generally, but not necessarily, with the participation of one or more bank intermediaries as arranger (the “Arranger”)⁷ usually acting in an agency capacity (i.e. as a facilitator between the Borrower and the Investor, but not as an underwriter of the debt)⁸. Instruments such as equities, covered bonds and securitization products are often privately placed but are outside the scope of this Guide, which solely focuses on corporate debt.

An ECPP may be in the form of a loan (an “ECPP Loan”) or represented by securities (an “ECPP Note”)⁹.

2.1 Key characteristics of an ECPP

Target Borrowers

The target Borrowers are primarily medium-sized European and international companies who may be looking to diversify from the bank loan market or for an introduction or alternative to the established European debt capital markets, and for whom an ECPP could constitute a transition towards those markets. The ECPP market can however also accommodate larger or smaller Borrowers. An ECPP is capable of benefitting from a guarantee of a guarantor, usually a parent or sister company of the Borrower.

No rating requirement

An ECPP is primarily aimed at Borrowers who are not rated. The market will, nonetheless, also be open to rated Borrowers.

Target Investors

The target Investors are primarily institutional Investors such as insurance companies, fund managers and asset management companies. These Investors are sophisticated professionals who are able to analyse the creditworthiness of a Borrower in-house and to negotiate the underlying contractual documentation.

Private offering of debt

An ECPP is offered privately to a small group of Investors rather than offered publicly to a broader group of Investors. The contractual terms and conditions of the ECPP are negotiated directly between the Borrower and the Investors, albeit with the benefit of legal advice, assistance from the Arranger (if any) and any other external principles or guidance deemed to apply to the ECPP transaction (such as is set out herein).

Unlisted debt

An ECPP Note is primarily a type of unlisted debt in line with other major international private placement markets, although it may in certain circumstances be listed, notably to satisfy Investors’ investment criteria and other legal and tax requirements.

Transferability

An ECPP is transferable but largely illiquid, and is mainly suited to a ‘buy and hold’ investment strategy. An ECPP Note is primarily issued in registered (or similar) form and is intended to be held outside the clearing systems, although it may in certain circumstances be cleared, notably to satisfy particular Investors’ investment criteria.

Seniority and security

An ECPP has senior and unsecured status, and should rank *pari passu* with other outstanding senior debt of the Borrower (save for agreed and duly documented exceptions) and therefore, should not be capable of being subordinated or preferred (implicitly or otherwise) to other outstanding senior debt of the Borrower. Borrowers and/or Investors may seek to secure an ECPP, depending on the type of the ECPP, the Borrower’s situation, particular Investors’ requirements and market conditions.

Role of Arranger

It is envisaged that, rather than performing an underwriting role, the Arranger (if any) will perform the role of agent for the Borrower. As such, the Arranger will help to facilitate the documentation process and, if required, approach Investors and coordinate marketing, as well as assist with pricing and, potentially, with hedging¹⁰.

⁷ When used in this Guide, “Arranger” assumes one or more arrangers.

⁸ An Arranger is always appointed on a SSD transaction, in which its role differs to that of an Arranger in an ECPP transaction.

⁹ The distinction between the two forms of ECPP may be driven by, for example, specific restrictions on direct lending. For the avoidance of doubt, the term “Borrower” is used in this Guide for both ECPP Notes and ECPP Loans.

¹⁰ The role of Arranger differs in the context of a SSD transaction, as more fully described in Section 7.

Disclosure, due diligence and on-going reporting

Disclosure, due diligence arrangements and on-going reporting provisions will be determined on a case-by-case basis, depending on particular Investors' and Arranger's requirements, the Borrower's situation and capabilities, and as appropriate for the particular ECPP.

Issue structure

The ECPP will allow for flexibility in the size of issues. Funds will usually be fully drawn upon issue. The ECPP will be repayable at maturity or by instalments, and may be denominated in any currency.

For the avoidance of doubt and notwithstanding the range of characteristics set out above, the remainder of this Guide assumes a non-guaranteed, unlisted, unsecured ECPP that is held outside the clearing systems and is issued by an unrated Borrower.

2.2 It is important to note that an ECPP is not:

- A widely offered and syndicated public bond issue¹¹ such as a "wholesale" or "retail" Eurobond, issued on a stand-alone basis or off a debt issuance programme, euro medium term note programme or other programme for the issuance of negotiable debt instruments ("Debt Issuance Programmes")¹². The "wholesale" Eurobond market involves very large volumes, with an active secondary market (compared to the European debt private placement market) as a result of large issues (often above €300 million) of high denomination securities syndicated among a number of intermediaries and allocated to a very large number of institutional investors. The "retail" Eurobond market involves issues of low denomination debt securities which may be offered to retail investors as well as to institutional investors. Eurobond issues are generally rated by a rating agency.
- An issue in the form of a private placement under a Debt Issuance Programme.
- A loan from a bank or syndicate, where the bank or syndicate may be seeking ancillary business from the Borrower.

¹¹ In market terminology, a "public" bond issue is one that may be placed with a wide range of investors on the Eurobond market.

¹² Debt Issuance Programmes enable Borrowers with market recognition to carry out wholesale or retail syndicated issues or opportunistic funding transactions with a smaller number of Investors who are seeking an investment with a specific term or structure on a private placement basis. Borrowers with Debt Issuance Programmes are typically highly rated companies who approach the eurobond market relatively frequently.

3. Negotiation and Documentation

Negotiation of contractual terms and conditions between the Borrower and the Investors is an important feature of an ECPP, with the whole process more closely resembling that of the bank loan market. This distinguishes an ECPP from public bond issues, where Investors subscribe to an issue without usually being involved in these negotiations, and from a SSD transaction, where the Arranger negotiates the majority of the contractual terms and conditions in advance of them being presented to the Investors, as more fully described in Section 7.

As stated above, an ECPP may take the form of an ECPP Loan or an ECPP Note. Both the Euro PP Working Group and the Loan Market Association (LMA)¹³ have published standard model framework documentation for each type of ECPP, to which users of this Guide are directed.

3.1 LMA Documentation

The LMA has produced four template documents (the “LMA Private Placement Documents”) and an associated user guide for use in European corporate debt private placement transactions, consisting of:

1. a recommended form of facility agreement (the “LMA PP Facility Agreement”);
2. a recommended form of subscription agreement (the “LMA PP Subscription Agreement”);
3. a recommended form of term sheet for use with either the LMA PP Facility Agreement or the LMA PP Subscription Agreement; and
4. a confidentiality agreement for use with either the LMA PP Facility Agreement or the LMA PP Subscription Agreement.

The LMA Private Placement Documents are governed by English law, assume unsecured transactions and are aimed primarily at investment grade-equivalent Borrowers, but are designed to be easily adapted to other credits.

The LMA Private Placement Documents have been compiled by a working party consisting of a selection of banks, non-banks and City law firms, all of whom are active in the private placement market (both in the US and across Europe). The project has also been coordinated alongside both ICMA and the UK Association of Corporate Treasurers (ACT).

The LMA Private Placement Documents are available to LMA members via its website, www.lma.eu.com.

3.2 Euro PP Working Group Documentation

The Euro PP Working Group has released standard documentation for each type of European corporate debt private placement transaction, comprising:

1. a form of loan agreement for ECPP Loans (the “Euro PP Loan Agreement”); and
2. a form of subscription agreement and terms and conditions for ECPP Notes (together with the Euro PP Loan Agreement, the “Euro PP Working Group Documents”), which has been co-ordinated with ICMA.

The Euro PP Working Group Documents build upon existing market practices and refer to the standards developed in the Charter for Euro Private Placements. They assume unlisted, unrated and unsecured transactions, but are nonetheless explicitly intended to be adapted as part of the negotiations, depending on the Borrower’s situation, the characteristics of the ECPP transaction and market conditions. They are governed by French law but may be adapted to any other legal system and were developed for international use.

Resulting from a cross-market initiative, and expanding upon practices developed in the Euro corporate debt private placement market since 2012, the Euro PP Working Group Documents are the result of consensual cross-market efforts of, and represent a fair and balanced standard between, representatives from the market’s major participants, borrowers, intermediaries and investors active in the private placement market and with the assistance of leading international law firms CMS Bureau Francis Lefebvre, Kramer Levin Naftalis & Frankel and Gide Loyrette Nouel.

The Euro PP Working Group Documents are available free of charge, in English, French and Italian, at www.euro-privateplacement.com.

¹³ More information regarding the LMA is set out in Appendix 8.

4. Special Case: Listed ECPPs

This Guide is written on the basis that ECPP Notes will primarily take the form of unlisted securities. However, listed private placement transactions currently occur in some national European markets (for example, in France and Italy) as a result notably of domestic legal requirements and Investor preferences. As a result, it is possible that parties to certain ECPP transactions may also seek to have the relevant instruments listed. In such cases, ECPP transaction participants will need, amongst other things, to:

- carefully review with their financial advisor and legal counsel the consequences of relevant national and EU legislation for listed transactions, including, without limitation, taking advice in relation to the Prospectus Directive (Directive 2003/71/EC), the Transparency Directive (Directive 2004/109/EC) and the Market Abuse Regulation (Regulation 596/2014) and (once it is published and implemented) the EU Packaged Retail and Insurance-based Investment Products Regulation (Regulation (EU) No 1286/2014) (each as amended or replaced from time to time);
- refer to the Charter for Euro Private Placements developed by the Euro PP Working Group which covers many of the generic features and implications of listed private placement transactions in note format;
- consider alternative listed debt products available in the European markets; and
- consider the tax regime applicable upon listing of the ECPP Notes.

5. Parties, Documents and Timetable¹⁴

5.1 Roles of the parties

Each party to an ECPP transaction is expected to adhere to all applicable legal, regulatory and professional rules and standards, and to act with integrity to help establish a robust corporate debt private placement market by ensuring high execution standards and appropriate risk and credit processes.

Each party to an ECPP transaction (including the intermediary and Arranger, if any) should consider its obligations and assess its responsibilities in light of the role being performed by it and the structure of the ECPP transaction, and should carry out such obligations, responsibilities and roles in a manner appropriate for the particular ECPP transaction. Each party should consult its legal counsel and other advisors regarding, amongst other things, managing confidential information, inside information and conflicts of interest, as well as anti-money laundering regulations and know-your-customer procedures.

The following is an indicative summary of the roles and responsibilities of the main parties to an ECPP transaction. It is not intended to be prescriptive, and the scope of such roles and responsibilities is subject to specific negotiation between the relevant parties.

Party	Before execution or issue of the ECPP	During the term of the ECPP
Borrower	Review of terms of appointment of Arranger (if any), Paying Agent (if any) and Trustee (if any) ¹⁵	Payments of interest and principal (bullet or amortising)
	Negotiation and execution of a Non-Disclosure Agreement (see Appendix 2)	Compilation and reporting of financial information, to include Investor calls, if contractually specified
	Compilation and disclosure of financial information and Information Memorandum (if any) ¹⁶ (see Appendix 1)	Compliance with financial covenants and any other covenants and related disclosure
	Presentation by senior management of the Borrower to Investors on a one-on-one or group basis	
	Agreement on the financial terms and term sheet (see Appendix 3)	
	Negotiation of the Agreements (as defined and described in Section 5.2)	
Investor(s)	Origination – identification of eligible Borrowers for ECPP	Management of information received from the Borrower
	Negotiation and execution of Non-Disclosure Agreement	Monitoring the credit profile of the Borrower, including all developments that could affect the quality of the investment (credit events, new financings, amendments and waivers, any new business plans, developments leading to a possible subordination or preference of the ECPP, etc.)
	Execution of Investor(s) representation letter for the Borrower	Monitoring compliance with financial and other covenants

¹⁴ Note that this section is subject to specific negotiation and agreement between the parties.

Party	Before execution or issue of the ECPP	During the term of the ECPP
Investor(s) (Cont)	Obtain sufficient and adequate information about the Borrower	Management of any renegotiation of contractual terms (e.g. meeting of Investors/waiver/amendment) ¹⁷
	Credit analysis, including analysis of credit risk and all available contractual undertakings relating to the ECPP under consideration; review of Borrower's existing loan/note documentation	Management of any events of default or redemption/repayment/prepayment events
	Review and negotiation of the contractual and financial terms ¹⁸ and disclosure (if any) relating to the ECPP	Sale and transfer of the ECPP Note (if required)
	Review and negotiation of the relevant Agreements to which it is a party	
	Due diligence of Borrower	
	Coordinating release of funds/settlement (if settled directly with the Borrower) at closing of the ECPP	
Arranger (if any) (regulated financial intermediary, credit institution or investment firm)	Origination – identification of eligible Borrowers and Investor(s) for ECPP, and management of dialogue and information flow between Borrower and Investor(s)	Assistance with any renegotiation of terms, if so engaged (meeting of Investors/waiver/amendment)
	Negotiation and execution of an engagement letter with the Borrower	
	Preparation of a detailed term sheet (together with Arranger's legal counsel, if any, and Borrower's legal counsel ¹⁹)	
	Assistance to the Borrower (together with Arranger's legal counsel) in preparing the Information Memorandum (if applicable)	
	Execution – assisting with the negotiation of (in the case of an ECPP), or negotiating (in the case of a SSD transaction), contractual and financial terms, the Information Memorandum and the Agreements (together with Arranger's legal counsel, Investors' legal counsel and/or Borrower's legal counsel, if any)	
	Assistance with pricing of the ECPP	
	For ECPP Notes, facilitating securities settlement and delivery (if not settled directly with Investor(s))	
Legal counsel ²⁰	Borrower's legal counsel: Coordination of information and information flow, drafting of the Information Memorandum (if any) and review and negotiation of the term sheet, the terms and conditions of the ECPP and the other Agreements.	Borrower's/Arranger's/Investors' legal counsel: occasional advice on issues arising during the term of the ECPP Note or the ECPP Loan
	Potentially producing a local law legal opinion for the Arranger (for an ECPP with an Arranger) and/or initial lenders (for an ECPP with no Arranger), and, where appropriate, for the identified secondary lenders acceding to the ECPP Loan	

Party	Before execution or issue of the ECPP	During the term of the ECPP
Legal counsel (Cont)	Arranger's legal counsel (if any): ²¹ Assisting with drafting and negotiation of all documentation and the Agreements. Producing a local law legal opinion, if required, for the Arranger, and, where appropriate, for the identified secondary lenders acceding to the ECPP Loan	
	Investors' legal counsel: Review and analysis of all documentation and the Agreements, assistance with the due diligence process. In some cases, some or all of the Arranger's legal counsel duties may be performed by the Investors' legal counsel	
Statutory Auditors	Review of financial data in the Information Memorandum	Certifying compliance with covenants, where agreed and appropriate
	Provision of a comfort letter ²²	
Paying Agent (as agent of the Borrower)	Review of administrative procedures and Paying Agency Agreement	Management of interest and principal
	For ECPP Notes, settlement and delivery	Technical agent for transmission of financial and other information disclosures to Investors
	Release of the funds to the Borrower	Management of interest calculations and payments
		Information agent for monitoring covenants, where appropriate
Trustee (ECPP Notes) (acting for the Investors)	Review of terms and conditions and Trust Deed	Pursuant to the terms of the Trust Deed, can agree to certain changes of terms and conditions on behalf of Investors
		Can call an event of default
		Releases certificates of compliance with covenants
		Acts as a liaison between the Investors and the Borrower in the event of a renegotiation, waiver, amendment, default, etc.
Registrar		Maintenance of a register which will record the serial number (if relevant), holder and transfer of each ECPP Note or SSD transaction

15 The appointment of a "trustee" is optional, and will be dependent on governing law, as well as on the format and nature of the ECPP transaction. In certain jurisdictions, aspects of the role of trustee may be undertaken by alternative bodies, such as a noteholder representative.

16 An Information Memorandum is not necessarily required, but is recommended in ECPP transactions for Borrowers who do not already provide appropriate publicly available information. The exact form of Borrower information provided will be determined by the parties to the transaction in light of the nature of the ECPP, the Borrower's specific profile and the relevant facts at the time. In certain jurisdictions, the distribution of the Information Memorandum may be subject to regulation.

17 See Appendix 4.

18 On a SSD transaction, the Arranger negotiates the majority of the contractual terms and conditions in advance of them being presented to the Investors.

19 Borrower's legal counsel may not be required for a SSD transaction (see further Section 7).

20 These sections may be applicable based on the format and structure of the ECPP transaction and depending on which of the parties agree to engage legal counsel. The need for the Arranger to have separate legal counsel will depend on the nature of the ECPP transaction and, in particular, whether the Arranger is carrying out an agency or an underwriting role.

21 This is an indicative guide of what Arranger's legal counsel, if appointed, may do. In practice, this may change depending on the role and agreement of the Arranger.

22 This may be appropriate depending on the format and nature of the transaction, and is subject to agreement between the parties.

5.2 Documents and conditions precedent

The Borrower, the Investors, the Arranger, the Paying Agent and the Trustee (if applicable) will negotiate and enter into certain documents relating to the ECPP (the "Agreements"). The Agreements to be entered into will vary depending on the nature of the ECPP, but will typically include some or all of the following:

- Engagement letter between the Borrower and the Arranger pursuant to which the Borrower engages the Arranger, and stating in which capacity the Arranger is acting.
- Non-Disclosure Agreement entered into between the Borrower and each Investor for managing confidential information, as the case may be.
- A Subscription Agreement (in the case of an ECPP Note) or a Loan Agreement (in the case of an ECPP Loan) entered into between the Borrower and the Investors, pursuant to which the Borrower and the Investors agree the terms and conditions upon which the ECPP Notes may be issued or the ECPP Loan made, based on a number of representations, warranties and undertakings (including as to the satisfactory indemnification of the Arranger, if relevant) from the Borrower.
- A Paying Agency Agreement may be entered into between the Borrower and the Paying Agent for the purpose of organising financial flows during the term of the ECPP (interest payments, redemption) and setting out technical procedures for provision of information to Investors and procedures for calculating amounts due, as the case may be.
- In the case of an ECPP Note, in certain circumstances a Trust Deed may also be entered into by the Borrower and the Trustee, in which the Trustee agrees to act as a fiduciary on behalf of the Investors.

In addition to the Agreements, the following documents may be required in connection with the ECPP:

- An Information Memorandum describing the Borrower and summarising the terms and conditions of the ECPP and form of the ECPP Note, if relevant.
- Legal opinions, comfort letters and/or other conditions precedent as may be required and as agreed between the parties.
- An Investor representation letter in which the Investors make certain representations to the Borrower relating to their status as investment professionals and acknowledging the risks associated with the ECPP.
- A statement of existing security interests or guarantees granted by the Borrower (which may include only material security interests or guarantees), if relevant.

Illustrative Timetable

		W1	W2	W3	W4	W5	W6	W7	W8	W9	W10	
MAIN STEPS		INVOLVED PARTIES										
KICK-OFF												
Engagement letter of the Arranger(s)	Borrower / Arranger(s)											
Preparation of a short credit profile of the Borrower	Arranger(s)											
Signing of a Non-Disclosure Agreement (if applicable)	Borrower / Arranger(s)											
Preliminary analysis of the Borrower's credit profile	Investor(s)											
MARKETING												
Preparation of the Investor presentation / information memorandum	Borrower / Arranger(s)											
Meeting(s) between the Borrower and the Investor(s)	Borrower / Arranger(s) / Investor(s)											
Credit analysis	Investor(s)											
Negotiation of key terms and conditions	Borrower / Arranger(s) / Investor(s)											
Investor(s) credit committee approval (terms, size, maturity, price)	Investor(s)											
LEGAL DOCUMENTATION												
Preparation of the Term Sheet	Borrower / Arranger(s) / Legal Council											
Term Sheet sent to Investor(s)	Arranger(s)											
Preparation of Agreements	Borrower / Arranger(s) / Legal Council											
CLOSING												
Signing of Agency / Trustee mandates (if applicable)	Borrower / Agent / Trustee											
Satisfaction of conditions precedent	All Parties											
Signing of Agreements	Borrower / Arranger(s)											
Funding	Arranger(s) / Agent / Investor(s)											

6. Key Processes - Recommendations

6.1 Borrower's Information

The Borrower will be required to represent that it has provided the information as required by the Investor and agreed as appropriate for the particular ECPP.

Minimum requirements:

While the levels of information required may vary according to the ECPP transaction, different Investors' requirements and the Borrower's situation, this is likely to include, at a minimum, some or all of the following:

- Audited consolidated financial statements for at least the last two years (IFRS or local GAAP) and the related statutory auditors' reports.
- Information on business activity, share ownership, legal organisation (including management) and key risks.
- Strategy, operating and financial results and business plan, where appropriate.
- Details of liquidity and description of the main financial and non-financial commitments, including potential disclosure of existing loan agreements, where appropriate, or any other matters as required to give the Investors sufficient information and understanding of the Borrower's overall financing structure, and to ensure that the Investor is adequately informed to be able to meaningfully negotiate the terms and conditions of the ECPP²³.
- Investors will expect a presentation of information by senior management of the Borrower; for most Investors, the ability to question senior management is a key element of their credit analysis.

All such information is to be provided in accordance with relevant confidentiality and inside information requirements.

Information memorandum:

It is recommended that the Borrower, with the assistance of legal counsel, and the Arranger (if any) gathers all of the information about the Borrower in an Information Memorandum²⁴ to be submitted to each potential Investor. The Information Memorandum will contain disclosure confirming that it has not been approved as a prospectus under the Prospectus Directive, and the Agreements and the Investor representation letter will contain related representations from the Investors confirming their acknowledgement of this.

In the case of a SSD transaction, it is customary for the Arranger (of which there will always be one) to compile a profile of the Borrower, which is typically in the form of an issuer profile (research report) or as otherwise agreed.

Non-public information:

If the Borrower already has listed equity or debt securities (or is seeking a listing for its securities), disclosure of any *non-public information* gives rise to risks regarding equal access to information (under the EU Transparency Directive or corresponding national requirements) and inside information (under the EU Market Abuse Regulation or corresponding national requirements). Therefore, the Borrower is advised to direct Investors to any *publicly available information*.

The Borrower and the Investors must also ensure that any disclosure, or use or disclosure of any *non-public information*, is in compliance with applicable laws and regulations, including as to inside information, and that adequate information barriers are in place to deal with any such non-public information in accordance with applicable laws and regulations. In particular, disclosure of any non-public information must be covered by a Non-Disclosure Agreement signed between the Borrower and each Investor. A Non-Disclosure Agreement may also be required between the Borrower and the Arranger (if any), unless the Arranger is subject to confidentiality rules in its capacity as a credit institution or an investment firm.

In some cases, Investors may prefer not to receive non-public information that might affect their ability to trade in securities, and therefore not to enter into a Non-Disclosure Agreement (and may request the Borrower to confirm that, in its opinion, none of the information disclosed to the Investor would prevent the Investor from trading in securities under applicable laws relating to insider dealing).

Even where the Borrower has no listed equity or debt securities (and has no immediate plans to seek a listing), the non-public information should also be managed under the terms of the Non-Disclosure Agreement and in accordance with applicable laws and regulations, including as to inside information. Investors may wish to consider whether they

²³ This may be appropriate depending on the format and nature of the transaction, and is subject to agreement between the parties.

²⁴ In some cases, a preliminary Information Memorandum, without pricing terms, may be submitted to Investors in advance of the final Information Memorandum.

require an undertaking from the Borrower that, if (in the future) any of the Borrower's securities are or are to be listed, the Borrower will (on request) publicly disclose any information previously disclosed to Investors, the knowledge of which would prevent an Investor from trading in those securities under applicable laws relating to insider dealing and confirm to Investors that, in the Borrower's opinion, all such information has been publicly disclosed (or that there is no such information).

In this Guide, references to "listed" securities are used to cover officially listed securities as well as securities admitted to trading or traded on regulated markets or other similar trading venues within the scope of EU or national laws on insider dealing.

6.2 Agreeing the key economic and legal terms and conditions of the ECPP transaction

The preparation of a detailed term sheet - containing a summary of the main financial and legal terms and conditions of the ECPP - is recommended to reflect negotiations between the Borrower, the Arranger (if any) and the Investors who wish to take part in the ECPP transaction. In cases where an Arranger is involved in the ECPP transaction, Investors who do not wish to take part in the negotiations directly can do so through the Arranger.

A description of the key points to be discussed and addressed and which will form the basis of the terms and conditions of an ECPP can be found in Appendix 3. This description may be helpful when drafting the term sheet.

Term sheet

Investors will generally require that the terms of the ECPP are in line with those included in the Borrower's other bank loans and other outstanding senior indebtedness, including as to status, so as to reduce the risk of subordination. As such, transparency of information concerning all of the Borrower's debt (including the key covenant package), both before and during the term of the ECPP transaction, is essential for Investors.

Certain other clauses requiring special attention include:

- The status and ranking of the ECPP relative to other outstanding indebtedness of the Borrower.
- Borrower's undertakings in the form of a negative pledge (which, subject to certain exceptions, restricts the ability of the Borrower to create security over its assets and thereby maintains the ranking of the ECPP), financial covenants (with relevant definitions), disclosure of information and other undertakings, including, *inter alia*, authorisations, compliance with laws, restrictions on disposals of assets, mergers and corporate restructurings, change of business, and a potential "more favourable terms" clause such that if the Borrower grants more favourable financing terms to another creditor, it must also offer such terms to the Investors.
- Representations on, *inter alia*, corporate matters, governing law and enforcement, tax issues, no default, no misleading information, financial statements, *pari passu* ranking and no proceedings pending or threatened.
- Options for early redemption/repayment/prepayment of the ECPP, including on the occurrence of a change of control or change in tax characterisation²⁵.
- Events of default, including non-payment, breach of financial covenants and other obligations of the Borrower, misrepresentation, cross default, insolvency and related events and other occurrences which may give Investors the right to acceleration/early redemption/prepayment of principal.
- Structural changes, such as a step-up clause on an increase in the probability of default (common in the SSD market).
- Withholding tax gross-up provisions, including availability of any relevant tax certifications²⁶.
- Transferability of the ECPP.

Typical discussion process

- The Arranger (if any) and the Borrower enter into an engagement letter.
- The Investors sign the Non-Disclosure Agreement to gain access to the Borrower information necessary to conduct their credit analysis.
- As soon as practicable following signing of the Non-Disclosure Agreement, the Arranger and/or the Borrower provides certain key commercial information about the ECPP transaction: investment amount, planned maturities, price range.

²⁵ An early redemption, repayment or prepayment or other provision which affects the cash flows of the ECPP may affect the ability of certain Investors to hold ECPPs under the matching adjustment purposes for Solvency II, which falls outside the scope of this Guide.

²⁶ For example, as required for withholding tax exemption in the UK, and as set out in Appendix 5.

- The Investors meet with the Borrower.
- The Arranger ascertains the early interest of the Investors on the basis of the draft detailed term sheet submitted by the Arranger/Borrower.
- Each Investor submits to the Arranger and the Borrower the conditions under which it could potentially take part in the ECPP transaction, such as investment amount, maturity, price and main clauses in the Agreements.
- Based on these conditions, Investors are selected for further discussions with the Borrower.
- The Borrower and/or the Arranger notify each Investor that it has been selected or excluded.
- Investors may choose lead Investors/Arranger²⁷ to negotiate primary terms (or, other than in the case of SSD, the largest Investor may *de facto* assume this role).
- Once the term sheet has been finalised and accepted by all of the parties, it becomes the basis for drafting the Subscription Agreement or the Loan Agreement.

6.3 Arranger and Investors' due diligence

Arranger due diligence

The Arranger (if any) should carefully consider the appropriate level of due diligence it should perform in the context of each ECPP transaction, independently of the Investors' due diligence and credit analysis. The appropriate procedures will depend on the circumstances of each ECPP transaction, including the nature of the Borrower and its business and the role being undertaken by the Arranger. In this regard, the Arranger may want to consider the due diligence procedures consistent with those contained in Guidance Note 4 of the ICMA Primary Market Handbook²⁸.

Investors' Due Diligence

No Investor will be entitled to rely on any Arranger's due diligence. Investors may be required to affirm that they have conducted their own investigation of the Borrower, and to give representations to this effect either in a separate investor representation letter provided to the Arranger or in the Subscription Agreement or the Loan Agreement. As a result, notwithstanding any Arranger due diligence, the Investor must carry out its own due diligence before a ECPP transaction is concluded. This due diligence may include the Investors' attendance at a presentation of the Borrower (whether at a meeting or on a call) by the senior management of the Borrower.

The main Investors' due diligence tasks include²⁹:

- negotiating and signing Non-Disclosure Agreements with the Borrower;
- managing confidential information and any resulting inside information, where applicable³⁰;
- conducting credit analysis, including credit risk analysis and an analysis of financial information;
- conducting legal due diligence, including analysis of all significant contractual and other legal documents of the Borrower;
- reviewing and negotiating the ECPP documentation (including the term sheet, the terms and conditions of the ECPP and the Agreements, both in the context of the ECPP and the Borrower's other obligations);
- reviewing materials provided by the Borrower in any data room;
- managing any conflicts of interest; and
- reviewing legal opinions regarding the Borrower's legal capacity and the validity and enforceability of its contractual obligations, certifications and other forms of conditions precedent. A statement of existing security interests or guarantees is also recommended.

6.4 Disclosures and monitoring of legal and financial covenants

Covenants, in which the Borrower undertakes to comply with certain ratios, act as a means of measuring the Borrower's ability to service and repay its debt and, if measured in a consistent way, can be an effective "early warning system" which allows Investors to assess changes in the credit quality of the Borrower, and in the risks attached to the ECPP transaction. The requirement for covenants will depend on, *inter alia*, the Borrower's situation. Well designed and appropriate financial and legal covenants can also provide timely performance indicators for Investors.

²⁷ In the case of the SSD market.

²⁸ Available to ICMA members at www.icmagroup.org. In general terms, Guidance Note 4 directs parties to consider carefully the appropriate level of due diligence, and advises that due diligence procedures will vary greatly from issue to issue.

²⁹ This is not an exhaustive list and advice should be taken from independent legal, financial and other advisors.

³⁰ See further Section 6.1.

Borrowers may be required to supply Investors with a compliance certificate signed by senior management and/or auditors of the Borrower, at a frequency and time to be specified in the documentation, demonstrating to Investors their compliance with the covenants and potentially showing the calculations of relevant financial ratios, based upon which Investors will ascertain compliance with the covenants. In order to mitigate problems associated with monitoring negative undertakings, the Borrower should disclose any concerns about potential breaches of the covenants, and is encouraged to discuss them with Investors at the earliest opportunity.

Disclosure and monitoring both throughout the life of the ECPP (and periodically) may include:

During the term of the ECPP

- Managing information received from the Borrower.
- Monitoring the credit profile of the Borrower, including all developments that could affect the quality of the investment (credit events, new financings, amendments and waivers, any new business plans, events leading to potential subordination, etc.).
- Monitoring compliance with financial and other covenants.
- Managing any renegotiation of contractual terms and conditions (e.g. waivers/amendments).
- Managing any events of default or redemption/repayment/prepayment events.

Periodic disclosures

If the Borrower has listed equity or debt securities:

- The Borrower is required to publicly publish or otherwise disclose its financial statements³¹ and disclose any non-public material information that may affect the securities already listed. Investors must have free access to such information.
- The Borrower's undertaking to notify Investors of any material event that could affect the ECPP must be explicitly stipulated in the Agreements, in compliance with the applicable rules regarding inside information. Disclosures to Investors may be made through the Paying Agent (if any), or directly by the Borrower; any disclosures to potential new Investors must be subject to signing a new Non-Disclosure Agreement.

If the Borrower has no listed securities:

- It is recommended that the Borrower undertakes in the Agreements to (i) submit or make available its financial statements during the term of the ECPP with appropriate frequency (at least once a year, or more frequently, depending on the regulatory requirements for Investors), inter alia for the purpose of monitoring the Borrower's covenants, and (ii) notify Investors of any default (as defined in the relevant Agreements).
- Disclosures to Investors may be made through the Paying Agent (if any), or directly by the Borrower; any disclosures to potential new Investors must be subject to signing a new Non-Disclosure Agreement.

In any case, financial information must be published, transmitted or made available at the same time and frequency as it is made available to the Borrower's lending banks (if any), and subject to compliance with the applicable rules regarding inside information, where appropriate.

6.5 Amendments and waivers

Given the relatively long-term nature of a typical ECPP, it is likely that at some point during the life of the ECPP, the Borrower may request changes to the original terms of the transaction – this may include for instance an amendment to, or waiver of, a particular covenant or obligation or other amendment which has come about due to a change in the circumstances of the Borrower. The general principles set out in Appendix 4 of this Guide, although non-binding in nature, are intended to apply to the conduct of such amendments and waivers.

³¹ With an exception for Borrowers who issue exclusively (i) debt securities the denomination per unit of which is at least €100,000 (or the equivalent thereof in another currency) and which are admitted to trading on a regulated market and/or (ii) securities listed on certain multilateral trading facilities.

7. The Schuldscheindarlehen and the wider ECPP universe

7.1 The Schuldscheindarlehen

Comparable to an ECPP, a Schuldscheindarlehen (SSD) is a privately-placed, unsecured, unsubordinated and usually investment grade debt financing instrument that combines characteristics of corporate bonds, bank loans and syndicated facilities. As a loan instrument, a SSD does not require a listing or any kind of securities prospectus. While typically issued by German Borrowers and aimed at German Investors, SSD's reach has become increasingly international, with approximately one third of SSD Borrowers (in terms of volume) being non-German.

Borrowers

A SSD is a corporate financing tool used for raising funds relatively quickly and expanding the Borrower's financing mix in a variety of currencies (predominantly euro, but also US dollar and sterling). The SSD facilitates the growth and investment opportunities of mainly large and medium-sized, implied investment grade corporates. Transaction volumes range from €10 million up to more than €1 billion, with typical issuance in the €100-300m range. Maturities encompass the entire curve, usually starting at 2 years and now reaching as long as 10 years. Under German law, loans are subject to call rights after 10 years, but for maturities of up to 30 years, the "*Namenschuldverschreibung*", which is a different German private placement instrument, may be used.

Investors

SSD transactions are placed with a wide group of Investors, such as regional and international banks, insurance companies, investment and pension funds, as well as treasury departments of large corporates, allowing Borrowers to broaden their existing lender base without the requirement for an external rating. These "buy-to-hold" Investors also appreciate that *Handelsgesetzbuch* (German Commercial Code) and IFRS-governed SSD loans do not require to be marked-to-market in Germany³².

Documentation

SSD transactions are characterized by their short, straightforward contractual documentation (typically between 1 page for public Borrowers and up to 25 pages for corporate Borrowers), which is governed by German law. Given its long track record, SSD documentation and procedures have become standardised and are quite familiar to SSD market participants, resulting in a highly efficient syndication processes. However, SSD documentation also allows for a high degree of structuring flexibility, while benefitting from an established legal framework. Amendments to SSD transaction documentation require the agreement of all Investors, which makes it more suitable for rated or implied investment grade issuers.

Arranger role

In line with market procedures, there is always an Arranger involved in a SSD transaction. In most cases, the Arranger is a long term core relationship bank of the Borrower with sound knowledge of the Borrower's credit and risk profile. This knowledge is helpful for the Arranger when negotiating the contractual terms and conditions of the SSD transaction, the majority of which are agreed in advance of the Agreements being presented to the Investors. More generally, the Arranger also facilitates the overall documentation process, thereby eliminating the requirement for separate Borrower's legal counsel.

The Arranger also facilitates the execution process, provides settlement and paying agency roles as well as advisory services to the Borrower throughout the life cycle of the SSD.

7.2 Relevance of the Guide

The SSD benefits from long established market practices and a specific legal format. There are nonetheless many points of convergence with the ECPP market that make certain sections of this Guide also relevant to SSD market participants. These include:

- 6.1 Borrower's Information
- 6.3 Arranger and Investors' due diligence
- 6.4 Disclosures and monitoring of legal and financial covenants
- Appendix 1 - Information Memorandum Template
- Appendix 2 - Form of Non-Disclosure Agreement

³² This may differ for other jurisdictions.

- Appendix 3 – Description of Key Points to be discussed between the Borrower and the Investors, and specifically:
 - 3. Negative pledge
 - 4. Borrower's undertakings (including 4.1 Financial covenants)
 - 5. Representations

7.3 Other sources of information on the Schuldscheindarlehen market

The Association of German Public Banks (**Bundesverband Öffentlicher Banken Deutschlands, VÖB**) is a leading industry association in the German banking industry that brings together key participants in the SSD market. It has published an important document on the SSD market: **Schuldscheindarlehen (Private Placements) - Best practice for European Capital Markets Union**.

The LMA has also released a helpful publication **Schuldscheindarlehen – LMA Product Guide**, which describes in more detail SSD characteristics and broader market considerations.

Appendix 1

Indicative Information Memorandum Template³³

1. Executive summary

- (a) Company overview
 - (i) History, business, activities and markets
 - (ii) Breakdown of revenues by business segment
 - (iii) Group strategy and key objectives
 - (iv) Organisational structure
 - (A) Shareholder structure
 - (B) Management, organisation and employees
 - (C) Main subsidiaries/group structure
- (b) Recent events
 - (i) Key business trends/ events
 - (ii) Acquisitions, spin offs, etc.
 - (iii) Environmental, legal, litigation and others
- (c) Summary of financial performance
 - (i) Simplified [consolidated] financial statements
 - (ii) Overview of credit ratios, financing and group financial targets

2. Key investment considerations

- (a) Operational positioning, e.g.
 - (i) Key business strengths
 - (ii) Brand
 - (iii) Diversification (market, sector, geography, etc.)
 - (iv) Client analysis and relationship with suppliers
 - (v) Competitive position
- (b) Financial positioning, e.g.
 - (i) Cash flow generation
 - (ii) P&L accounts
 - (iii) Balance sheet
 - (iv) Investment policy
 - (v) Dividend policy
 - (vi) Main financial covenants and guarantees
- (c) Risks factors
- (d) Others

³³ This is a suggested indicative template for the Information Memorandum (if any). The exact form and structure of Borrower information to be provided will be determined by the relevant parties (in consultation with their legal counsel).

3. Company description

- (a) Business overview
- (b) History
- (c) Strategy, e.g.
 - (i) Long-term priorities and objectives
 - (ii) Growth opportunity
 - (iii) Brand strategy
 - (iv) Social and environmental commitments
- (d) Business activities, e.g.
 - (i) By geographical area
 - (ii) Trading performance by sector/market
- (e) Market description, e.g.
 - (i) Segments
 - (ii) Technology evolution
 - (iii) Competitors
 - (iv) Regulation
 - (v) Environmental matters
- (f) Management overview
 - (i) Board of directors and key executives
- (g) Financial Performance
 - (i) Summary of consolidated and [individual] financial statements
 - (ii) Trading performance history
 - (iii) Cashflows, working capital and capex
 - (iv) Credit metrics
 - (v) Financial structure and bank relationship
- (h) Other information
 - (i) Legal matters/litigation
 - (ii) Other (socially responsible investment)
 - (iii) Health and safety
 - (iv) Research and development
 - (v) IT
 - (vi) Intellectual property
 - (vii) Insurance
 - (viii) Related party transactions
 - (ix) Statement that the Information Memorandum has not been approved as a Prospectus under the Prospectus Directive.

Appendix 2

Indicative Form of Non-Disclosure Agreement³⁴

[Borrower / Investor]³⁵

Attn: [•]

[DATE]

RE: Confidentiality Undertaking

Dear Sirs,

In connection with a proposed private placement of [notes] [a loan] (the “**Transaction**”), in which [Name of potential investor] (“you” or the “**Recipient**”) may decide to participate, [Name of borrower] (the “**Borrower**”) [has engaged [Name of arranger] (the “**Arranger**”) and the Borrower [and/or the Arranger]] may disclose from time to time in the future to the Recipient or any Recipient affiliate or any of their respective directors, employees, legal advisors, auditors or legal counsel³⁶ (each a “**Representative**”) certain information concerning the Transaction, the Borrower or other parties involved in the Transaction which is confidential and/or proprietary in nature.

In consideration of [the Arranger or] the Borrower making available any such information, by signing and returning to us an executed copy of this confidentiality undertaking (the “Non-Disclosure Agreement”) you agree and undertake towards [the Arranger and] the Borrower as set forth here below.

1. Confidential Information

For the purposes hereof, “**Confidential Information**” means any information of whatever nature, (whether financial, commercial, technical or other)³⁷, in whatever form and by whatever medium (whether in writing, in electronic form, orally or otherwise) relating to the Borrower, the Transaction or the parties involved in the Transaction, disclosed to or obtained by the Recipient or any Representative from [the Arranger,] the Borrower, [any other potential investor in the Transaction notified to the Recipient by the Borrower in writing (“**Potential Investor**”)]³⁸, or their respective Representatives, (whether or not marked as confidential or private), together with any analyses, compilations, forecasts, opinions or studies contained in any document transmitted to or prepared by the Recipient, [any other Potential Investor] or any of [its/their respective] Representative[s] and which is derived from or which reflects any such information, including the existence and contents of this Non-Disclosure Agreement as well as the fact that any such information is being or has been transmitted or that discussions or negotiations are taking place concerning the Transaction, but excluding information which:

- (a) is in the public domain at the time of its disclosure hereunder;
- (b) thereafter comes into the public domain otherwise than through a breach of this Non-Disclosure Agreement;
- (c) is already lawfully in the possession of the Recipient prior to its disclosure hereunder; or
- (d) comes into the possession of the Recipient from a source which to the best of the Recipient's knowledge is not bound by a duty of confidentiality with respect to that information.

2. Non-disclosure

The Confidential Information will be treated and kept strictly confidential and will not be disclosed in whole or in part in any manner whatsoever without [the Arranger and] the Borrower's prior written consent or save as permitted hereunder.

³⁴ This is a suggested indicative form of Non-Disclosure Agreement. The exact form and structure of the agreement will be determined by the parties (in consultation with their legal counsel).

³⁵ The Non-Disclosure Agreement will generally be bilaterally signed between the Borrower and each Investor. In the event of a bilateral agreement between the Borrower and the Investor, bracketed references to the Arranger throughout the document should be deleted. Note that in this case confidentiality obligations of the Arranger would generally be addressed in the engagement letter entered into with the Borrower.

³⁶ As the case maybe, agents and financial advisors may be added. In addition, certain Investors may request to add named/unnamed individuals acting as agents on behalf of underlying investors and participating on the Recipient's investment committee.

³⁷ Depending on the type of transaction and Borrower and the needs of the Recipient, some or all of the following information can be disclosed by the Borrower to the Recipient at its sole discretion: main terms of its existing indebtedness (covenants, security interest, credit events, events of default etc.), cash flow, balance sheet, investment policy, dividend policy, business plan, and any other relevant information which could impact the credit quality of the Borrower.

³⁸ If the option of a discussion between Potential Investors is not applicable, bracketed references to the Potential Investor throughout the document should be deleted.

3. Permitted disclosure

The Confidential Information may be disclosed by the Recipient hereunder without the prior consent of [the Arranger and] the Borrower:

(a) to the Representatives of the Recipient and of the Recipient's affiliates who need to know the Confidential Information for the Permitted Use (as defined hereafter) [or any other Potential Investor] provided that (a) they are previously informed of the confidential nature of the Confidential Information and of the contents of this Non-Disclosure Agreement and, (b) the Recipient has ensured that [(x)] for the Representatives of the Recipient and of the Recipient's affiliates³⁹, any such Representative agrees to observe the obligations contained herein as if it were a party to this Non-Disclosure Agreement or is bound by obligations similar to the obligations contained hereunder either legally, statutorily or contractually towards the Recipient [or (y) for any Potential Investors, they have previously executed a similar Non-Disclosure Agreement with the Borrower [and the Borrower has approved, in writing, both the type of Confidential Information disclosed (which should not include pricing terms) and the timing of such disclosure]]; or

(b) if required by law or a court order of any competent jurisdiction or pursuant to any request of any regulatory or other authority provided that, to the extent permitted by law, the Recipient notifies [the Arranger and] the Borrower of such requirement as soon as becoming aware of such requirement.

4. Preservation of Confidentiality

The Recipient shall maintain [and shall procure that each person to whom the Confidential Information has been disclosed maintains] the confidential nature of the Confidential Information and shall establish, maintain and provide effective security measures to safeguard the Confidential Information from unauthorised access, use, copying, disclosure or which a prudent person would employ to protect that person's own confidential information.

5. Permitted Use

The Recipient agrees and undertakes and shall procure that each person to whom the Confidential Information has been disclosed agrees and undertakes to use the Confidential Information only for a Permitted Use.

For the purposes hereof, "**Permitted Use**" means the consideration, evaluation, negotiation, and monitoring of the Transaction for providing advice and services in relation thereto.

6. Inside Information⁴⁰

The Recipient agrees and acknowledges that some or all of the Confidential Information is or may be price-sensitive information and that the use of such information may be regulated or prohibited by applicable legislation relating to insider dealing and the Recipient undertakes not to use such Confidential Information for any unlawful purpose in contravention of such legislation.

7. Remedies

It is agreed and acknowledged that, without prejudice to any rights or remedies (including monetary damages) that any party may have, damages may not be an adequate remedy for any breach of the provisions of this Non-Disclosure Agreement and that, in addition to any other remedies, the Arranger and the Borrower shall be entitled to any remedies or injunction and specific performance (execution *in specie*) available under the relevant jurisdiction (or their equivalent in any jurisdiction) for any threatened or actual breach of this Non-Disclosure Agreement.

8. Return or destruction of copies

In the event that the Recipient decides not to join the Transaction or if the Transaction is not completed for whatever reason, upon written request of [the Arranger and] the Borrower, the Recipient shall return to the extent practicable all originals and destroy or permanently erase all copies of Confidential Information and procure that anyone to whom the Recipient may have disclosed Confidential Information does likewise, save that one copy of any such Confidential Information may however be retained if required by any applicable law, rule or regulation or by any competent judicial, governmental, supervisory or regulatory body, provided that, in each case, necessary measures are taken to preserve the confidential nature of the Confidential Information. Any Confidential Information that is not returned or destroyed, as the case may be, shall remain subject to the obligations set forth hereunder.

³⁹ As the case may be, agents and financial advisors may be added. In addition, certain investors may request to add named/unnamed individuals acting as agents on behalf of underlying Investors and participating on the Recipient's investment committee.

⁴⁰ This article applies only if bonds and/or shares of the Borrower are listed on a Regulated Market or a multilateral trading facility.

9. Limitation on use

Nothing contained herein shall be construed as granting or conferring any rights by licence or otherwise in any Confidential Information, except for the right to use Confidential Information strictly in accordance with the provisions hereof.

10. Duration

The undertakings contained hereunder shall survive the termination of any discussions or negotiations between the Recipient[, the Arranger] and the Borrower regarding the Transaction. [Notwithstanding the above, the obligations contained hereunder shall terminate [one year] after the date all parties have executed this Non-Disclosure Agreement.]

11. No warranties

It is agreed and acknowledged that the [Borrower and] Arranger makes no representations or warranties, express or implied, as to the quality, accuracy, reliability or completeness of the Confidential Information, will have no responsibility in connection therewith and shall be under no obligation to update or correct any such Confidential Information.

12. Preservation of rights

Any failure by any party to exercise any right, power and privilege hereunder shall not constitute a waiver hereunder, nor shall any single or partial exercise thereof preclude any further exercise of any right, power and privilege.

13. Invalidity and enforceability

The invalidity or unenforceability of any provision of this Non-Disclosure Agreement shall not affect the validity or enforceability of any other provision of this Non-Disclosure Agreement which shall remain in full force and effect.

14. Cumulative rights

The rights, powers and remedies provided in this Non-Disclosure Agreement are cumulative with, and not exclusive of, the rights, powers, or remedies provided by law.

15. Governing law

This Non-Disclosure Agreement shall be governed by and construed in accordance with [insert] Law.

16. Jurisdiction

Any dispute arising out of this Non-Disclosure Agreement shall be submitted to the jurisdiction of the [insert].

Please confirm your acceptance of the terms of this Non-Disclosure Agreement by signing the enclosed copy and returning it via fax with hard copy to follow to:

[Name of Borrower]

[address]

[contact name]

Tel: + [telephone number]

Fax: + [facsimile number]

Yours faithfully,

[For and on behalf of the Borrower]

Acknowledgement

We agree to the above

For and on behalf of [Name of Recipient]

Date:

Appendix 3

Description of Key Points to be discussed between the Borrower and the Investors

This Appendix 3 highlights and describes some of the more significant key points to be discussed between the Borrower and the Investors, but does not, and is not intended to, cover all aspects of the ECPP transaction, nor of the key points to be discussed as part of the discussion and negotiation process, and should be used for summary educational and indicative purposes only.

This Appendix 3 is not intended to be, nor is it intended to form the basis of, a contract. The terms and conditions will typically be set out in the Subscription Agreement or the Loan Agreement and will vary depending on the type of ECPP transaction, the Borrower's situation and market conditions. The parties should consider (a) the scope and nature of the terms and conditions, and (b) whether additional representations, undertakings and events of default or other conditions are appropriate, in each case depending on, *inter alia*, the nature of the ECPP transaction, the Borrower's situation and the terms of any other senior indebtedness of the Borrower.

The terms and conditions of the ECPP will contain many detailed provisions relating to, among other things, interest owed by the Borrower on the ECPP (fixed rate, variable rate, etc.), the interest calculation methods and any step-up/step-down provisions triggered by the occurrence of certain events. They will also set out details relating to payment mechanics and payment days as well as other administrative and legal information.

As more fully described and set out in this Guide, the LMA Private Placement Documents and the Euro PP Working Group Documents are available at www.lma.eu.com and www.euro-privateplacement.com, respectively.

1. Form, denomination and title

Purpose of the clause: in the case of an ECPP Note, the terms and conditions will specify the form, denomination and title of the ECPP Note. ECPP Notes are expected to be in registered form. The Borrower (or its agent) will be required to maintain a register in respect of the ECPP Notes, which will record the serial number (if relevant), holder and transfer of each ECPP Note. The person in whose name the ECPP Note is registered shall be treated as its absolute owner for all purposes.

2. Status of the ECPP

Purpose of the clause: to stipulate the ranking of the ECPP with respect to the Borrower's other debts (if any).

Key Points:

- (a) The ECPP will primarily constitute senior unsecured debt. However, depending on the type of ECPP transaction, the Borrower's situation, Investors' requirements and market conditions, the ECPP will be capable of being secured, which may lead to the parties' execution of security documents and an intercreditor agreement.
- (b) Payment obligations under the ECPP rank *pari passu* with bank loans and other senior debt of the Borrower having equivalent characteristics, save any duly documented exceptions (any specific limitation on granting of security interests to be stipulated in the negative pledge provision).

3. Negative pledge

Purpose of the clause: to maintain the ranking of the ECPP by restricting the Borrower's ability to grant security interests over its assets to secure other similar debt, in order to ensure that Investors rank equally with other creditors.

Key Points:

- (a) When drafting this clause, consideration should be given to consistency with negative pledge clauses in existing bank loans and other senior debt documentation with similar characteristics (if any), particularly with regards to exceptions and thresholds, so that Investors' claims benefit from the same protections as those bank loans and other senior debts. While the negative pledge can stray from existing negative pledges (for example, limiting the

granting of security interests to a certain percentage of the value of assets without any other exceptions), care should be taken to avoid an inadvertent breach of existing provisions.

- (b) Depending on the legal structure of the Borrower, the negative pledge may extend to some or all subsidiaries of the Borrower, or in some cases, only to the principal subsidiaries (as determined according to a formulation which will be set out in the relevant documentation).
- (c) When negotiating the negative pledge, the Borrower should compile a statement of existing security interests or guarantees and submit it to the Investors.
- (d) The negative pledge clause may restrict the ability of the Borrower to secure some or all of its debt, as the case may be (which may include bonds, notes, bank loans, financial debts such as leasing debt and factoring debt). However, certain permitted security interests and exceptions need to be agreed, for example, existing security, security which in the aggregate falls under a certain threshold, netting, set-off or hedging arrangements.

4. Borrower's undertakings

4.1 Financial covenants

Purpose of the clause: Financial covenants, in which the Borrower undertakes to comply with certain ratios, are a means of measuring the Borrower's ability to service and repay its debt, and, if measured in a consistent way, can be an effective "early warning system" which allows Investors to assess changes in the credit quality of the Borrower and in the risks attached to the ECPP transaction. Well designed and appropriate financial covenants can also provide timely performance indicators for Investors. The requirement for, and scope of, financial covenants depend on, *inter alia*, the Borrower's situation.

The financial covenants are likely to be the subject of much commercial negotiation, as to which the starting point will usually be the scope of any financial covenants in the Borrower's existing bank loan and other senior debt documentation (if any). Consideration should be given to ensure consistency with the nature, scope and drafting of any such existing financial covenants. It is therefore difficult to design a finite list of financial covenants which would be appropriate to an ECPP transaction. In certain circumstances, strong Borrowers may not be required to give any financial covenants at all; for other Borrowers, the terms may vary considerably depending on the circumstances, including market conditions, the nature of the Borrower's business and its credit quality.

Key Points:

The financial covenants described below are not necessarily designed, and may not be appropriate in their entirety, for all ECPP transactions.

- (a) Financial covenants may include, *inter alia*, one or several covenants such as, for example, a gearing ratio (debt to equity), cashflow cover ratio (cashflow to net debt service), a leverage ratio (total net debt to EBITDA⁴¹), an interest cover ratio (EBITDA to net finance charges) and possibly annual limits on capital expenditure.
- (b) The ratios, each component of the ratios and any corresponding definitions should be clearly drafted to ensure consistency with those used in the Borrower's bank loans and other senior debt documentation with similar characteristics (if any) and/or the accounting policies or requirements of the Borrower.
- (c) The frequency and timing for calculating the ratios and providing such calculations to Investors should be stipulated in the documentation (likely to be at least once a year, or more frequently, depending on the regulatory or other requirements of the Investors and the situation of the Borrower).

The documentation will specify the requirement for, and frequency and timing of, any covenant validation requirements. For instance, the Borrower may be required to deliver compliance certificates signed by senior management and/or auditors (at a frequency and time to be specified in the documentation) demonstrating to Investors their compliance with the covenants and potentially showing the calculation of relevant financial ratios, based upon which the Investors will ascertain compliance with the covenants. Details of the calculation and a validation of the compliance certificate by the Borrower's auditors may also be required.

In order to mitigate problems associated with monitoring negative undertakings, the Borrower should disclose any concerns about potential breaches, and is encouraged to discuss them with Investors at the earliest opportunity. Regular communication between the Borrower and the Investors, and the resulting transparency and familiarity with each others' positions, should make it easier to respond accordingly to amendment or waiver requests from the Borrower should the need arise, thus increasing efficiencies for all.

⁴¹ Earnings before interest, tax, depreciation and amortisation.

4.2 Information disclosure undertakings

Key Points:

The Borrower will be required by the relevant documentation to provide certain information to Investors on a regular basis. The extent of the information and the frequency and timing of delivery thereof should be carefully negotiated and specified in the documentation.

Method of information disclosure and equal access to information:

- (a) In some cases, the Borrower may satisfy its disclosure obligations by posting the required information on a designated electronic website.
- (b) The access, frequency and deadlines for disclosing the non-consolidated and/or consolidated financial statements and other information should be the same for all creditors. Consideration should be given to existing practices, to the Borrower's situation and the information disclosure provisions of any of the Borrower's existing bank loan and other debt documentation.
- (c) Information disclosed pursuant to a Non-Disclosure Agreement may be disclosed to Investors via the Paying Agent, or directly by the Borrower.⁴²
- (d) Although the circumstances will vary for each Borrower and each ECPP transaction, the information that Borrowers are likely to be required to disclose to Investors in order to ensure compliance with, and/or prevent a breach of, an undertaking, and/or as part of the due diligence process, may include some or all of the following:
 - (i) financial data prepared on the basis set out in the documentation (consolidated and non-consolidated annual financial statements and, where appropriate, interim financial statements, along with the relevant statutory auditors' reports and significant historical data), statement of existing security interests or guarantees and business plan, where appropriate;
 - (ii) any default under the ECPP or any other information that the Investors may reasonably request;
 - (iii) events affecting the Borrower's indebtedness, such as occurrence of an event of default, characteristics of new debt, amendments and waivers, acquisitions (beyond a given threshold, as the case may be) and the extension of financing, invocation of an exception to the negative pledge for a significant amount, etc.;
 - (iv) description of debt, security interests and guarantees and other specific characteristics in order to assess the potential for subordination of claims;
 - (v) all documents sent to the Borrower's shareholders or other creditors; and
 - (vi) details of litigation, arbitration or administrative procedures and further information regarding the financial condition, business and operations of the Borrower or its group as may be reasonably requested by the Investors and in all cases as agreed between the Borrower and the Investor.

4.3 Other undertakings

Key Points:

Other required undertakings will depend on the nature and situation of the Borrower and the ECPP transaction. However, generally, the Borrower may be required to give some or all of the following undertakings as to:

- (a) compliance with necessary authorisations and laws;
- (b) restrictions on disposals of assets (with agreed exceptions);
- (c) restrictions on mergers and corporate restructurings generally in certain circumstances;
- (d) restrictions on substantial changes to business;
- (e) potential requirement to hold an annual meeting with senior management of the Borrower;
- (f) use of proceeds of the issue; and
- (g) potential limits on the incurrence of additional indebtedness of the Borrower and its subsidiaries.

⁴² Care must be taken to ensure that disclosure of information does not render the Investor an "insider" under the Market Abuse Directive.

5. Representations

Purpose of the clause: a representation is a statement of fact which is relied upon by the relevant contractual party and induces them to enter into the contract. If a representation is not true as of the date it is made or stated to be made, the relevant party has the right to enforce its contractual remedies against the Borrower.

Key Points:

The scope and application of the representations to the Borrower and its group (if applicable) will be set out in the relevant documentation. Although the circumstances will vary for each Borrower and each ECPP transaction, the information that Borrowers are likely to be required to represent to Investors may include some or all of the following representations as to:

- (a) corporate matters: due incorporation and existence of the Borrower, legal title to its assets and capacity to carry on its business, power and authority to enter into the ECPP transaction, validity and admissibility of authorisations and compliance with constitutional documents;
- (b) governing law, enforceability and conflict: that obligations under the ECPP are legal, valid, binding and enforceable, and do not conflict with law or regulation applicable to the Borrower, its constitutional documents and other obligations;
- (c) tax, filing and stamp taxes;
- (d) no default;
- (e) accuracy of the information provided;
- (f) financial statements;
- (g) insolvency proceedings;
- (h) *pari passu* ranking;
- (i) litigation pending or threatened; and
- (j) in the case of ECPP Notes, that the ECPP Notes are offered privately rather than to the public, and that all financial regulatory requirements have been met in connection with the offering.

In certain jurisdictions, the Investor may be required to make representations as to its status, that the investment is not for distribution, and that the Investor is neither a customer nor a competitor of the Borrower.

6. Redemption and purchase⁴³

Key Points:

- (a) Other than in the case of redemption at maturity, the Investors may have the option to request the Borrower to redeem or repay the ECPP in certain circumstances, such as it becoming illegal for the Investor to hold the ECPP, or a change of control of the Borrower. The definition and scope of a change of control will be negotiated between the Borrower and the Investor, but typically covers situations where the Borrower ceases to be controlled by its parent, or where a person or group of persons acting in concert gain control of the Borrower.
- (b) The Borrower may also redeem or repay the ECPP other than on maturity either at any time (with notice to the Investors) and in certain other circumstances, such as for tax reasons following a change of law or interpretation of the law.
- (c) The amount at which the ECPP may be redeemed or repaid (other than at maturity) will be specified in the documentation, and may constitute principal plus accrued interest to the early redemption date, or, particularly where an ECPP Note carries a fixed rate of interest, a “makewhole amount” (to compensate the Investors for loss of future interest payments) and/or may include other breakage costs and pre-payment fees. For an ECPP Note, the makewhole amount may correspond to the present value of any remaining scheduled payments of principal and interest until the scheduled maturity date, discounted on the basis of a benchmark yield.

⁴³ An early redemption, repayment or prepayment or other provision which affects the cash flows of the ECPP may affect the ability of certain Investors to hold ECPPs under the matching adjustment purposes for Solvency II, which falls outside the scope of this Guide.

7. Tax

Purpose of the clause:

“Gross-up” clause in relation to withholding tax applied to interest payments, subject to usual exceptions.

Key points:

The Borrower may be required to provide certain tax certifications in order to satisfy requirements for the application of exemptions for withholding tax, such as the one set out in Appendix 5 of this Guide for UK tax purposes. In this case, the Borrower should ensure that it is a requirement of the ECPP transaction documentation that each Investor provides a creditor certificate, if required, and that it is not required to gross up for UK withholding tax applied to the interest payments on the ECPP as a result of the Investor’s failure to produce a valid certificate.

8. Events of default

Purpose of the clause:

Upon the occurrence of an event of default, the Investor may (a) declare the ECPP to be immediately due and payable, whereupon it shall become immediately due and payable by the Borrower (together with accrued interest), or (b) declare the ECPP to be payable on demand, whereupon it shall become payable on demand.

Key points:

The scope and application of the events of default will depend on the structure and complexity of the Borrower and its group (if applicable), and will be set out in the relevant documentation. Although the circumstances will vary for each Borrower and each ECPP transaction, the events of default will usually include:

- (a) non-payment of amounts due under the ECPP (unless caused by certain technical errors or remedied within a certain grace period);
- (b) breach of financial covenants by the Borrower;
- (c) breach of other obligations by the Borrower (unless remedied within a certain grace period);
- (d) misrepresentation (unless capable of being remedied and actually remedied within a certain grace period);
- (e) cross default and/or cross acceleration. The defaults which may trigger a cross default clause may be subject to minimum thresholds and usually cover financial indebtedness such as bond debt, bank debt, financial debt such as leasing debt, receivables and factoring debt, derivatives and guarantees or indemnities;
- (f) events relating to insolvency, creditors’ processes (subject to certain thresholds and grace periods);
- (g) unlawfulness;
- (h) repudiation; and
- (i) occurrence of a material adverse change (on the basis of a definition to be agreed).

9. Transferability

Purpose of the clause:

Applicable restrictions to transferability (e.g. registration, number of transfers) should be disclosed.

10. Amendments & Waivers

Key points:

Given the relatively long-term nature of a typical ECPP, it is likely that at some point during the life of the ECPP, the Borrower may request changes to the original terms of the transaction – this may include for instance an amendment to, or waiver of, a particular covenant or obligation or other amendment which has come about due to a change in the circumstances of the Borrower. The general principles set out in Appendix 4 of this Guide, although non-binding in nature, are intended to apply to the conduct of such amendments and waivers.

Appendix 4

ECPP Deal Amendments

General Principles

Given the relatively long term nature of a typical ECPP, it is likely that at some point during the life of the transaction, the Borrower may request changes to its original terms – this may include for instance an amendment to, or waiver of, a particular covenant or obligation, or an amendment to the documentation.

Depending on the type of amendment or waiver, different levels of conduct, procedure and response can be expected. This Appendix 4 is intended to provide guidance to parties who are conducting negotiations on amendments or waivers to an ECPP transaction. It is not, and is not intended to be, professional advice but rather sets out general principles which should be followed during such negotiations.

Amendments may be of a purely technical nature (to reflect changes in law or accounting principles, for example) or more substantive, which may necessitate negotiations between the Borrower and the Investors. In either event, amendments may give rise to effort and cost in terms of time involved and various fees payable. To minimize both, and to ensure a smooth process, efficiency can be optimized by way of cooperation, communication, transparency and good faith of the parties.

Communication

While the Guide sets out recommendations relating to, *inter alia*, periodic disclosure and monitoring of legal and financial covenants, more generally, Borrowers and Investors should maintain regular and periodic contact. As recommended in “Key Processes – Recommendations/Disclosures and monitoring of legal and financial covenants”⁴⁴, the Borrower should disclose any issues around potential breaches of covenant, and is encouraged to discuss them with Investors at the earliest opportunity. Similarly, Investors should commit consistent resources to proactively analyse, and become familiar with, the business, market, outlook and strategy of the Borrower throughout the term of the transaction.

Regular communication between the parties and transparency and familiarity with the other's position should make it easier to understand and respond accordingly to amendment or waiver requests from the Borrower, thus increasing efficiencies for all.

Categorisation of amendments/waivers

There are various considerations that an Investor will take into account when considering an amendment or waiver request, such as: the reason for the amendment or waiver (for instance, whether motivated by growth of the Borrower or by financial difficulties); the economic risks involved; the relationship with the Borrower (communication and transparency between the Borrower and its Investors); and the position of other creditors negotiating the same amendment or waiver.

As a guideline, amendments and waivers can be categorised as set out in the following table. This is not an exhaustive list, and other issues may arise which should be addressed with appropriate and commensurate gravity. Costs may escalate depending on the severity of the amendment or waiver, which are expected to be at the expense of the Borrower. However, if the amendment or waiver results in a change to the economics of the transaction, costs and risks associated with the ECPP may be affected.

⁴⁴ Section 6.4.

Category	Situations giving rise to need for such amendments	Examples	Notes
Category 1: Pro-forma	Changes in accounting rules (IFRS) or laws		Limited discussion needed; change benefits all parties
Category 2: Minor	Operational or administrative changes of the Borrower's business	Change in: - reporting dates - subsidiaries covered by covenants	Necessity and/or effect of change may be open to discussion
Category 3: Significant	Potential or likely inability to continue satisfying covenants (or other obligations) without requested change, reasons for which could be positive, e.g. growth of the company.	Change in financial covenants Borrower taking on additional debt	Will require substantive negotiation among the parties Investors may request additional security (security interest or negative covenants)
Category 4: Breach	Likely or actual inability to satisfy covenants without requested change Insolvency	Breach of financial covenants Failure to make payments	Generally leads to restructuring of the Borrower's debt, or termination of the ECPP due to an event of default

Process/roles of parties

The following is an indicative summary of the expected roles and responsibilities of the relevant parties when negotiating an amendment or waiver of an ECPP.

Party	Recommended responsibilities
Borrower	<p>Prepare a detailed amendment or waiver request, outlining the reason for the request and the specific changes being requested, including:</p> <ul style="list-style-type: none"> - relevant financial information (e.g. pro-forma calculations of existing and proposed covenants, financial projections, etc.) - changes being made/requested to other agreements (e.g. intercreditor/subordination, bank facilities, other financial obligations) <p>Prepare a list of Investors with name and contact information by tranche/amount outstanding.</p> <p>Submit the amendment request to all capital Investors simultaneously.</p> <p>Arrange a forum for all Investors at which the Borrower can present the request and respond to Investors' questions.</p> <p>Negotiate the terms of the amendment or waiver with the Investors (or their representative/working group).</p>
Investors	<p>After initial calls with the Borrower, the Investors may, to the extent practicable, schedule a separate, Investor-only call with the following objectives:</p> <ul style="list-style-type: none"> - if the amendment or waiver is Category 1 or 2, arrange for a vote on the amendment or waiver. If approved, appoint an Investor representative (if appropriate) to contact the Borrower to facilitate implementation of the amendment or waiver; - if an amendment is Category 3 or 4, designate an amendment working group to prepare the modification (solicit opinions from all Investors, coordinate communication, engage outside counsel, etc.) or discuss the terms of the restructuring of the Borrower's debt or the termination of the ECPP, as the case may be. <p>The Investors should attempt to reach a consensus among all Investors, with the group response predicated on the consent of the required holders, as defined in the underlying Agreements.</p> <p>Members of the amendment working group, if any, will be expected to conduct themselves in a manner consistent with the principles in this Appendix 4.</p>

Best practice - General

It is assumed that, when negotiating an amendment or waiver, all parties will act in good faith and will conduct the amendment or waiver process in a fair and reasonable manner that is consistent and commensurate with the request. Generally, no party should use the amendment or waiver request as an opportunity to change other terms of the ECPP transaction (other than as included in, or as part of, or as required to effect, the amendment or waiver request).

Best practice - Borrowers

Borrowers should be proactive in keeping Investors apprised of the Borrower's financial position, business, market, outlook and strategy on an ongoing basis, and should not wait until such time as it is experiencing difficulties to contact Investors.

Borrowers should continue to treat Investors *pari passu* with other creditors, which includes providing Investors with early information as to the potential need for an amendment or waiver, and including Investors (or an appointed investor representative) in all discussions.

Borrowers are expected to appoint experienced advisers to assist in managing the amendment drafting, negotiation and execution process.

Borrowers are expected to keep all records and relevant information relating to the evolution and development of the circumstance giving rise to the amendment or waiver. They should also produce all such information that the Investors may reasonably require to inform their decision, including measures taken to resolve and/or mitigate those circumstances, if appropriate, in a timely manner.

Borrowers should ensure that they have sufficient human resources at an appropriate level of seniority available in order to enter into the negotiations and address Investor questions.

Best Practice - Investors

Investors should appoint a lead investor or representative(s) to participate in discussions/negotiations on Category 1 or 2 amendments, or an amendment working group for Category 3 or Category 4 amendments.

Investors should ensure that Borrowers have current contact information for the person(s) monitoring the investment and the amendment or waiver, and should commit sufficient human resources at an appropriate level of seniority and with the requisite level of authority to process the amendment or waiver in a timely manner.

Investors should manage the Borrower's expectations in terms of timing of the amendment or waiver process, including keeping the Borrower and other Investors apprised if approval will require a lengthy or unique internal approval process.

Appendix 5

UK Creditor Certificate

On 1 January 2016, an exemption from the obligation to deduct UK income tax from yearly interest paid on “qualifying private placements” came into force in the UK. In order to benefit from the exemption, certain formalities have to be complied with, including that the Borrower must hold a “creditor certificate” for each Investor (who must be beneficially entitled to the interest payment on the ECPP). The creditor certificate constitutes written confirmation from or on behalf of each Investor that it is a resident of a “qualifying territory” and that it is beneficially entitled to the interest on the relevant ECPP for genuine commercial reasons and not as part of a tax advantage scheme.

Borrowers should ensure that it is a requirement of the ECPP transaction documentation that each Investor provides a creditor certificate, and that it is not required to gross up for UK withholding tax applied to the interest payments on the ECPP as a result of an Investor’s failure to produce a valid certificate.

The following form of creditor certificate satisfies the creditor certificate requirements of the exemption.

Form of Creditor Certificate for the purposes of regulations 3(1)(b) and 5 of The Qualifying Private Placement Regulations 2015

For the attention of: [•]⁴⁵

This certificate is made on the date of and applies to payments of interest on the bond(s) described as follows (the “**Security**”):

Issuer: [•]⁴⁶

ISIN: [•]

Issue date: [•]

Redemption date: [•]

Ultimate beneficial owner (the “Creditor”): [•]⁴⁷

Direct holder: [•]⁴⁸

Total number of bonds comprised in the Security held by the Creditor: [•]

[We confirm that on the date hereof the Creditor is:

- A. a person who, under the law of [•]⁴⁹, is liable to tax there by reason of its domicile, residence or place of management and otherwise than in respect only of income from sources in that territory or capital situated therein; and
- B. beneficially entitled to the interest on the Security identified above for genuine commercial reasons, and not as part of any tax advantage scheme within the meaning of regulation 2(1) of The Qualifying Private Placement Regulations 2015.]⁵⁰

⁴⁵ Insert name of appropriate contact person and name of the Borrower.

⁴⁶ Insert name, registered address and company registration number of the Borrower.

⁴⁷ This is the ultimate beneficial owner of payments of interest on the ECPP. Insert name, (registered) address and, if applicable, company registration number of this person.

⁴⁸ This is the direct investor in the ECPP, i.e. the person who directly holds the bonds comprised in the ECPP. Insert name, registered address and, if applicable, company registration number of this person.

⁴⁹ Insert name of the Creditor’s jurisdiction of residence. This must be the United Kingdom or a territory in relation to which the United Kingdom has made double taxation arrangements which include a non-discrimination provision (i.e. a provision to the effect that nationals of one contracting state are not to be subject in the other contracting state to any taxation or requirement connected with taxation which is other or more burdensome than the taxation and connected requirements to which nationals of the first contracting state in the same circumstances (particularly with respect to residence) are or may be subjected). A list of such territories is available at www.gov.uk/hmrc-internal-manuals/international-manual-intm412090 (note that this is subject to change and the position – including whether HM Treasury has made regulations excluding particular territories – should be reviewed at the time of giving this certificate and periodically thereafter).

⁵⁰ Include if the Creditor is a company or individual.

[OR]

[We confirm that on the date hereof the Creditor is:

- C. the State, or any part of the State (including any local authority), of [●]⁵¹ and is not under the law of [●]⁵² liable to tax there by reason of its domicile, residence or place of management or is liable to tax in that territory in respect only of income from sources in that territory or capital situated therein; and
- D. beneficially entitled to the interest on the Security identified above for genuine commercial reasons, and not as part of any tax advantage scheme within the meaning of regulation 2(1) of The Qualifying Private Placement Regulations 2015.]⁵³

[OR]

[We confirm that on the date hereof the Creditor is:

- A. a pension scheme which has been established under, and is governed by, the law of [●]⁵⁴ and whose trustees act in their capacity as representatives of the pension scheme's members;
- B. a person, trust or arrangement who, under the law of [●]⁵⁵, is (or whose trustees are) liable to tax there by reason of domicile, residence or place of management and otherwise than in respect only of income from sources in that territory or capital situated therein; and
- C. entitled to the interest on the Security for genuine commercial reasons, and not as part of any tax advantage scheme within the meaning of regulation 2(1) of The Qualifying Private Placement Regulations 2015.]⁵⁶

We acknowledge that, under regulation 6(2) of The Qualifying Private Placement Regulations 2015, we are required as soon as practicable after becoming aware that any confirmation given in this certificate has ceased to apply to notify the debtor company to that effect.

We authorise you to produce this certificate to an officer of Her Majesty's Revenue and Customs in accordance with regulation 7 of The Qualifying Private Placement Regulations 2015 if required by such officer.

Please contact [●]⁵⁷ of [●]⁵⁸ on [●]⁵⁹ with any questions in relation to this certificate.

[Signed by [●]⁶⁰ [in its capacity as a trustee of [●]⁶¹ and representative of the members of [●]⁶²⁶³ acting by [●]⁶⁴

.....

Authorised signatory]⁶⁵

[OR]

51 See footnote 54 above.
52 Same territory as identified at footnote 54 above.
53 Include if the creditor is the State or any part of the State (including any local authority).
54 See footnote 54 above.
55 Insert same name as is determined at footnote 54 above unless the vehicle or its trustees is/are liable to tax in a different territory, in which case the same test as is set out at footnote 54 above should be applied in relation to the territory in which the vehicle/trustees is/are resident.
56 Include if the Creditor is a pension scheme.
57 Insert name of contact person at the Creditor or, if the confirmation is given on behalf of the Creditor, the agent (as applicable).
58 Insert name of Creditor or, if the confirmation is given on behalf of the Creditor, the agent (as applicable).
59 Insert telephone number and email address.
60 Insert name, registered address and company registration number of Creditor company which is incorporated outside the United Kingdom.
61 Insert name of pension scheme.
62 Insert name of pension scheme.
63 Include if signatory is acting in its capacity as a trustee of a pension scheme.
64 Insert name of authorised signatory.
65 Include if the Creditor (or the agent giving the confirmation on behalf of the Creditor) is a company incorporated outside the United Kingdom. In relation to a confirmation given by a trust (such as a pension scheme), include for each trustee which is a company incorporated outside the United Kingdom. For trusts, all trustees must execute the deed unless the trust deed provides otherwise. If the correct execution block for the legal form of the Creditor in any particular case is not included here (that is, if the creditor does not take the form of a company, the State, a trust or an individual), please seek specialist advice.

[Executed by [●]⁶⁶ [in its capacity as a trustee of [●]⁶⁷ and representative of the members of [●]⁶⁸⁶⁹ acting by [●]⁷⁰, a director, and [●]⁷¹, [a director] [OR] [its secretary]⁷²

.....

Director

.....

[Director] [OR] [Secretary]⁷³⁷⁴

[OR]

[Signed by [●]⁷⁵

.....

Authorised signatory]⁷⁶

[OR]

[Signed by [●]⁷⁷ [in its capacity as a trustee of [●]⁷⁸ and representative of the members of [●]⁷⁹⁸⁰

.....]⁸¹

66 Insert name of company.

67 Insert name of pension scheme.

68 Insert name of pension scheme.

69 Include if signatory is acting in its capacity as a trustee of a pension scheme.

70 Insert name of first director.

71 Insert name of second director/secretary.

72 Delete as appropriate.

73 Delete as appropriate.

74 Include if the Creditor (or the agent giving the confirmation on behalf of the creditor) is a company incorporated in the United Kingdom. In relation to a confirmation given by a trust (such as a pension scheme), include for each trustee which is a company incorporated in the United Kingdom. For trusts, all trustees must execute the deed unless the trust deed provides otherwise.

75 Insert name of officer who has been granted the appropriate authority under the relevant State/local authority's scheme of delegation and has authority to bind it.

76 Include if signatory is a State or part of a State (including a local authority).

77 Insert full name of individual.

78 Insert name of pension scheme.

79 Insert name of pension scheme.

80 Include if signatory is acting in its capacity as a trustee of a pension scheme.

81 Include if the Creditor (or the agent giving the confirmation on behalf of the Creditor) is an individual other than an individual binding the State/local authority (in which case use the signature block immediately above). In relation to a confirmation given by a trust (such as a pension scheme), include for each trustee which is an individual. For trusts, all trustees must execute the deed unless the trust deed provides otherwise.

Meaning of “tax advantage scheme” within the meaning of regulation 2(1) of The Qualifying Private Placement Regulations 2015

“Tax advantage scheme” means a scheme, arrangement or understanding of any kind (whether or not legally enforceable, including a single transaction or two or more transactions) the main purpose, or one of the main purposes, of which is to obtain a “tax advantage”, other than a negligible tax advantage.

A “tax advantage” includes each of the following:

- a) a relief from tax or increased relief from tax;
- b) a repayment of tax or increased repayment of tax;
- c) the avoidance or reduction of a charge to tax or an assessment to tax;
- d) the avoidance or reduction of a charge or assessment to a charge under the controlled foreign company rules; and
- e) the avoidance or reduction of a charge or assessment to the bank levy.

Appendix 6

List of the professional organisations which support the ECPP Market Guide and Observers from the official sector

Allen & Overy LLP	International Capital Market Association (ICMA)
Ashurst	KBC Group
ASMEP-ETI	Kings & Wood Mallesons
Association of Corporate Treasurers	Kramer Levin Naftalis & Frankel
Association for Financial Markets in Europe	LGIM
Association Française de la Gestion financière (AFG)*	Linklaters
Association Française des Investisseurs Institutionnels (Af2)*	Lloyds Banking Group
Association Française des Marchés Financiers (AMAFI)*	Loan Market Association (LMA)
Association Française des Trésoriers d'Entreprises (AFTE)*	Loyens & Loeff
Aviva Investors	M&G Investments
Banca IMI	Mouvement des entreprises de France (MEDEF)*
Banque de France (Observer)	Muzinich
Bank of America Merrill Lynch	National Australia Bank Limited
Bank of Italy (Observer)	Natixis Asset Management
BNP Paribas	Paris Europlace*
Bundesverband Öffentlicher Banken Deutschlands, VÖB	Paris IDF Chamber of Commerce and Industry*
Clifford Chance LLP	Santander GCB
CMS	Slaughter and May
Confederation of British Industry (CBI)	Société Générale
Commerzbank	Stifel Nicolaus Europe Limited
Credit Agricole CIB	S&P Global Ratings
Delta Lloyd	TheCityUK
DLA Piper	The Investment Association
Egan-Jones Ratings Company	The Royal Bank of Scotland
European Commission (Observer)	White & Case
European Private Placement Association (EU PPA)	<small>*Member of the Euro PP Working Group</small>
Fédération Bancaire Française (FBF)*	
Fédération Française des Sociétés d'Assurances (FFSA)*	
Fédéris Gestion d'Actifs	
French Euro Private Placement (Euro PP) Working Group	
French Trésor (Observer)	
Gemma and Partners, Tax and Law Firm	
Gide Loyrette Nouel AARPI	
Grimaldi Studio Legale	
Groupement des entreprises mutuelles d'assurance (GEMA)*	
Herbert Smith Freehills	
Hogan Lovells	
HM Treasury (Observer)	
ING	

Appendix 7

Membership of the Euro PP Working Group

The Euro PP Working Group is a French financial industry initiative bringing together corporate borrowers, investors and intermediaries through the active engagement of all relevant French financial industry associations (Including Association Française des Investisseurs Institutionnels (Af2), Association Française des Marchés Financiers (AMAFI), French Association of Corporate Treasurers (Association Française des Trésoriers d'Entreprises - AFTE), Fédération Française des Sociétés d'Assurances (FFSA), Groupement des entreprises mutuelles d'assurance (GEMA), Fédération Bancaire Française (FBF), Mouvement des entreprises de France (MEDEF), Association Française de la Gestion financière (AFG), and Paris Europlace; the Paris IDF Chamber of Commerce and Industry has also provided a valuable support to this initiative). Established in 2012, this initiative has produced the Charter for Euro Private Placements as well as a set of standard documentation. It benefits from the support of the Banque de France and the Direction Générale du Trésor (French Treasury) participating in an observer capacity.

Appendix 8

The Loan Market Association (LMA)

The LMA is the trade body for the EMEA (Europe, Middle East and Africa) syndicated loan market and was founded in December 1996 by banks operating in that market. Its aim is to encourage liquidity in both the primary and secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice, which are widely used and adopted. Membership of the LMA currently stands at over 570 from 56 nationalities across EMEA and consists of banks, non-bank investors, law firms, rating agencies and service providers. The LMA has gained substantial recognition in the market and has expanded its activities to include all aspects of the primary and secondary syndicated loan markets. It sees its overall mission as acting as the authoritative voice of the EMEA loan market vis à vis lenders, borrowers, regulators and other interested parties.

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