

PAN-EUROPEAN CORPORATE PRIVATE PLACEMENT MARKET GUIDE

February 2015

Disclaimer

This Pan European Corporate Private Placement Market Guide is not, is not intended to be and should not be relied upon as being, investment, legal, business, financial, regulatory, tax or other professional advice. Users of this Guide are encouraged to seek appropriate independent professional advice before entering into any kind of private placement transaction. While the information contained in this Guide is believed to be reliable, neither ICMA nor any of the members of the Pan-European Private Placement Working Group (as described herein) shall have any liability arising from, or relating to, the use of this Guide or its contents.

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Introduction

Agreement on common market standards and best practices is essential for the development of a Pan-European private placement market for corporate debt. This Pan-European Corporate Private Placement Market Guide (the “Guide”) aims to support the development of this market, and builds on existing practices in the bond and bank loan markets, as well as practices in other international private placement markets. The Guide is intended to provide a non-binding framework of best practices for Pan-European private placement (“PEPP”) transactions.

The Guide has evolved out of the Charter for Euro Private Placements, which was developed by the Euro PP Working Group, a French financial industry initiative bringing together corporate borrowers, investors and intermediaries and endorsed by all relevant French financial industry associations. This initiative benefits from the support of the Banque de France and the French Treasury. The Charter for Euro Private Placements was published in March 2014 and is available at www.euro-privateplacement.com.

The Guide is the result of a collective effort by many different market participants and has been developed by the Pan-European Private Placement Working Group (PEPP WG)¹, led by the International Capital Market Association (ICMA), which brought together representatives from major institutional investors, international banks and key industry bodies, as well as observers from the official sector. The Guide also benefits from the support of leading international law firms.

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

Although intended to be a foundation for a truly pan-European private placement market, this edition of the Guide will be adapted, updated and supplemented as the PEPP market and corresponding practice develops throughout the Member States of the European Union (EU).

¹ In addition to ICMA, the PEPP WG currently includes the Association for Financial Markets in Europe (AFME), the European Private Placement Association (EU PPA), the French Euro Private Placement (Euro PP) Working Group, the Loan Market Association (LMA), TheCityUK and The Investment Association. It also brings together representatives from major institutional investors (including Delta Lloyd, Fédéris Gestion d’Actifs, KBC Group, LGIM, M&G Investments, Muzinich, Natixis Asset Management), and benefits from the participation of major law firms, including Allen & Overy LLP, Ashurst, Bonelli Erede Pappalardo LLP, CMS Bureau Francis Lefebvre, DLA Piper, Gide Loyrette Nouel AARPI, Herbert Smith Freehills, King & Wood Mallesons, Kramer Levin Naftalis & Frankel, Linklaters, Loyens & Loeff, Simmons & Simmons, Slaughter and May and White & Case. This initiative benefits from the support of the official sector participating in an observer capacity (including the Banque de France, the Bank of Italy, the French Trésor and HM Treasury).

1. PEPP Market Objectives

The objectives for the development of the PEPP include:

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

– The growth of private placements has accelerated since the onset of the financial crisis, with markets in countries such as France and Germany providing certain borrowers with a local solution. However, until now, there has not been a pan-European private placement market comparable to the SEC Rule 4(a)(2) Private Placement (USPP) market in the United States. A European private placement market would 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 PEPP market companies. It is expected that investors in the PEPP market will seek undertakings that are similar to the contractual terms included in the borrower's other relevant senior debt documentation, which would enable investors to maintain compliance with their prudential and regulatory requirements. It is further expected that the PEPP will rank *pari passu* with the borrower's other senior debt.

Set a market standard for PEPP – This standard will be based on European and international credit market best practices and, to the extent possible, on self-regulation and adoption of industry practices, and will be further developed alongside recognised industry bodies.

Strengthen the identity and recognition of the PEPP market – The objective is to make the PEPP market a fully-fledged market and a benchmark of quality for European and international borrowers, bank intermediaries and investors.

Promote long-lasting and transparent market relationships – Such relationships between borrowers, bank intermediaries and investors will be essential to the development of the PEPP market.

Contribute to the development of a European Capital Markets Union – The development of a PEPP market is aligned to the EU'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"*.

2. PEPP Market Characteristics

A PEPP 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(s) (the “Arranger(s)”) 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). 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.

A PEPP may be in the form of a loan (a “PEPP Loan”) or represented by securities (a “PEPP Note”)².

The key characteristics of a PEPP are:

- **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 capital markets, and for whom a PEPP could constitute a transition towards those markets. The PEPP market can also accommodate larger or smaller Borrowers. A PEPP is capable of benefitting from a guarantee of a guarantor, usually a parent or sister company of the Borrower.

- **No rating requirement**

A PEPP 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**

A PEPP is offered privately to a small group of Investors rather than offered publicly to a broader group of Investors.

- **Unlisted debt**

A PEPP 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**

A PEPP is transferable but largely illiquid, and is mainly suited to a ‘buy and hold’ investment strategy. A PEPP 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**

A PEPP 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 (implicitly or otherwise) to other outstanding senior debt of the Borrower. Borrowers and/or Investors may seek to secure a PEPP, depending on the type of the PEPP, 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 co-ordinating pricing and, potentially, with hedging.

² The distinction between the two forms of PEPP may be driven by, for example, specific restrictions on direct lending.

2. PEPP Market Characteristics

- **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 Arrangers' requirements, the Borrower's situation and capabilities, and as appropriate for the particular PEPP.

- **Issue structure**

The PEPP will allow for flexibility in the size of issues. Funds will usually be fully drawn upon issue. The PEPP 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 PEPP that is held outside the clearing systems and is issued by an unrated Borrower.

It is important to note that a PEPP is not:

- A widely offered and syndicated public bond issue³ such as a wholesale or retail Eurobond, issued on a stand-alone basis or off a programme (see below). The wholesale Eurobond market involves very large volumes, with an active secondary market (compared to the European private placement market) as a result of large issues (often above €300 million) of high denomination securities and a very large number of institutional investors as well as a number of intermediaries. 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 Euro Medium Term Note ("EMTN") programme or other programme for the issuance of negotiable debt instruments. Such debt issuance programmes enable Borrowers with market recognition to carry out syndicated issues (as mentioned above) or opportunistic funding deals with a smaller number of Investors who are seeking an investment with a specific term or structure on a private placement basis. Borrowers with such programmes are typically highly rated companies who approach the eurobond market relatively frequently.
- A loan from a bank or syndicate, where the bank or syndicate may be seeking ancillary business from the Borrower.

³ In market terminology, a "public" bond issue is one that may be placed with a wide range of investors on the Eurobond market.

3. Negotiation and Documentation

Negotiation of contractual terms and conditions by the Borrower and the Investors is an important feature of a PEPP, distinguishing a PEPP from public and syndicated bond issues, such as Eurobond issues where Investors subscribe to an issue without usually being involved in the negotiation of the terms and conditions. The negotiation of PEPP terms and conditions therefore more closely resembles the negotiation process and contractual terms seen in the bank loan market.

A PEPP may take the form of a PEPP Loan or a PEPP Note⁴. Both the Euro PP Working Group⁵ and the Loan Market Association (LMA)⁶ have published standard model framework documentation for each type of PEPP, to which users of this Guide are directed.

LMA Documentation

The LMA has produced four template documents (the “LMA Private Placement Documents”) and an associated user guide for use in European 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.

⁴ For this reason, the term “Borrower” is used in this Guide for both PEPP Notes and PEPP Loans.

⁵ 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 (Af2i), 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), ASMEP-ETI and Paris Europlace; the Paris IDF Chamber of Commerce and Industry has also provided 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.

⁶ 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.

3. Negotiation and Documentation

Euro PP Working Group Documentation

Following the publication of the Charter for Euro Private Placements in March 2014, the Euro PP Working Group has released standard documentation for each type of European Private Placement transaction, comprising:

1. a form of loan agreement for PEPP Loans (the "Euro PP Loan Agreement"); and
2. a form of subscription agreement and terms and conditions for PEPP Notes (together with the Euro PP Loan Agreement, the "Euro PP Working Group Documents"), which has been coordinated 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 negotiations, depending on the Borrower's situation, the characteristics of the PEPP transaction and market conditions. Resulting from a cross-market initiative, the Euro PP Working Group Documents represent a fair and balanced standard between the interests of Borrowers and Investors. They are governed by French law but may be adapted to any other legal system and were developed for international use.

Expanding upon practices developed in the Euro private placement market since 2012, the Euro PP Working Group Documents are the result of consensual cross-market efforts between representatives from the market's major participants, borrowers, intermediaries and investors active in the private placement market and with the assistance of 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 and in French, at www.euro-privateplacement.com.

4. Special Case: Listed PEPPs

This Guide is written on the basis that PEPP Notes will primarily take the form of unlisted securities. However, listed private placement transactions currently occur in some national European markets (for example, the French Euro private placement market and the Italian private placement market) as a result notably of domestic legal requirements and Investor preferences. As a result, it is possible that parties to certain PEPP transactions may also seek to have the relevant instruments listed. In such cases, PEPP 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 Directive (Directive 2003/5/EC) and (once it is published and implemented) the EU Packaged Retail and Insurance-based Investment Products Regulation (Regulation (EU) No 1286/2014);
- 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 PEPP Notes.

5. Parties, Documents and Timetable⁷

5.1 Roles of the parties

Each party to a PEPP 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 private placement market by ensuring high execution standards and appropriate risk and credit processes.

While there is flexibility with regard to whether, and how, an intermediary is involved, and (to the extent there is an Arranger) the exact scope of the Arranger's role, each intermediary is expected to assess its responsibilities in light of the role being performed by it and to carry out such roles and responsibilities in a manner appropriate for the particular PEPP transaction.

Specifically, each party should consider its obligations in light of its role and the structure of the PEPP transaction and 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 main parties to a PEPP transaction, and their respective roles and responsibilities at various stages of a PEPP transaction. It is not intended to be prescriptive, and the scope of such roles and responsibilities are subject to specific negotiation between the relevant parties.

Party	Before execution or issue of the PEPP	During the term of the PEPP
Borrower	Review of terms of appointment of Arranger (if any), Paying Agent (if any) and Trustee (if any) ⁸	Payments of interest and principal (bullet or amortising)
	Negotiation and execution of a Non-Disclosure Agreement (see Appendix B)	Compilation and reporting of financial information to include Investor calls if contractually specified
	Compilation and disclosure of financial information and Information Memorandum (if any) ⁹ (see Appendix A)	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 C)	
	Negotiation of the Agreements (as defined and described in Section 5.2)	

⁷ Note that this section is subject to specific negotiation and agreement between the parties.

⁸ The appointment of a "trustee" is optional, and will be dependent on governing law, as well as on the format and nature of the PEPP transaction. In certain jurisdictions, aspects of the role of trustee may be undertaken by alternative bodies, such as a noteholder representative.

⁹ An Information Memorandum, or similar document, is not necessarily required, but is recommended in PEPP 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 PEPP, 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.

5. Parties, Documents and Timetable

5.1 Roles of the parties (continued...)

Party	Before execution or issue of the PEPP	During the term of the PEPP
Investor(s)	Origination – identification of eligible Borrowers for the PEPP	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 of the PEPP, etc.)
	Investor(s) representation letter	Monitoring compliance with financial and other covenants
	Obtain sufficient and adequate information about the Borrower	Management of any renegotiation of contractual terms (e.g. meeting of Investors/waiver/ amendment)
	Credit analysis, including analysis of credit risk and all available contractual undertakings relating to the PEPP under consideration; review of existing loan/ note documentation	Management of any events of default or redemption/repayment/prepayment events
		Sale and transfer of the PEPP Note (if required)
	Review and negotiation of the contractual and financial terms and disclosure (if any) relating to the PEPP	
	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 PEPP	

5. Parties, Documents and Timetable

5.1 Roles of the parties (continued...)

Party	Before signature or issue	During the term of the PEPP
Arranger(s) (if any) (regulated financial intermediary, credit institution or investment firm)	Origination – identification of eligible Borrowers for PEPP, and management of dialogue 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)	
	Assistance to the Borrower (together with Arranger(s)' legal counsel) in preparing the Information Memorandum (if applicable)	
	Execution – assisting with the negotiations of 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 co-ordinating pricing of the PEPP	
	For PEPP Notes, facilitating securities settlement and delivery (if not settled directly with Investors)	

5. Parties, Documents and Timetable

5.1 Roles of the parties (continued...)

Party	Before signature or issue	During the term of the PEPP
Legal counsel ¹⁰	Borrower's legal counsel: Coordination of information, drafting of the Information Memorandum (if any) and review and negotiation of the term sheet, the terms and conditions of the PEPP and the other Agreements. Potentially producing a local law legal opinion for the Arranger (for a PEPP with an Arranger) and/or initial lenders (for a PEPP with no Arranger), and, where appropriate, for the identified secondary lenders acceding to the PEPP loan	Borrower's/Arranger's/Investors' legal counsel: occasional advice on issues arising during the term of the PEPP Note or the PEPP Loan
	Arranger's legal counsel (if any) ¹¹ : 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 PEPP 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	

¹⁰ These sections may be applicable based on the format and structure of the PEPP 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 PEPP transaction and, in particular, whether the Arranger is carrying out an agency or an underwriting role.

¹¹ 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.

5. Parties, Documents and Timetable

5.1 Roles of the parties (continued...)

Party	Before signature or issue	During the term of the PEPP
Statutory Auditors	Review of financial data in the Information Memorandum ¹²	Certifying compliance with covenants, where agreed and appropriate
Paying Agent (as agent of the Borrower)	Review of administrative procedures and Paying Agency Agreement	Management of interest and principal
	For PEPP 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 (PEPP 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.

¹² In some PEPP transactions, the parties may agree to the delivery of a comfort letter from the Borrower's auditors. While this is not a requirement for a PEPP transaction, it may be appropriate depending on the format and nature of the transaction, and is subject to agreement between the parties.

5. Parties, Documents and Timetable

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 PEPP (the “Agreements”). The Agreements to be entered into will vary depending on the nature of the PEPP, 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 a PEPP Note) or a Loan Agreement (in the case of a PEPP 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 PEPP Notes may be issued or the PEPP 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 PEPP (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 a PEPP 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 PEPP:

- An Information Memorandum describing the Borrower and summarising the terms and conditions of the PEPP and form of the PEPP 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 PEPP.
- A statement of existing security interests or guarantees granted by the Borrower (which may include only material security interests or guarantees), if relevant.

5. Parties, Documents and Timetable

5.3 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 levels of information as required by the Investor and agreed as appropriate for the particular PEPP and the Borrower's situation.

Borrower's information

The Borrower will be required to provide audited consolidated financial statements for at least the last two years¹³ (IFRS or local GAAP) and the related statutory auditors' reports.

Other information concerning the Borrower will be requested, including (but not limited to):

- Business activity, share ownership, legal organisation (including management) and key risks.
- Strategy, operating and financial results and business plan, where appropriate.
- 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 negotiate the terms of the PEPP.

Investors will expect a presentation of information regarding the Borrower by senior management. For most Investors, access to senior management and the opportunity to ask questions and obtain answers are key elements of their credit analysis.

It is recommended that the Borrower, with the assistance of legal counsel, and the Arranger, if there is one, gathers all of the information about the Borrower in an Information Memorandum¹⁴ to be submitted to each potential Investor. The Information Memorandum, if any, 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.

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 Directive or corresponding national requirements). 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 information in accordance with applicable laws and regulations. In particular, any disclosure of non-public information must be covered by a Non-Disclosure Agreement signed between the Borrower and each Investor.

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). A Non-Disclosure Agreement may also be required between the Borrower and the Arranger, if there is one, unless the Arranger is subject to confidentiality rules in its capacity as a credit institution or an investment firm.

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 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 is 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.

¹³ Or more than two years, depending on Investor requirements.

¹⁴ In some cases, a preliminary Information Memorandum, without pricing terms, may be submitted to Investors in advance of the final Information Memorandum.

6. Key Processes - Recommendations

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

The preparation of a detailed term sheet - containing a summary of the main financial and legal terms and conditions of the PEPP - is recommended to reflect negotiations between the Borrower, the Arranger, if there is one, and the Investors who wish to take part in the PEPP transaction. In cases where an Arranger is involved in the PEPP 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 a PEPP can be found in Appendix C. This description may also be used for drafting the term sheet.

Term sheet

Certain clauses require special attention:

- The status and ranking of the PEPP 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 PEPP), 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 PEPP, including on the occurrence of a change of control or change in tax characterisation¹⁵.
- Withholding tax gross-up provisions.
- 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.
- Transferability of the PEPP.

Investors will generally require that the terms of the PEPP 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 PEPP transaction, is essential for Investors.

¹⁵ An early redemption, repayment or prepayment or other provision which affects the cash flows of the PEPP may affect the ability of certain Investors to hold PEPPs under matching adjustment purposes for Solvency II, which falls outside the scope of this Guide.

6. Key Processes - Recommendations

6.2 Agreeing the key economic and legal terms and conditions of the PEPP transaction (continued...)

Typical discussion process

- The Arranger (if there is one) 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 PEPP transaction: investment amount, planned maturities, price range.
- 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 PEPP 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 to negotiate primary terms (or 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. Key Processes - Recommendations

6.3 Arranger and Investors' due diligence

Arranger due diligence

The Arranger should carefully consider the appropriate level of due diligence it should perform in the context of each PEPP transaction, independently of the Investors' due diligence and credit analysis. The appropriate procedures will depend on the circumstances of each PEPP 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 Handbook¹⁶.

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 PEPP 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 include¹⁷:

- negotiating and signing Non-Disclosure Agreements with the Borrower;
- managing confidential information and any resulting inside information, where applicable;
- 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 PEPP documentation (including the term sheet, the terms and conditions of the PEPP and the Agreements, both in the context of the PEPP 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.

¹⁶ 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.

¹⁷ This is not an exhaustive list and advice should be taken from independent legal, financial and other advisors.

6. Key Processes - Recommendations

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 PEPP 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. Borrowers will 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 PEPP (and periodically) will include:

During the term of the PEPP

- 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 statements¹⁸ 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 PEPP must be explicitly stipulated in the contractual documents, in compliance with the applicable rules regarding inside information. Disclosures to Investors may be made through the Paying Agent (if there is one), 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 contractually undertakes to (i) submit or make available its financial statements during the term of the PEPP 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 documentation).
- Disclosures to Investors may be made through the Paying Agent (if there is one), 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 there are any, and subject to compliance with the applicable rules regarding inside information, where appropriate.

¹⁸ 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.

Appendix A

Indicative Information Memorandum Template¹⁹

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

¹⁹ 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).

Appendix A

Indicative Information Memorandum Template (continued...)

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 B

Indicative Form of Non-Disclosure Agreement²⁰ [Borrower / Investor]²¹

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 counsel²² (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)²³, 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**”)]²⁴, 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

²⁰ 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).

²¹ 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.

²² 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.

²³ 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.

²⁴ If the option of a discussion between Potential Investors is not applicable, bracketed references to the Potential Investor throughout the document should be deleted.

Appendix B

1. Confidential Information (*continued...*)

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.

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 affiliates²⁵, 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

²⁵ 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.

Appendix B

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 Information²⁶

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.

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.]

²⁶ This article applies only if bonds and/or shares of the Borrower are listed on a Regulated Market or a multilateral trading facility.

Appendix B

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 C

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

This Appendix C 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 PEPP 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 C 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 PEPP 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 PEPP transaction, the Borrower's situation and the terms of any other senior indebtedness of the Borrower.

The terms and conditions of the PEPP will contain many detailed provisions relating to, among other things, interest owed by the Borrower on the PEPP (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 a PEPP Note, the terms and conditions will specify the form, denomination and title of the PEPP Note. PEPP Notes are expected to be in registered form. The Borrower (or its agent) will be required to maintain a register in respect of the PEPP Notes, which will record the serial number (if relevant), holder and transfer of each PEPP Note. The person in whose name the PEPP Note is registered shall be treated as its absolute owner for all purposes.

2. Status of the PEPP

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

Key Points:

- (a) The PEPP will primarily constitute senior unsecured debt. However, depending on the type of PEPP transaction, the Borrower's situation, Investors' requirements and market conditions, the PEPP 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 PEPP rank *pari passu* with bank loans and other senior debt of the Borrower having equivalent characteristics save duly documented exceptions (any specific limitation on granting of security interests to be stipulated in the negative pledge provision).

Appendix C

Description of Key Points to be discussed between the Borrower and the Investors (continued...)

3. Negative pledge

Purpose of the clause: to maintain the ranking of the PEPP 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 PEPP 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 a PEPP 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.

Appendix C

Description of Key Points to be discussed between the Borrower and the Investors (continued...)

4.1 Financial covenants (continued...)

Key Points:

The financial covenants described below are not necessarily designed, and may not be appropriate in their entirety, for all PEPP 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 EBITDA²⁷), 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 of the covenants, and is encouraged to discuss them with Investors at the earliest opportunity.

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.²⁸

²⁷ Earnings before interest, tax, depreciation and amortisation.

²⁸ Care must be taken to ensure that disclosure of information does not render the Investor an "insider" under the Market Abuse Directive.

Appendix C

Description of Key Points to be discussed between the Borrower and the Investors (continued...)

4.2 Information disclosure undertakings (continued...)

- (d) Although the circumstances will vary for each Borrower and each PEPP 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 PEPP 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 PEPP 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.

Appendix C

Description of Key Points to be discussed between the Borrower and the Investors (continued...)

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 PEPP 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 PEPP transaction, validity and admissibility of authorisations and compliance with constitutional documents;
- (b) governing law, enforceability and conflict: that obligations under the PEPP 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 PEPP Notes, that the PEPP 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 purchase²⁹

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 PEPP in certain circumstances, such as it becoming illegal for the Investor to hold the PEPP, 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.

²⁹ An early redemption, repayment or prepayment or other provision which affects the cash flows of the PEPP may affect the ability of certain Investors to hold PEPPs under matching adjustment purposes for Solvency II, which falls outside the scope of this Guide.

Appendix C

Description of Key Points to be discussed between the Borrower and the Investors (continued...)

6. Redemption and purchase²⁹ (continued...)

- (b) The Borrower may also redeem or repay the PEPP 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 PEPP 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 a PEPP 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 a PEPP 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.

7. Tax

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

8. Events of default

Purpose of the clause:

Upon the occurrence of an event of default, the Investor may (a) declare the PEPP 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 PEPP 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 PEPP transaction, the events of default will usually include:

- (a) non-payment of amounts due under the PEPP (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).

Appendix C

Description of Key Points to be discussed between the Borrower and the Investors (continued...)

9. Transferability

Purpose of the clause:

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

Appendix D

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

Allen & Overy LLP	Herbert Smith Freehills
Ashurst	HM Treasury (Observer)
ASMEP-ETI	International Capital Market Association (ICMA)
Association of Corporate Treasurers	KBC Group
Association for Financial Markets in Europe	Kings & Wood Mallesons
Association Française de la Gestion financière (AFG)*	Kramer Levin Naftalis & Frankel
Association Française des Investisseurs Institutionnels (Af2i)*	LGIM
Association Française des Marchés Financiers (AMAFI)*	Linklaters
Association Française des Trésoriers d'Entreprises (AFTE)*	Loan Market Association (LMA)
Banca IMI	Loyens & Loeff
Banque de France (Observer)	M&G Investments
Bank of America Merrill Lynch	Mouvement des entreprises de France (MEDEF)*
Bank of Italy (Observer)	Muzinich
Bonelli Erede Pappalardo LLP	Natixis Asset Management
CMS Bureau Francis Lefebvre	Paris Europlace*
Credit Agricole CIB	Paris IDF Chamber of Commerce and Industry*
Delta Lloyd	Simmons & Simmons
DLA Piper	Slaughter and May
European Private Placement Association (EU PPA)	Société Générale
Fédération Bancaire Française (FBF)*	Standard & Poor's
Fédération Française des Sociétés d'Assurances (FFSA)*	Stifel Nicolaus Europe Limited
Fédéris Gestion d'Actifs	TheCityUK
French Euro Private Placement (Euro PP) Working Group	The Investment Association
French Trésor (Observer)	White & Case
Groupement des entreprises mutuelles d'assurance (GEMA)*	
Gide Loyrette Nouel AARPI	<i>*Member of the Euro PP Working Group</i>

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