

UKLA Technical Note

Choice of Home Member State under the PD

Ref: UKLA / TN / 630.1

PD –
Article 2(1)(m)
(ii);
ESMA
Questions and
Answers on
Prospectuses
(Q&As)

Market participants have enquired about the application of Article 2(1)(m)(ii) of the Prospectus Directive (PD), particularly regarding convertible securities and Global Depositary Receipts (GDRs). Under Article 2(1)(m)(ii), if certain conditions are met, the issuer, offeror or person seeking admission may choose their Home Member State.

It appears that Article 2(1)(m)(ii) sets out two different categories of securities. Firstly, non-equity securities whose denomination amounts to at least €1,000 (or a near equivalent amount in an alternative currency) and secondly non-equity securities giving the right to acquire any transferable securities or to receive a cash amount, as a consequence of their being converted or the rights conferred by them being exercised. In the ESMA document 'ESMA Questions and Answers on Prospectuses', ESMA considers that the amount should be calculated at the time the draft prospectus is submitted (Q&A 13). The €1,000 threshold does not appear to apply to the second category. Also, the second category only applies to non-equity securities that are not issued by the issuer of the underlying securities or an entity belonging to that issuer's group. So, the choice of Home Member State, as detailed in Article 2(1)(m)(ii) may be exercised, for example, by issuers of non-equity securities whose denomination amounts to at least €1,000 as well as issuers of convertibles and GDRs (irrespective of their denomination) to which the second category of Article 2(1)(m)(ii) applies.

Under Recital 12 of the PD, GDRs fall within the definition of non-equity securities. GDRs, could therefore fall within the second category of Article 2(1)(m)(ii) if they give a right to acquire the underlying securities or to receive a cash amount. However, it is up to the issuer to determine whether the rights attaching to a particular GDR confer such a right and so would enable it to fall within the second category of Article 2(1)(m)(ii), and therefore benefit from the ability to choose their Home Member State.

Issuers should note that under Recital 8 of the PD Amendment Directive 2010/73/EU, the Commission is requested to undertake a review of Article 2(1)(m)(ii) of the PD to consider whether this provision should be maintained or revoked.