

# FINANCING FOR MID-SIZED<sup>1</sup> COMPANIES

## Charter for Euro Private Placements (Euro PP)

### Industry guidance document<sup>2</sup>

#### Introduction

The purpose of this industry guidance document, which is the result of cross-market work carried out by various actors (issuers, intermediaries and investors), is to produce a charter for developing Euro Private Placements (Euro PPs) and creating a benchmark market for them, both in France and internationally. It is built on existing practices in the bond and bank loan markets, as well as practices in other international private placement markets.

This Charter is intended to provide a non-binding framework of best practices that are essential for the development of Euro PPs. This document is intended for instructional purposes and is not a pro forma contract. Readers are reminded of the importance for each party of negotiating contractual terms, which may vary depending on the type of transaction, the borrower's situation and market conditions.

This Euro PP Charter is designed to be adapted and supplemented as circumstances evolve.

#### Contents

- A. Issues and Objectives
- B. Definitions and Existing Formats
- C. Parties, Documentation and Timetable
- D. Key Processes - Recommendations

#### Appendices:

- **Appendix 1:** Information Memorandum Template
- **Appendix 2:** Form of Non-Disclosure Agreement
- **Appendix 3:** Terms and Conditions Template (bond format)
- **Appendix 4:** Arranger's Due Diligence Questionnaire Template

---

<sup>1</sup> Corresponds to the French notion of "ETI" or "Entreprise de taille intermédiaire".

<sup>2</sup> A list of the professional organisations which support the Euro PP Charter appears on the last page.

## **A. Issues and Objectives**

### **A.1 Euro PP Market Issues**

**Providing financing for mid-sized companies** – Capital markets can provide a significant share of the financing for mid-sized companies that might be unable to access international bond markets designed for large corporations with agency ratings. Examples include the *Schuldschein* market in Germany and the US Private Placement (USPP) market in the United States.

**Meeting investors' needs** – This will be accomplished by developing a rigorous investment framework that enables institutional investors from France and other countries to meet their risk diversification and financial performance targets by investing in unrated companies, while maintaining compliance with their prudential and regulatory requirements. These goals lead investors to seek contractual undertakings that are as similar as possible to the ones in bank loan documentation, in particular concerning the status of the bonds, which must rank *pari passu* with bank debt. For this purpose, investors need the most detailed term sheet possible, particularly with respect to the Euro PP covenants (see Appendix 3).

Furthermore, regulatory requirements applicable to certain investors investing in the Euro PP market may call for a credit analysis and monitoring procedure through the existence of covenants. This would require broad access to information about the borrowers' financial situations and degree of indebtedness prior to making investment decisions, so that investors can analyse risks beforehand and at any time during a Euro PP transaction.

The terms and conditions for implementing these guiding principles for investors may be negotiated when setting up a Euro PP.

### **A.2 Objectives**

**Determining a specific execution framework**, based on international credit market best practices and, to the extent possible, on self-regulation and adoption of industry practices. For this purpose, setting-up a common working basis for the issuers, intermediaries and investors concerned to provide appropriate responses to their respective needs.

**Establishing a brand**: make the French Euro PP market a fully-fledged market segment and a standard of quality for French and international issuers, intermediaries and investors.

**Promoting long-lasting relationships** between borrowers and investors.

## **B. Definitions and existing formats**

### **B.1. Definition of a Euro PP**

A Euro PP is a **medium or long-term financing transaction** between a listed or unlisted company and a **limited number of institutional investors**, based on **deal-specific documentation** negotiated between the borrower (the Borrower) and the investors (the Investors), generally with the participation of an arranger (the Arranger).

Negotiation of contractual terms and conditions is an important feature of Euro PP transactions; it distinguishes them from public and syndicated bond issues, such as Eurobond issues where investors merely subscribe an issue without having any say in the terms and conditions. For this reason, the process for carrying out a Euro PP transaction more closely resembles negotiating a bank loan agreement than preparing the documentation for an issue of listed bonds.

A Euro PP may take the form of a bond issue or a loan<sup>3</sup>.

A Euro PP is usually **unrated** and is intended as a **buy-and-hold** investment (i.e. to be held by the investors until maturity):

- The Investors are professionals (institutional investors, asset managers, banks, etc.) with the policy and capacity of conducting in-house analysis and monitoring of creditworthiness and contractual documentation.
- In principle, a Euro PP is transferable. However, since it is a buy-and-hold investment by nature, the number of investors is generally restricted and liquidity on the secondary market may be limited.
- In terms of financial disclosures and legal and economic protection, the Euro PP draws its inspiration from the disclosures and protections that the relevant Borrower would provide to its banks for loans, as the case may be.
- The Euro PP allows for great flexibility in the size of issues. It is usually fully subscribed and paid up upon issue, redeemable at maturity or by instalments, and may be denominated in euros or in any other currency to suit the parties.

A Euro PP **is not**:

- A public and syndicated bond issue<sup>4</sup> such as a Eurobond issue: the Eurobond market involves very large volumes (some €200 billion in 2012), with a relatively liquid secondary market as a result of large issues (generally about €500 million) and a very large number of participants, investors and intermediaries. Eurobond issues are generally rated by Moody's, Standard & Poor's and/or Fitch.

---

<sup>3</sup> For this reason, we use the term "Borrower" in this document for both Euro PPs in the form of bond issues and loans. Furthermore, this term could refer to either a company or a local authority.

<sup>4</sup> In market terminology, a "public" bond issue is one that may be placed with all investors on the Eurobond market, as opposed to a "private" placement, which is placed with a limited number of investors. This terminology is different from the legal terminology, which distinguishes a "public offering" of financial instruments, as defined in Article L.411-1 of the Monetary and Financial Code, which is open to retail investors, from a "private placement", as defined by default in Article L.411-2(II) of the Monetary and Financial Code, which is limited to entities providing portfolio management services to third parties, qualified investors and a limited circle of investors.

An issue in the form of a private placement under a Euro Medium Term Note (EMTN) or other programme for the issuance of negotiable debt instruments (such as the TCN, *Billets de trésorerie*, BMTN, Commercial Paper). Such debt issuance programmes on international markets enable active issuers with market recognition to carry out syndicated issues or opportunistic funding deals with investors seeking an appropriate investment with a specific term or structure on a private placement basis. Issuers with such programmes are mostly rated companies. The specific features of the EMTN or other debt instrument markets (issuance programmes, tap issues, etc.) are different from those of the Euro PP market in this respect.

- A public offering of bonds to retail investors (such as the IBO initiative of the *Bourse des Entrepreneurs* in France).
- A loan from a credit institution, which is typically the basis for a business relationship for the lending bank.

## B.2. Existing Euro PP formats

| Format  | Documents | Listing                            | Confidential transaction | Transferability   |
|---|-----------|------------------------------------|--------------------------|---|
| <b>Bonds<sup>5</sup> traded on a RM<sup>6</sup></b> | Bond      | Euronext Paris, Luxembourg         | No                       | Yes<br>No limitation allowed                                    |
| <b>Bonds traded on a MTF<sup>7</sup></b>            | Bond      | Alternext or Euro MTF (Luxembourg) | No                       | Yes<br>No limitation allowed                                    |
| <b>Unlisted bonds</b>                               | Bond      | None                               | Yes <sup>8</sup>         | Yes<br>Limitations may be set out in a transfer approval clause |
| <b>Loans</b>  | Bank      | None                               | Yes                      | Yes, but only to the extent permitted by the loan agreement     |

**NB:** To date, all the transactions have been governed by French law. However, under certain conditions, some future transactions could be governed by another country's law, particularly in the case of certain foreign borrowers.

The loan format may involve a minority co-investment by the Arranger.

<sup>5</sup> Within the meaning of Article L. 213-5 of the Monetary and Financial Code.

<sup>6</sup> Regulated Market, as defined in Article L. 421-1 of the Monetary and Financial Code.

<sup>7</sup> Multilateral Trading Facility, as defined in Article L. 424-1 of the Monetary and Financial Code.

<sup>8</sup> To a certain extent only if the bonds are admitted for clearing by Euroclear France (see Article 1 of Appendix 3 below).

**B.3. Existing formats: contractual and regulatory approval and financial disclosure requirements upon issuance**

| <b>Format</b>                | <b>Approval</b>   | <b>Level of financial disclosure required</b>   |
|------------------------------|---|---|
| <b>Bonds listed on a RM</b>  | Market authority (AMF, CSSF, etc.)                              | Prospectus Directive type: Consolidated financial statements for the last 2 years, IFRS     |
| <b>Bonds listed on a MTF</b> | Stock exchange (NYSE Euronext, Luxembourg Stock Exchange, etc.) | Consolidated financial statements for the last 2 years, IFRS or French accounting standards |
| <b>Unlisted bonds</b>        | None  | Established by contract   |
| <b>Loans</b>                 | None  | Established by contract   |

## **C. Parties, Documents and Timetable**

### **C.1. Roles of the Different Parties**

|                    | <b>Arranging the deal</b>  | <b>During the term of the bond or loan</b>  |
|--------------------|--|---|
| <b>Borrower</b>    | <ul style="list-style-type: none"> <li>▪ Negotiation and signature of a Non-Disclosure Agreement (with the Issuer and/or Arranger, as the case may be)</li> <li>▪ Compilation and disclosure of financial information</li> <li>▪ Presentation of the company by Senior Management to Investors on a one-on-one or group basis</li> <li>▪ Negotiation of the contractual terms, including the Term Sheet, the prospectus (including the terms and conditions of the bonds) and the agreements (placement or subscription agreement and paying agency agreement (bond format) / loan agreement (loan format))</li> <li>▪ Setting the financial terms</li> </ul>  | <ul style="list-style-type: none"> <li>▪ Coupon payments and redemption</li> <li>▪ Compilation and reporting of financial information</li> <li>▪ Compliance with covenants, particularly Investor information, financial covenants or any other covenants, as applicable</li> </ul>   |
| <b>Investor(s)</b> | <ul style="list-style-type: none"> <li>▪ Origination – Identification of eligible Borrowers for Euro PP</li> <li>▪ Negotiation and signature of Non-Disclosure Agreement (with the Issuer and/or Arranger, as the case may be)</li> <li>▪ Management of confidential information and any resulting inside information, where appropriate</li> <li>▪ Obtaining sufficient and adequate information</li> <li>▪ Credit analysis, including analysis of credit risk and all available contractual undertakings, especially those relating to the Euro PP under consideration (including the Term Sheet, the prospectus and the agreements)</li> <li>▪ Review and negotiation of the contractual and financial terms (price), including the Term Sheet, the prospectus (including the terms and conditions of the bonds) and the agreements (placement or subscription agreement and paying agency agreement (bond format) / loan agreement (loan format))</li> <li>▪ Investor due diligence</li> <li>▪ Release of funds</li> <li>▪ Management of conflicts of interest, if applicable</li> </ul> | <ul style="list-style-type: none"> <li>▪ Management of information received from the Issuer, the Bondholders' Representative or the Facility Agent</li> <li>▪ Monitoring the credit profile, including all developments that could affect the quality of the investment (credit events, new financing, amendments and waivers, any new business plans, elements leading to a possible subordination, etc.)</li> <li>▪ Monitoring compliance with financial and other covenants</li> <li>▪ Managing any renegotiation of terms (General Meeting of Bondholders or waiver/amendment from the Agent in the case of a loan)</li> <li>▪ Management of any events of default or redemption events, as needed</li> </ul> |

**Arranger(s)**

(regulated financial intermediary, credit institution or investment firm, as the case may be)

- Origination – Identification of eligible Borrowers for Euro PP – Management of dialogue between Borrower and Investor(s)
- Negotiation and signature of an engagement letter with the Borrower
- Negotiation and signature of the Non-Disclosure Agreement, with the Investor(s) and/or Borrower, as the case may be
- Preparing a detailed Term Sheet summarising the points mentioned in Appendix 3
- Management of confidential information and any resulting inside information, as appropriate
- Know-Your-Customer and Anti-Money Laundering due diligence with respect to the Borrower
- Management of conflicts of interest, if applicable
- Assisting the company in preparing a presentation of the Borrower credit profile
- Execution – Monitoring and assistance during the negotiations of the contractual and financial terms (especially verification of conditions precedent (CPs) to signing and closing) and during the drafting of the Prospectus, Information Memorandum and the agreements
- Arranger due diligence
- Securities settlement and delivery (bonds)
- For loans with co-investment, analysis of credit risk and contractual undertakings for its own investment/account
- Periodic valuation of listed bonds, where appropriate
- For loans with co-investment: monitoring the credit profile of its own investment

|   |   |  |
|---|---|--|
| <p><b>Legal Counsel</b></p>                       | <ul style="list-style-type: none"> <li>▪ Borrower's Counsel: information coordination, drafting the Prospectus/Information Memorandum and negotiation of the agreements. Producing a legal opinion for the Arranger (bond) and/or initial lenders (for a bond with no Arranger or for a loan), and, where appropriate, for the identified secondary lenders (loan) acceding to the loan within 15 days after signature (see C.2 below)</li> <li>▪ Arranger's Counsel: Drafting the Prospectus/Information Memorandum and negotiation of the agreements. Producing a legal opinion for the Arranger (bond) and/or initial lenders (for a bond with no Arranger or for a loan), and, where appropriate, for the identified secondary lenders (loan) acceding to the loan within 15 days after signature (see C.2 below)</li> <li>▪ Investors' Counsel: Analysis of all documentation</li> </ul> | <ul style="list-style-type: none"> <li>▪ Borrower's/Arranger's Counsel: occasional advice on issues arising during the term of the bond or the loan</li> </ul>   |
| <p><b>Statutory Auditors</b></p>                  | <ul style="list-style-type: none"> <li>▪ Review of financial data in the Prospectus and delivery of a comfort letter to the Arranger (bond)</li> </ul>  | <ul style="list-style-type: none"> <li>▪ Certifying compliance with covenants, where appropriate</li> </ul>  |
| <p><b>Paying Agent (bond)</b></p>                 | <ul style="list-style-type: none"> <li>▪ Review of administrative procedures</li> <li>▪ Where appropriate, securities settlement and delivery (bond)</li> </ul>   | <ul style="list-style-type: none"> <li>▪ Management of coupon and redemption payments</li> <li>▪ Technical agent for transmission of financial and other information disclosures to Investors</li> </ul>   |
| <p><b>Bondholders' Representative (bond)*</b></p> | <ul style="list-style-type: none"> <li>▪ Review of administrative procedures</li> </ul>   | <ul style="list-style-type: none"> <li>▪ Information agent for monitoring covenants and disclosures made through the technical intermediary of the Paying Agent</li> <li>▪ General duty to represent investors**</li> </ul>  |
| <p><b>Facility Agent (loan)</b></p>               | <ul style="list-style-type: none"> <li>▪ Calls for funds from the Investors and the Arranger for the co-investment, where appropriate</li> <li>▪ Release of the funds to the Borrower</li> </ul>  | <ul style="list-style-type: none"> <li>▪ Management of interest calculations and payments</li> <li>▪ Information agent for monitoring covenants, where appropriate</li> <li>▪ Information agent for financial and other data, where appropriate</li> <li>▪ Acts as a liaison between the Investors and the Borrower in the event of a renegotiation, waiver, amendment, default, etc.</li> </ul> |

\* It should be noted that legislative change may be proposed that would allow the functioning of the Bondholders' group to be governed by contractual terms in the case of issues with a denomination of €100,000 or more

\*\* The duties of the Bondholders' Representative depend on its expertise and skills, as well as on the way each investor would like to manage or delegate some or all of its duties: monitoring covenants, Investor-Borrower relations in the case of a renegotiation, waiver, amendment, default, etc.

## C.2 Documents and Conditions Precedent

### Listed Bonds (traded on a RM or a MTF)

- Non-Disclosure Agreement for managing confidential information
- Prospectus describing the Borrower (business, financial statements, risk factors), the bonds issued (terms and conditions and risk factors of the bonds) as well as the placement procedures and certain tax aspects. The Prospectus is drafted using the applicable template for the RM (Prospectus Directive and Regulation 809/2004/EC, as amended) or for the MTF concerned (internal regulations or other set of rules). The terms and conditions of the bonds describe the characteristics of the bonds: form, maturity, interest rate, issuance and redemption features, events of default, financial or other covenants and other undertakings, protection and exercise of Investors' rights notably (see Appendix 3)
- Placement or subscription agreement signed between the Borrower and the Arranger or the Investor(s), pursuant to which the Borrower undertakes to issue the bonds, the Arranger undertakes to place them or/and the Investor(s) undertake to subscribe for them, based on a number of representations, warranties and undertakings from the Borrower
- Paying agency agreement signed between the Borrower and the Paying Agent for the purpose of organising financial flows during the term of the bond (interest payments, redemption, technical procedures for provision of information to investors and procedures for calculating the amounts due, as the case may be)
- Comfort letter from the Borrower's statutory auditors delivered to the Arranger or the Investor(s), in which the statutory auditors give their opinion on any changes in certain financial information since the date of the Borrower's last audited or reviewed accounts
- Legal opinions from the Borrower's and the Arranger's Legal Counsel (internal or external) delivered to the Arranger regarding the capacity of the Borrower to issue bonds and the validity of its obligations
- Arranger Due Diligence Questionnaire delivered to the Borrower to supplement or confirm, as the case may be, the Borrower's representations and warranties in the Placement Agreement or the Subscription Agreement (see Appendix 4)
- Statement of existing security interests (may include only material security interests), as the case may be
- Documents for admission to trading on the RM or the MTF concerned (admission form or equivalent document)
- Documents for admission of bonds to Euroclear France (accounting letter)

**Unlisted bonds**

- Non-Disclosure Agreement for managing confidential information
- Information Memorandum describing the Borrower and the terms and conditions of the bonds, as the case may be
- Placement or subscription agreement signed between the Borrower and the Arranger or the Investor(s), pursuant to which the Borrower undertakes to issue the bonds, the Arranger undertakes to place them or/and the Investor(s) undertake to subscribe for them, based on a number of representations, warranties and undertakings from the Borrower, to which the terms and conditions of the bonds are appended
- Paying agency agreement signed between the Borrower and the Paying Agent for the purpose of organising financial flows during the term of the bonds (interest payments, redemption, technical procedures for provision of information to investors and procedures for calculating the amounts due, as the case may be)
- Comfort letter from the Borrower's statutory auditors delivered to the Arranger and the Investor(s), in which the statutory auditors give their opinion on changes in certain financial information since the date of the Borrower's last audited or reviewed financial statements.
- Legal opinions of the Borrower's and Arranger's Legal Counsel (internal or external) delivered to the Arranger regarding the capacity of the Borrower to issue bonds and the validity of its obligations
- Arranger Due Diligence Questionnaire submitted to the Borrower to supplement or confirm, as the case may be, the Borrower's representations and warranties in the Placement Agreement or the Subscription Agreement (see Appendix 4)
- Statement of existing security interests (may include only material security interests), as the case may be
- Documents for admission of bonds to Euroclear France (accounting letter), as the case may be

**Loans**

- Loan agreement and appendices signed between the Borrower and the initial lenders
- Legal opinions of the Borrower's and the Arranger's Legal Counsel delivered to the initial lenders
- Statement of security interests or guarantees granted by the Borrower (may include only material security interests or guarantees), as the case may be

**C.3 Illustrative Timetable (bonds listed on a Regulated Market)**

| MAIN STEPS   | PARTIES INVOLVED                                   | W 1 | W 2 | W 3 | W 4 | W 5 | W 6 | W 7 | W 8 | W 9 | W 10 |
|--|--|-----|-----|-----|-----|-----|-----|-----|-----|-----|------|
| <b>STARTING DISCUSSIONS</b>  |  |     |     |     |     |     |     |     |     |     |      |
| Pre-requisites :<br>- Issuer's consent<br>- Investor's request   | Arranger(s)  | █   |     |     |     |     |     |     |     |     |      |
| Compiling the group's synthetic credit profile   | Arranger(s)  | █   | █   |     |     |     |     |     |     |     |      |
| Signature of Non-Disclosure Agreement, if necessary  | Issuer / Investor(s)                               | █   |     |     |     |     |     |     |     |     |      |
| Preliminary analysis of synthetic credit profile   | Investor(s)  |     | █   | █   | █   | █   |     |     |     |     |      |
| <b>APPROACHING INVESTORS</b>   |  |     |     |     |     |     |     |     |     |     |      |
| Borrower's presentation to Investor(s)   | Issuer / Arranger(s)                               |     | █   | █   | █   |     |     |     |     |     |      |
| Meeting of Issuer and Investor(s)  | Issuer / Arranger(s) / Investor(s)                 |     |     | █   | █   | █   | █   | █   | █   | █   | █    |
| Credit analysis  | Investor(s)  |     |     | █   | █   | █   | █   | █   | █   | █   | █    |
| Negotiation of the terms and conditions of the transaction   | Issuer / Arranger(s) / Investor(s)                 |     |     |     | █   | █   | █   | █   | █   | █   | █    |
| Investor's investment agreement (terms and conditions, amount, maturity, spread, coupon)                               | Investor(s)  |     |     |     |     |     |     |     |     | █   |      |
| <b>LEGAL DOCUMENTS</b>   |  |     |     |     |     |     |     |     |     |     |      |
| Drafting of detailed terms and conditions  | Issuer / Arranger(s) / Lawyers                     |     |     |     |     | █   | █   | █   | █   |     |      |
| Submission of detailed terms and conditions to Investor(s)   | Arranger(s)  |     |     |     |     |     | █   |     |     |     |      |
| Drafting and finalising other legal documents  | Issuer / Arranger(s) / Lawyers / Statutory Auditor |     |     |     |     |     | █   | █   | █   | █   | █    |
| From first filing of the prospectus to validation of the preliminary prospectus and validation of the final prospectus | Issuer / Arranger(s) / Lawyers                     |     |     |     |     |     |     | █   | █   | █   | █    |
| <b>FINALISING THE DEAL</b>   |  |     |     |     |     |     |     |     |     |     |      |
| Due diligence call   | Issuer / Arranger(s)                               |     |     |     |     |     |     |     |     | █   |      |
| Setting the price  | Issuer / Arranger(s)                               |     |     |     |     |     |     |     |     | █   |      |
| Obtaining final approval of the prospectus (including the price)   | Stock exchange                                     |     |     |     |     |     |     |     |     | █   |      |
| Signature of legal documentation   | Issuer / Arranger(s) / Investors                   |     |     |     |     |     |     |     |     |     | █    |
| Payment of funds/delivery of securities  | Issuer / Arranger(s) / Euroclear France            |     |     |     |     |     |     |     |     |     | █    |
| Listing of the securities  | Listing Agent                                      |     |     |     |     |     |     |     |     |     | █    |
| Press release  | Issuer / Arranger(s)                               |     |     |     |     |     |     |     |     |     | █    |

## D. Key Processes - Recommendations

### D.1. Borrower's Presentation

| Borrower's Presentation |   |
|-------------------------|---|
|                         | <p>The Borrower and the Investors need to agree on the level of disclosure necessary for the Investors to make an informed investment decision:</p> <ul style="list-style-type: none"> <li>▪ <b>If the Borrower already has equity or debt securities listed (on a RM or a MTF):</b> disclosure of any non-public information gives rise to risks regarding equal access to information and inside information and may accordingly be contemplated by the Borrower in compliance with applicable laws and regulations only</li> <br/> <li>▪ <b>If the Borrower has no listed securities:</b> similar level of disclosure, in particular: <ul style="list-style-type: none"> <li>▪ Audited consolidated financial statements for at least the last 2 years<sup>9</sup> (IFRS or French accounting standards) and the related statutory auditors' reports</li> <li>▪ Other information about the Borrower, and in particular: <ul style="list-style-type: none"> <li>• Business activity, share ownership, organisation and main risks</li> <li>• Strategy, operating and financial results, business plan, where appropriate, depending on the type of issuer or transaction</li> <li>• 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 Investor sufficient information and understanding of the Borrower's overall financing structure to make an informed investment decision</li> </ul> </li> <li>▪ Presentation of the Borrower by Senior Management to the Arranger, if there is one, and/or to potential Investors. For most Investors, access to Senior Management and opportunity to ask questions and obtain answers are key elements of their credit analysis</li> </ul> </li> <br/> <li>▪ <b>For Euro PP in the form of unlisted bonds,</b> it is recommended that the Borrower, with the assistance of the Arranger, if there is one, gathers all of the information about the Borrower in an Information Memorandum that is submitted to each potential Investor as soon as possible. A template for the Information Memorandum can be found in Appendix 1. The potential Investor(s) will sign a letter acknowledging that the Information Memorandum is a contractual document and not a Prospectus within the meaning of the Prospectus Directive (or the regulations of the MTF concerned)<sup>10</sup>. This acknowledgement may be included in the Non-Disclosure Agreement</li> </ul> |

<sup>9</sup> Generally speaking, 3 to 5 years depending on the Investors' demand.

<sup>10</sup> Such a prospectus (or equivalent document for a listing on a MTF) is not required if there is no listing on a regulated market or no public offering.

|  |  |
|--|--|
|  | <ul style="list-style-type: none"> <li>▪ <b>For Euro PP in the form of listed bonds (on a RM or a MTF)</b> <ul style="list-style-type: none"> <li>▪ Mandatory publication of a prospectus<sup>11</sup> containing the information required by the Prospectus Directive for a listing on a RM or equivalent information for a listing on a MTF</li> <li>▪ It is recommended to submit a preliminary prospectus<sup>12</sup> to Investors as early as possible before the planned transaction commencement date, so as to facilitate their investment decisions (risk factors, terms and conditions of the bonds, etc.)</li> </ul> </li> <li>▪ <b>For all forms of Euro PP</b>, including listed bonds and unlisted bonds or loans, any disclosure of non-public information must be covered by a Non-Disclosure Agreement signed between the Borrower and the Investors. A form for such agreement can be found in Appendix 2. No such agreement needs to be signed between the Borrower and the Arranger, if there is one, since the Arranger is subject to confidentiality rules in its capacity as a credit institution or an investment services provider</li> </ul> <p><b>Management of confidential information and inside information, as the case may be:</b> confidential information, some of which may be inside information, is managed under the terms of a Non-Disclosure Agreement signed between the parties (see above) and by the applicable laws and regulations</p> |
|--|--|

## D.2. Defining the economic terms and conditions of the transaction and the Borrower's legal and financial undertakings

|  | <b>Defining the economic terms and conditions of the transaction and the Borrower's legal and financial undertakings</b>  |
|--|---|
|  | <ul style="list-style-type: none"> <li>▪ It is recommended to prepare a detailed Term Sheet<sup>13</sup> after negotiations between the Borrower, the Arranger, if there is one, and the Investors who wish to take part. The Term Sheet is based on information provided by the Borrower. Investors who do not wish to take part in the negotiations directly can do so through the Arranger.</li> <li>▪ Certain clauses require special attention: <ul style="list-style-type: none"> <li>• The ranking of the bonds with respect to existing creditors</li> <li>• Negative pledge (maintaining the ranking of the bonds/debt) and exceptions, especially as compared to the provisions of the loan agreement, particularly with regard to acquisitions</li> <li>• Use of proceeds from the issue</li> <li>• Change of control and its definition (percentage of voting rights or capital)</li> <li>• Financial covenants and their consequences, affirmative and negative undertakings and restrictive clauses, where appropriate (investment, acquisitions, asset sales, distribution of dividends or other payments, indebtedness limits for subsidiaries, etc.)</li> <li>• Events of default and cross default thresholds as well as other cases of acceleration/early redemption</li> <li>• Fall-away clauses, whereby some covenants may be suspended under certain conditions</li> <li>• Transfer clause for deals in the form of a loan</li> </ul> </li> <li>▪ Generally speaking, Investors aim to achieve provisions that are in line with those included in pre-existing bank loans so as to reduce the risk of subordination. As such, transparency of information concerning all of the Borrower's debt, both before and during the term of the transaction, is essential for Investors</li> </ul> |

<sup>11</sup> Though it does not provide sufficient information for making an investment decision, the Prospectus describes the Borrower's business, financial statements and risk factors, as well as the terms and conditions of the bonds, thus enabling Investors to substantiate their analysis.

<sup>12</sup> A preliminary prospectus is usual in the case of first-time issuers on the euro market and helps present the company to Investors. It corresponds to the final version of the Prospectus for admission to trading, with the exception of the financial characteristics (coupon, principal amount, maturity, issue price, interest payment dates), on which the informal approval of the competent authority has been obtained.

<sup>13</sup> A Term Sheet contains a summary of the main financial and legal terms and conditions of the transaction.

**Discussion Process**

- the Arranger submits the Non-Disclosure Agreement to the Investors once the Arranger and the Borrower have signed a mandate;
- the Investors sign the Non-Disclosure Agreement to gain access to all the information they need to conduct their credit analysis;
- immediately following signing of the Non-Disclosure Agreement, the Arranger and/or the Borrower provide certain information about the transaction: investment amount, planned maturities, price range;
- the Investors meet with the Borrower, if they wish to continue their analysis and enter into negotiations/discussions with the Arranger/Borrower;
- the early interest of the Investors must be gained on the basis of the Term Sheet submitted by the Arranger/Borrower. The Term Sheet must provide adequate details about covenants, negative pledge, etc. The quality of the Term Sheet is critical for a successful deal; this is the responsibility of the Arranger, if there is one;
- when adaptations are required to finalise the Term Sheet, Investors may be permitted by the Borrower to discuss the deal among themselves, under the terms of the Non-Disclosure Agreement, to improve the language of the Term Sheet (excluding any discussion about pricing terms), in the presence of the Arranger and/or the Borrower, as the case may be. The Borrower shall have received prior notice of such discussions;
- each Investor who so wishes may submit the conditions under which it could take part in the planned Euro PP deal, such as investment amount, maturity, price and main clauses in the documents;
- based on these conditions, the Investors are selected or excluded for further discussions with the Borrower;
- the Borrower and/or the Arranger then notifies each Investor that is selected;
- Investors may quit the process at any time (subject to maintaining confidentiality), particularly if changes are made to the planned deal;
- a template for Terms and Conditions of Euro PP deals in the bond format can be found in Appendix 3; it is also used for drafting the Term Sheet;
- once the Term Sheet has been finalised and accepted by all of the parties, it becomes the basis for drafting the full and final Terms and Conditions of the bonds for Euro PP deals in the bond format or of the loan agreement for Euro PP deals in the loan format.

### D.3. Arranger and Investors Due Diligence

#### D.3.1. Arranger Due Diligence

The Arranger is required to carry out due diligence, independently of the Investors' credit analysis work. The main due diligence tasks are:

- **For Euro PP in the form of listed bonds (on a RM or a MTF)**
  - The Arranger takes part in a Due Diligence in the form of a telephone call or meeting with the Senior Management of the Borrower. A template for the Arranger's due diligence can be found in Appendix 4
  - The Arranger requires the Legal Counsel (Arranger's lawyer and, where appropriate, Borrower's lawyer) to produce a legal opinion regarding the Borrower's legal capacity and the validity of its contractual obligations
  - The Arranger requires the statutory auditors to produce a comfort letter regarding changes in certain financial information since the date of the Borrower's last audited or reviewed accounts and regarding the accounting data presented in the Prospectus
- **For Euro PP in the form loans or of unlisted bonds**
  - Organisation of appropriate due diligence. A template can be found in Appendix 4
  - Legal opinions and the statutory auditors' comfort letters

#### D.3.2. Investors Due Diligence

Whether or not there is an Arranger, the Investors must carry out their own due diligence. Their main tasks are:

- Negotiating and signing Non-Disclosure Agreements with the Borrower and/or the Arranger where applicable
- Managing confidential information and any resulting inside information, where applicable
- Conducting credit analysis, including credit risk analysis and analysis of all legal documents (particularly the Term Sheet, the Prospectus and the agreements)
- Reviewing and negotiating the contractual and financial terms and conditions (particularly the Term Sheet, the Prospectus and the agreements)
- Managing any conflicts of interest
- Obtaining legal opinions regarding the Borrower's legal capacity and the validity of its contractual obligations; a statement of existing security interests is also recommended
- Managing information received from the Borrower, the Bondholders' Representative and the Facility Agent
- Monitoring the credit profile, including all developments that could affect the quality of the investment (credit events, new financing, amendments and waivers, any new business plans, elements leading to potential subordination, etc.)
- Monitoring compliance with financial and other covenants
- Managing any renegotiation of terms and conditions (General Meeting of Bondholders or waiver/amendment via the Agent in the case of a loan)
- Management of any events of default

#### ***D.3.2.1. Specific Investors Due Diligence in the absence of an Arranger***

For deals with no Arranger, the Investor is also required to carry out due diligence that is similar to that of an Arranger. The main tasks are:

- **For Euro PP in the form of listed bonds (on a RM or a MTF)**
  - The Investor attends the Borrower's presentation, in the form of a telephone call or a meeting with the Borrower's Senior Management
  - The Investor requires the Legal Counsel (Borrower's lawyer and/or Investor's lawyer) to produce a legal opinion regarding the Borrower's legal capacity and the validity of its contractual obligations
  - The Investor requires the statutory auditors to produce a comfort letter regarding changes in certain financial information since the date of the Borrower's last audited or reviewed accounts and regarding the financial data presented in the Prospectus
- **For Euro PP in the form of loan or unlisted bonds**
  - Organising a presentation by the Borrower with its Senior Management. The meeting is adapted to the characteristics of the Borrower and the Investor's organisational structure, drawing inspiration from the questionnaire in Appendix 4
  - It is recommended to obtain legal opinions and comfort letters from the statutory auditors

#### ***D.3.2.2. Investors Due Diligence in the presence of an Arranger***

Notwithstanding the Arranger due diligence, the Investor must carry out its own due diligence before a Euro PP deal is concluded. This due diligence may in particular include the Investor's attendance at a presentation of the Borrower (whether at a meeting or on a call) by the Senior Management of the Borrower and, as the case may be, the Arranger

#### D.4. During the term of the securities or loan, periodic disclosures and monitoring of legal and financial covenants

|  | <b>Periodic Disclosures</b>   |
|--|---|
|  | <ul style="list-style-type: none"> <li data-bbox="359 548 1449 627">▪ <b>If the Borrower has other equity or debt securities listed on a RM or a MTF</b>, the Borrower is already required to publish its financial statements<sup>14</sup> and disclose any material events that may affect the securities already listed. Investors have free access to such information               <ul style="list-style-type: none"> <li data-bbox="406 638 1449 716">• For Euro PP deals in the form of listed bonds on a RM or a MTF, this requirement also applies to the bonds: the Borrower must disclose any material event that could affect the bonds (and not just the other securities, since the materiality criterion may vary from one security to the next)</li> <li data-bbox="406 728 1449 884">• For Euro PP deals in the form of loans or unlisted bonds, the Borrower's undertaking to notify Investors of any material event that could affect the bonds or the loans must be explicitly stipulated in the contractual documents, in compliance with the applicable rules regarding inside information. Disclosures to Investors may be made through their Representative and/or the Paying Agent, or directly by the Borrower; any disclosures to potential new Investors must be subject to signing a new Non-Disclosure Agreement</li> </ul> </li> <li data-bbox="359 896 1449 918">▪ <b>If the Borrower has no other listed securities</b> <ul style="list-style-type: none"> <li data-bbox="406 929 1449 1086">• For Euro PP deals in the form of bonds listed on a RM or a MTF, the regulations require the Borrower to publish its financial statements (with an exception for bonds with a denomination of €100,000 or more, in which case the Borrower contractually undertakes to furnish or make available its financial statements with the appropriate frequency during the term of the bonds, and at least once a year) and to disclose any material event that could affect the bonds or the loan. The Borrower may also contractually undertake to publish its financial statements more frequently than the regulations require</li> <li data-bbox="406 1097 1449 1299">• For Euro PP deals in the form of loans or unlisted bonds, it is recommended that the Borrower contractually undertake to (i) submit or make available its financial statements during the term of the bonds or the loans with appropriate frequency (at least once a year, or more frequently, depending on the regulatory requirements for Investors), <i>inter alia</i> for the purpose of monitoring the Borrower's covenants, and (ii) notify Investors of any material events that could affect the bonds or the loans. Disclosures to Investors may be made through their Representative and/or the Paying Agent, or directly by the Borrower; any disclosures to potential new Investors must be subject to signing a new Non-Disclosure Agreement</li> </ul> </li> <li data-bbox="359 1310 1449 1388">▪ <b>In any case</b>, financial information must be published, transmitted or made available simply and rapidly, with the same frequency and deadlines as for lending banks, if there are any, and subject to compliance with the applicable rules regarding inside information, where appropriate</li> </ul> |

<sup>14</sup> With an exception for debt securities with a face value of €100,000 or more and securities listed on Euro MTF in Luxembourg.

|  | <b>Monitoring legal and financial covenants</b>   |
|--|---|
|  | <ul style="list-style-type: none"> <li>▪ The financial covenants should give rise to issuance of a compliance certificate by the Borrower:               <ul style="list-style-type: none"> <li>• Bond format: the certificate must be delivered to the Representative and the Paying Agent, who then notify the Investors or, in the absence of such delivery, notify the Investors of the lack of a certificate. The documentation may give the Representative the power to assess the conformity of the certificate and the compliance with the covenants, to require early redemption in an event of default, or to notify Investors when necessary</li> <li>• Loan format: The Facility Agent receives the certificate and sends it to the Investors. It notifies the Investors in case of non-compliance</li> </ul> </li> <li>▪ If the documents do not assign this task to the Representative or the Facility Agent, it is the responsibility of the Investors to ensure compliance with the covenants and to demand early redemption in an event of default</li> <li>▪ The appointed Facility Agent or Representative must have the technical skills required, which means they must be remunerated accordingly</li> <li>▪ Problems monitoring negative undertakings: Provide for an undertaking by the Borrower to disclose any breach of a negative undertaking and/or reiteration of the representations regarding compliance with undertakings with a frequency to be defined (e.g. upon making of interest payments, as in the case of loan agreements)</li> </ul> |

## Appendix 1

### Information Memorandum Template

- I. Executive summary
  - a. Company overview
    - (1) Business, activities and markets
    - (2) Breakdown of revenues by business segment
    - (3) Group strategy and key objectives
    - (4) Organisational structure
      - (i) Shareholder structure
      - (ii) Management and organization
      - (iii) Main subsidiaries
  - b. Recent events
    - (i) Key business trends/ events
    - (ii) Acquisitions, spin offs, etc.
    - (iii) Environmental, legal and others
  - c. Summary of financial performance
    - (i) Simplified [consolidated] financial statements
    - (ii) Overview of credit ratios, financing and group financial targets
- II. Key investment considerations
  - a. Operational positioning, e.g.
    - Key business strengths
    - Brand
    - Diversification (market, sector, geography, etc.)
    - Client analysis and relationship with suppliers
    - Competitive position
  - b. Financial positioning, e.g.
    - Cash flow generation
    - P&L accounts
    - Balance sheet
    - Investment policy
    - Dividend policy
    - Main financial covenants and guarantees
  - c. Risks and Mitigants
  - d. Others

- III. Company description
  - a. Business overview
  - b. History
  - c. Strategy, e.g.
    - Long-term priority and objectives
    - Growth opportunity
    - Brand strategy
    - Social and environmental commitments
  - d. Business activities, e.g.
    - By geographical area
    - Trading performance by sector/market
  - e. Market description, e.g.
    - Segments
    - Technology evolution
    - Competitors
  - f. Management overview
    - Board of directors and key executives
  - g. Financial Performance
    - (1) Summary of consolidated and [individual] financial statements
    - (2) Trading performance history
    - (3) Cashflows, working capital and capex
    - (4) Credit metrics
    - (5) Financial structure and bank relationship
  - h. Other information
    - (1) Legal matters
    - (2) Other (socially responsible investment,...)

## Appendix 2

### Form of Non-Disclosure Agreement

#### [Borrower / Investor] / Arranger / Investor<sup>15</sup>

Attn: [            ]

[ DATE ]

RE: Confidentiality Undertaking

Dear Sirs,

In connection with a proposed private placement (the “**Transaction**”), in which [Name of potential investor] (“you” or the “**Recipient**”) may decide to participate, [Name of company] (the “**Company**”) [has engaged [Name of arranger] (the “**Arranger**”) and the Company 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 or legal advisers<sup>16</sup> (each a “**Representative**”) certain information concerning the Transaction, the Company or other parties involved in the Transaction which is confidential and/or proprietary in nature.

In consideration of [the Arranger or] the Company making available any such information, by signing and returning to us an executed copy of this confidentiality undertaking (the “**Undertaking**”) you agree and undertake towards [the Arranger and] the Company 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)<sup>17</sup>, in whatever form and on whatever medium (whether in writing, in electronic form, orally or otherwise) relating to the Company, the Transaction or the parties involved in the Transaction, disclosed to or obtained by the Recipient or any Representative from [the Arranger,] the Company, [any other potential investor in the Transaction notified to the Recipient by the Company in

---

<sup>15</sup> The Non-Disclosure Agreement can be bilateral (between the Company and the Investor or between the Arranger and the Investor), or tripartite (among the Company, the Arranger and the Investor). In the event of a bilateral agreement between the Company 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 Company.

<sup>16</sup> As the case maybe, agents and financial advisers 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.

<sup>17</sup> Depending on the type of transaction and Company and the needs of the Recipient, some or all of the following information can be disclosed by the Company to the Recipient at its sole discretion: main terms of its existing indebtedness (covenants, security interest, credit events, events of default...); Cash flow; Balance sheet; Investment policy; Dividend policy; Business plan, and any other relevant information which could impact the credit quality of the Transaction (...).

writing (“**Potential Investor**”)]<sup>18</sup>, 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 Undertaking 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:

- (i) is in the public domain at the time of its disclosure hereunder;
- (ii) thereafter comes into the public domain otherwise than through a breach of this Undertaking;
- (iii) is already lawfully in the possession of the Recipient prior to its disclosure hereunder;
- (iv) 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 Company'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 Company:

- (i) to the Representatives of the Recipient 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 Undertaking and, (b) the Recipient has ensured that [(x)] for the Recipient's Representatives and affiliates<sup>19</sup>, any such Representative or affiliate agrees to observe the obligations contained herein as if it were a party to this Undertaking 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 Undertaking with the Company [and the Company has approved, in writing, both the type of Confidential Information disclosed (which should not include pricing terms) and the timing of such disclosure]] ;

---

<sup>18</sup> If the option of a discussion between Potential Investors is not applicable, bracketed references to the Potential Investor throughout the document should be deleted.

<sup>19</sup> As the case maybe, agents and financial advisers 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.

- (ii) 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 Company 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 establishes and maintains 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 by the Recipient or any of the Recipient's affiliates or providing advices and services in relation thereto

#### 6. Inside Information<sup>20</sup>

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 Undertaking and that, in addition to any other remedies, the Arranger and the Company 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 Undertaking.

---

<sup>20</sup> This article applies only if the bonds and/or the shares of the Company are listed on a Regulated Market or a MTF.

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 Company, 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 do 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 Company regarding the Transaction. [Notwithstanding the above, the obligations contained hereunder shall terminate [one year] after the date all parties have executed this Confidentiality Agreement.]

[11. No warranties

It is agreed and acknowledged that the [Company 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 Enforceability

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

14. Cumulative rights

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

15. Governing law

This Undertaking shall be governed by and construed in accordance with French Law.

16. Jurisdiction

Any dispute arising out of this Undertaking shall be submitted to the jurisdiction of the Commercial Court (Tribunal de Commerce) of Paris.

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

[Name of Company]

[address]

[contact name]

Tel: + [telephone number]

Fax: + [facsimile number]

Yours faithfully,

\_\_\_\_\_  
[For and on behalf of the Company]

\_\_\_\_\_  
[For and on behalf of the Arranger]

Acknowledgement  
We agree to the above

\_\_\_\_\_  
For and on behalf of [Name of Recipient]

Date:

## Appendix 3

### Template for Terms and Conditions and Key Points to be discussed by the Borrower and the Investors<sup>21</sup> (*Terms and Conditions / Bond Format*<sup>22</sup>)

#### 1. Form, denomination and title (for bonds issued under French law)

Bonds issued in France and governed by French law are dematerialised and can be in bearer form or registered form.

Key Points:

- Only bonds admitted for clearing by Euroclear France may be bearer bonds. Admission for clearing by Euroclear France is mandatory for listed securities and optional for unlisted securities. While it is legally possible to have listed bonds in registered form, most of the time issuers opt for bonds in bearer form, which are then admitted for clearing by Euroclear France, even if they are not listed.

Securities that are admitted for clearing by Euroclear France are represented by book entries in the bondholder's name in the books of an accountholder entitled to hold accounts, directly or indirectly, with Euroclear France acting as central depository.

- Investors usually prefer securities admitted for clearing by Euroclear France in order to facilitate transfers and payments.
- Admission for clearing by Euroclear France entails the attribution of an ISIN code, which results in the basic features (issuer, yield, amount, maturity) of the bonds, including unlisted bonds, becoming public knowledge. If the Borrower wishes an unlisted Euro PP deal to remain confidential, then it must opt for bonds in registered form without admission for clearing by Euroclear France.
- French withholding tax rules for interest payments: if the bonds are not admitted for clearing by Euroclear France (and are not admitted for trading on a RM or a MTF, or offered to the public), gross-up clauses need to be customised (no gross-up for bondholders located in Non-Cooperative Countries and Territories).

---

<sup>21</sup> This document does not cover all of the key points to be discussed. This is an educational document and not a contract. Readers are reminded of the importance of negotiating the contractual terms and conditions for each party. These terms and conditions vary depending on the type of deal, the Borrower's circumstances and market conditions.

<sup>22</sup> This document will be supplemented with a template for Euro PP deals in the form of loans.

- The Borrower makes coupon payments and principal repayments through the Paying Agent if the bonds are admitted for clearing by Euroclear France. Otherwise, the payments may be made through the Paying Agent or, less often, directly by the Borrower.

## 2. Status of the Bonds

Purpose of the clause: Stipulate the ranking of the bonds vis-à-vis the company's other debts.

Key Points:

- In most cases, the bonds constitute unsecured debt.
- The bonds rank *pari passu* with bank loans having equivalent characteristics, save duly documented exceptions (any specific limitation on granting of security interests to be stipulated in the negative pledge provision).
- Possibility of obtaining security interests in a Euro PP deal, which may lead to an intercreditor agreement.

## 3. Negative pledge

Purpose of the clause: maintaining the rank of the bond by limiting the Borrower's right to grant security interests to secure other debt in order to ensure that bondholders receive the same treatment as other creditors of the same rank (and of the same nature, as the case may be).

Key Points:

- This clause needs to be drafted in light of the negative pledge clause in the bank loan documentation, particularly with regard to exceptions and thresholds (acquisitions), so that Investors' claims benefit from the same protections as the bank loans with equivalent characteristics. Alternatively, a negative pledge that is different from that in the bank loan documentation may be given, such as a clause limiting the granting of security interests to a certain percentage of the value of assets without any other exceptions.
- The principal subsidiaries (as determined by the percentage of EBITDA/assets, stipulating that, in aggregate, the principal subsidiaries account for a given percentage of EBITDA/assets) and consolidated subsidiaries may be covered.
- The Borrower may compile a statement of existing security interests and submit it to the Investor (unless already specified in the Conditions Precedent).
- The negative pledge clause may concern some or all of the Borrower's debt, as the case may be (bonds, bank loans, financial debts such as leasing debt and factoring debt), with a list of permitted security interests and exceptions, as appropriate.

## 4. Borrower's Undertakings

### 4.1 Financial Covenants

Key Points if there are financial covenants:

- The Borrower's undertakings to comply with ratios, such as a gearing ratio, a leverage ratio and an interest cover ratio, with precise definitions of each component of the ratios.
- The ratios should be drafted in light of those used in the bank loan documents. The definitions shall be clear to avoid differences depending on the documents used.
- Frequency for calculating the ratios (at least once a year, or more frequently, depending on the regulatory requirements applying to the Investors).
- Delivery of a compliance certificate by the Borrower:
  - The covenant calculations must be validated at least once a year after the end of the fiscal year by a legal representative of the Borrower and its statutory auditors or, where calculations are made more frequently, by a legal representative of the Borrower. The certificate is submitted to the Representative and the Paying Agent within X days after the end of the accounting period. The Paying Agent notifies the Investors of the receipt of the certificate or the lack of a certificate. The documents may give the Representative the power to assess the compliance of the certificate and the compliance with the covenants, to demand early redemption upon an event of default, or to notify Investors when necessary. The compliance certificate may include the detailed calculations.
  - If the documents do not give this task to the Representative, it is the responsibility of the Investors to verify compliance with the covenants and to require early redemption upon an event of default.
- The appointed Representative must have the technical skills required, which means it must be remunerated accordingly.

### 4.2 Disclosure Undertakings

Key Points:

Method of disclosure of information:

- Access needs to be rapid, simple and secure.
- The frequency and deadlines for disclosing the company and consolidated financial statements and other information that may affect the quality of the credit or the bonds to Investors must be the same as for all creditors and defined in light of existing practices and the provisions of existing bank loan agreements.

- Information covered by a Non-Disclosure Agreement may be disclosed to Investors through their Representative and/or the Paying Agent, or directly by the Borrower; any disclosures to potential new Investors must be subject to signing a new Non-Disclosure Agreement.

Transparency and equal access to information:

- Investors, in their capacity as the Borrower's creditors, must have equal access to transparent information, particularly with regard to pre-existing financing from banks and other sources, so that they can analyse their credit risk, including potential subordination of their claims.
- Examples of information for Borrowers to disclose to Investors:
  - Financial data (parent company and consolidated annual financial statements and, where appropriate, interim financial statements, along with the relevant statutory auditors' reports and significant historical data (3 to 5 years)), statement of existing security interests and business plan, where appropriate;
  - Material events that may affect the bonds and any other information that the Investors may reasonably request;
  - Events affecting the Borrower's indebtedness, such as: occurrence of an event of default (this is a particularly important point if the Borrower has listed securities), 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.;
  - Description of debt, security interests and guarantees and other specific characteristics in order to assess the potential for subordination of claims.

#### 4.3 Other undertakings

Key Points if other undertakings are given:

- Contents of the compliance certificate and submission of a monitoring report on negative undertakings by the Borrower to the Bondholders' Representative and/or directly to Investors, as the case may be, and the frequency of such reports.
- Possibility of an annual meeting with the Borrower's senior managers.
- The use of proceeds from the issue: ensuring that the financing provided is actually used for the planned and agreed purpose; the structuring of the transaction and the drafting of the documents will vary depending on the use of proceeds (refinancing LBOs, structuring acquisitions, other acquisitions, repayment of bank loans, project financing, etc.)
- Possibility of setting limits on the indebtedness of the Borrower and its principal subsidiaries (on a consolidated basis and expressed as an amount or as a percentage of assets).

- Examples of other undertakings that may be given (generally, in the case of non-investment-grade Borrowers, or Borrowers with financial difficulties, and customised in light of the bank loan documents), while taking care not to unduly interfere in the management of the company, limiting: external growth transactions/acquisitions, mergers, demergers, joint-ventures (where appropriate, the right to request audited financial statements for approval above a certain amount); asset sales; dividend distributions; the right of the Borrower to engage in new businesses; the scope of business; relocation of the head office; lease-back transactions; other customised undertakings.
- Fall-away clauses may be included (to provide for the suspension of some of the protections provided to Investors under certain circumstances, primarily when the Borrower's credit quality improves, so that the Borrower may enjoy more favourable and less restrictive conditions during the term of the Euro PP deal).

In such cases, the following points need to be discussed:

- Defining the Borrower's undertakings that will cease to apply when the fall away clause is triggered, such as:
  - financial covenants (ratios), and/or
  - negative pledge covering all financial debt
- Definition of the event triggering the fall-away clause:
  - the Borrower is granted an investment grade rating by at least two or more rating agencies where appropriate
  - completion by the Borrower of an issue of benchmark size that does not include such undertakings (bond event)
- The fall-away clause must cease to apply and the protections for Investors must be reinstated in certain cases, such as:
  - loss of investment grade rating
  - completion of an issue including more restrictive undertakings (most-favoured nation clause)
- If there are no fall-away clauses in the existing bank loan documents, no such clause should be included in the Euro PP documentation to avoid any *de facto* subordination of the Investors' claims.

## 5. Interest

Definition of the interest owed by the Borrower on the bonds (fixed rate, variable rate, etc.) and the interest calculation methods.

In addition to the usual provisions relating to interest, the documents may include step-up/step-down provisions triggered by the occurrence of certain events (non-compliance with ratios, non-compliance with an undertaking to release certain security interests, losing or obtaining an investment grade rating, etc.).

## 6. Redemption and Purchase

Key Points:

- Other than in the case of redemption at maturity, the Borrower must give notice of an event of default within the same timeframe as stipulated in the bank loan documents, if there is a bank loan.
- The Investor may have the option to waive its right to early redemption.
- Calculating the redemption amount: principal and accrued interest / makewhole amount through maturity / breakage costs.

### 6.1 Redemption at Maturity

Defining the maturity date and the redemption amount (par value in most cases).

### 6.2 Redemption for Taxation Reasons

If the gross-up clause is invoked, the Borrower may have the option (or the obligation in certain circumstances) of exercising a tax call.

### 6.3 Redemption at the Option of the Bondholders following a Change of Control

Key Points if a change of control clause is included:

- Definition of the change of control: the specified threshold should be higher or lower depending on the case in point.
- Stipulate who has the right to exercise the put option and the deadline for doing so.

### 6.4 Redemption at the Option of the Bondholders for Non-Compliance with Financial Ratios

If non-compliance with Financial Ratios does not constitute an event of default, but leads to an early redemption right available to each Investor.

### 6.5 Make Whole Redemption at the Option of the Borrower

This option enables the Borrower to redeem the bonds during a given period before maturity in light of market practices, subject to paying Investors a make whole amount that corresponds to the present value of any remaining scheduled payments of principal and interest until the initial maturity date, discounted on the basis of a benchmark yield, usually the French Treasury yield (OAT) or the German Treasury yield (Bund), plus a spread.

### 6.6 Purchases

This option permits the Borrower to purchase any bonds offered for sale.

## **6.7 Cancellation**

The bonds that the Borrower buys back must be cancelled (except in cases where Article L.213-1-A of the Monetary and Financial Code applies).

## **7. Payments**

### **7.1 Payment Method/Payment on Business Days**

Description of the terms and conditions for payments of principal and interest.

### **7.2 Fiscal Agent, Paying Agent, [Calculation Agent] and [Put Agent]**

Appointment of agents, roles and replacements

## **8. Tax**

Gross-up clause if a withholding tax is applied to interest payments, subject to the usual exceptions

## **9. Events of Default**

Usual events of default are payment default, breach of an obligation, cross default, winding up, liquidation, bankruptcy.

This clause must be drafted in light of the provisions of the bank loan documentation, particularly with regard to exceptions and thresholds.

Key Points (depending on the Borrower's size and business):

- Cross default and/or cross acceleration.
- The cross default clause concerns the same type of debt as that targeted by bank loans with equivalent characteristics (bond debt, bank debt, financial debt, such as leasing debt and factoring debt).
- Applicability, where appropriate, to the principal subsidiaries (as determined by the percentage of EBITDA/assets and the aggregate of principal subsidiaries accounting for a given percentage of EBITDA/assets) or consolidated subsidiaries, depending on the structure and complexity of the Borrower's group.

## **10. Prescription**

Prescription periods for principal and interest.

**11. Representation of Bondholders**

The Bondholders are grouped in a *Masse* (Article L.228-46 or L.228-90 of the Commercial Code). Appointment of the Bondholder Representative, setting Representative's remuneration and description of the Representative's role, where appropriate.

**12. Notices to Bondholders**

Procedures for notification of Bondholders.

**13. Further Issues**

Option for the Borrower to issue fungible bonds.

**14. Governing Law and Jurisdiction**

Choice of governing law and jurisdiction.

## Appendix 4

### **Arranger's Due Diligence Questionnaire Template to be adapted to the Borrower and the legal format of the Transaction<sup>23</sup>**

As part of its professional obligations, the Arranger must ensure that it has an adequate knowledge of the operational and financial situation of the Borrower and that the latter has put all the elements which may affect the Euro PP transaction at the disposal of the Investors. To that effect, the Arranger uses a questionnaire which may be answered by telephone or in a face-to-face meeting<sup>24</sup>, without it always being necessary to provide written answers. The person answering the questions on behalf of the Borrower must be duly authorised to answer the following questions.

For a successful dialogue between the parties, it is advisable to provide access to loan agreements arranged by the Arranger, if any.

The template below summarizes the main points which may be part of the questionnaire. The term Group used below means the Borrower and its consolidated subsidiaries.

- I. PRESENTATION OF THE GROUP AND ITS ORGANISATIONAL STRUCTURE
- II. CORPORATE GOVERNANCE, CONFLICTS OF INTEREST AND ETHICS
- III. MARKETS, TRENDS, BUSINESS AND GROUP STRATEGY
- IV. INTELLECTUAL PROPERTY
- V. PRODUCTION - SUPPLIES
- VI. SALES - MARKETING
- VII. FINANCIAL AND ACCOUNTING MATTERS
- VIII. HUMAN RESOURCES
- IX. SHAREHOLDERS
- X. LITIGATION
- XI. INSURANCE
- XII. OTHER MATTERS

---

<sup>23</sup> This Appendix does not apply to Investors.

<sup>24</sup> The answers to some of the questions may be short, or even just a yes or a no.

**List of professional organisations supporting the Euro PP Charter, which was developed at the initiative of the Paris IDF Chamber of Commerce and Industry and under the auspices of the Banque de France and the French Treasury**

- Association Française des Investisseurs Institutionnels (Af2i)
- Association Française des Marchés Financiers (AMAFI)
- Association Française des Trésoriers d'Entreprises (AFTE)
- Fédération Bancaire Française (FBF)
- Mouvement des entreprises de France (MEDEF)
- Association Française de la Gestion financière (AFG)
- Fédération Française des Sociétés d'Assurances (FFSA)
- Groupement des entreprises mutuelles d'assurance (GEMA)
- Paris Europlace
- ASMEP-ETI



**Acknowledgements for their contribution to the drafting of the Euro PP Charter to:**

- Marc-Etienne Sébire (CMS Bureau Francis Lefebvre)
- Hubert de Vauplane (Kramer Levin Naftalis & Frankel)
- Hubert du Vignaux (Gide Loyrette Nouel)