



MAR soundings briefing call

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APAC issuers & investors – 4 November 2016



A. Background – ICMA

International Capital Market Association (ICMA) formed in 2005

- Merger of ISMA/AIBD (1960's) and IPMA (1984)
- Representing a broad range of capital market interests including banks, asset managers, exchanges, central banks, law firms and other professional advisers, ICMA's market conventions and standards have been the pillars of the international debt market for almost 50 years
- 385 full members and 131 associate members – across 58 countries
- About 40 staff across Zurich (seat), London, Paris and Hong Kong

Ruari Ewing

- ICMA since 2007
- Senior Director, ICMA Market Practice and Regulatory Policy team
- Supports ICMA's lead-manager constituency (ICMA Primary Market Practices Committee, ICMA Legal and Documentation Committee and related working groups)
- Covers all aspects of interest to the above – i.e. concerning cross-border issuance of investment grade bonds (so disclosure, market abuse, conduct of business, tax...)
- Administers the ICMA Primary Market Handbook
- Previously a debt capital markets transaction lawyer

B. Background – ICMA work

- Development / maintenance of high standards of **market practice** (inc. documentation)
- Fostering appropriate levels of **regulation** and assisting market understanding
- Educating market participants and others through formal **training and research** – ICMA Centre, University of Reading
- Facilitating **communication** (inc. between functions: business, legal, compliance) and establishing information forums and other events
- **ICMA Market Practice & Regulatory Policy department:** a dozen or so staff in London; three each in Hong Kong and Paris
- **Current focuses:** post-crisis initiatives; post trade transparency; secondary illiquidity; FSAP Directive reviews (PR, MAR, MiFID II); CMU; Brexit; FEMR / FICC Market Standards Board; green bonds; private placements; automation...

C. Background – MAR

Market Abuse Regulation

- In application from 3 July; replaces MAD (indirect **Directive** → direct **Regulation**);
- ‘Level 1’ [MAR](#) + two ‘Level 2’ technical standards (substantive [delegated Regulation](#) + templates’ [implementing Regulation](#)) + ‘Level 3’ investor [Guidelines](#)
- Scope extension from ‘**regulated markets**’ to ‘multilateral trading facilities’ (**MTFs**) and (from 3 January 2018) ‘organised trading facilities’ (**OTFs**) → increased scope sensitivity
- Renewed focus on MAR **scope** generally (in addition to MAR sounding scope specifically)

ICMA focus

- Industry regulatory representations / commercial approaches – **not legal advice**
- Only aspects specific to **new bond issuance** (Euromarkets): soundings, stabilisation, etc.
- ICMA **lead-manager deliberations** – Syndicates (PMPC/CHF/Nordic/Asia); compliance / regulatory lawyers (PDCM Compliance WG); and legal/documentation (LDC/WC/ALDF)
- ICMA **formal materials / newsletter commentary** on [Market abuse - Primary markets](#) webpage
- **Other** – Nordic investor briefing (22 June), European issuer briefing call (14 July), APAC issuer/investor briefing call (4 November), SSA issuer briefings

D. MAR 'inside information' recap

- Prohibited **unlawful disclosure** of inside information: “*where a person possesses inside information and discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties” [L1 Art.10.1, Art.14(c)]*
- **Inside information** includes: “*information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments” [L1 Art.7.1(a)]
 - **Precise** if “*it indicates a set of circumstances [...] or an event [...] where it is specific enough to enable a conclusion to be drawn as to the possible effect*” [L1 Art.7.2], including intermediate steps in a protracted process [L1 Arts.7.2/7.3]
 - **Likely significant price effect** means “a reasonable investor would be likely to use as part of the basis of his or her investment decisions.” [L1 Art.7.4]
 - **Importance of price sensitivity** highlighted in MAR [L1 Recital 14-15, 18], following previous [Geltl v Daimler ruling](#) by the European Court of Justice [#48-55]*
- Broadly **unchanged** from pre-July MAD [and 11 Oct 2013 conference – Paris II Prof. Stephane Torck, ESMA Christophe Polisset and EC Philip Tod]

E. Inside info 'sounding'

New 'sounding' concept defined as: *“communication of information, prior to the announcement of a transaction, in order to gauge [investor] interest [...] in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more investors by an issuer [...] or a third party acting on [its] behalf”*

- Disclosing **inside information** following 'sounding' procedures now **deemed** to be *“in the normal exercise of an employment, a profession or duties”* and so not *“unlawful disclosure of inside information”* (better safe harbour – previously question of fact only)
 - Inside information ('wallcrossed') **procedures** [slide F]:
 - broadly/conceptually consistent with pre-July good practices
 - but more procedurally onerous, inc. required information exchange + detailed records
 - **'Cleansing'** inside information:
 - obligation to notify investor when sounded inside information *“ceases to be inside [...] according to the [bank's] assessment”* (but investor cannot rely)
 - timing trigger – need to release sales, investor request, issuer notice (and issuer input on rationale)? But beware further wallcrossing risk on rationale...
 - Soundings **after deal announcement** to rely (as pre-July) on generic *“normal exercise of an employment, a profession or duties”* (but follow process anyway?)
- ➔ **wallcrossed soundings continue to be muted?** (IPT impact / 'private side' investors?)

F. Procedures generally

1. Bank **reasoned record** of whether sounded information is inside or not
2. **'Standard set of information'** between bank and investor [L2]
 - a) Sounding purpose
 - b) Investor consent to audio/video recording (or 'minutes' for signing within 5 days)
 - c) Investor confirmation it is correct person to receive sounding
 - d) Sounded information considered [not] **inside** by bank
 - e) Each person responsible for own assessment [MAR L1]
 - f) **if possible, estimation when cease to be inside, factors that may alter this and how investor informed of any such change [and notification in due course]**
 - g) Investor consent to [non-]**inside** sounding
 - h) The sounded information, **flagging inside element**
3. Investor notifies bank of any further **internal soundees** [Recital MAR L1]
4. Investor **reasoned record** of whether sounded information is inside or not [Guidelines]
 - Generally: **policies/training**, 5 year **records**, record of investors **refusing soundings** (generally or specifically)
 - **Could have been much heavier:** "[ESMA final Level 2 proposals] seem much improved (though still highly prescriptive) compared to [original] consultation[...]."

G. Non-inside ‘sounding’

New ‘sounding’ concept defined as: “communication of information, *prior to the announcement of a transaction*, in order to gauge [investor] interest [...] in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more investors *by an issuer [...] or a third party acting on [its] behalf*”

- Where **no inside information**, new non-wallcrossed **procedure** [slide F]:
 - seemingly **odd** in prohibition-driven regime (and not envisaged at Level 1)
 - **purpose** seemingly to mitigate risk of inside information being mischaracterised as not inside (rationale recordings, warnings) – i.e. presumably due to subjective judgment
 - disproportionate **logistical burden**? Especially for extended / face-to-face deliberations (HY/capital deals...) and frequent / short exchanges (MTN and SSA levels...)?
 - **Investors unwilling** (currently) to be sounded on non-wallcrossed basis?
 - Investor **logistics**? (recording non-inside rationale etc. / internal procedure updating)
 - Investor **perception**? (emphasising historic individual responsibility for assessing information)
- ➔ **Muting non-wallcrossed soundings** (again IPT impact)
unless outside scope (of MAR sounding or MAR altogether)?

[slide H]

H. Non-inside / Falling out of scope

New **'sounding'** concept defined as: *"communication of information, prior to the announcement of a transaction, in order to gauge [investor] interest [...] in a possible transaction and the conditions relating to it such as its potential size or pricing, to one or more investors by an issuer [...] or a third party acting on [its] behalf"*

- Falling out of **overall MAR scope** – inter alia:
 - instruments that are not (i) RM/MTF instruments or (ii) other instruments whose price/value depends, or has an effect on, RM/MTF instruments' price/value (NB: also OTF instruments from 3 January 2018)
 - transactions by certain EEA-linked supra/sovereign/agency (SSA) entities [slide I] if in pursuit of, notably, public debt management policy
- Falling-out of **sounding definition scope** (but issuer practice change) – inter alia:
 - Read 'plain English' words in light of non-wallcrossed procedure purpose (no subjective judgment)
 - not acting 'on issuer behalf': limited/no prior interaction – reverse enquiry and independent 'fishing' (if no client-confidential information); publication or general communication to whole street (direct or via platforms) → MTN and SSA levels / private placements – initial stages?
 - not 'gauging' interest: 'hitting' levels / concluding deal → MTN and SSA levels / private placements – subsequent stages?
 - not prior to 'announcement': no residual non-public information → roadshows, etc.
- Various other **industry deliberations** at national level. ICMA focusing on consensus approach to **(commoditised) cross-border IG syndication** – trade-off between flexibility and certainty

I. EEA-linked SSAs

- [EEA] Member State
- ESCB members [*ECB and the national central banks of all EU Member States*]
- ministry, agency or **special purpose vehicle** of one or several [EEA] Member States, or person acting on its behalf
- member making up the federation (in the case of federal [EEA] Member State)
- European Commission or any other officially designated body or by any person acting on its behalf
- The EU
- European Investment Bank
- European Financial Stability Facility
- European Stability Mechanism
- international financial institution established by two or more [EEA] Member States which has the purpose to mobilise funding and provide financial assistance to the benefit of its members that are experiencing or threatened by severe financing problems

(Commission empowered to add certain public bodies and central banks of third countries, subject to reporting, by 3 January 2016, on the international treatment of public bodies charged with, or intervening in, public debt management and of central banks in third countries.)

J. Scope / 'On issuer behalf'

Issuer interaction: **mere discussion** vs. **questioning request** vs. **transaction mandate**

MAR Recital 33

*“(33) Examples of market soundings **include** situations in which the **sell-side firm has been in discussions with an issuer** about a potential transaction, and it has decided to gauge potential investor interest in order to determine the terms that will make up a transaction; where an issuer intends to announce a debt issuance or additional equity offering and key investors are contacted by a sell-side firm and given the full terms of the deal to obtain a financial commitment to participate in the transaction; or where the sell-side is seeking to sell a large amount of securities on behalf of an investor and seeks to gauge potential interest in those securities from other potential investors.”*

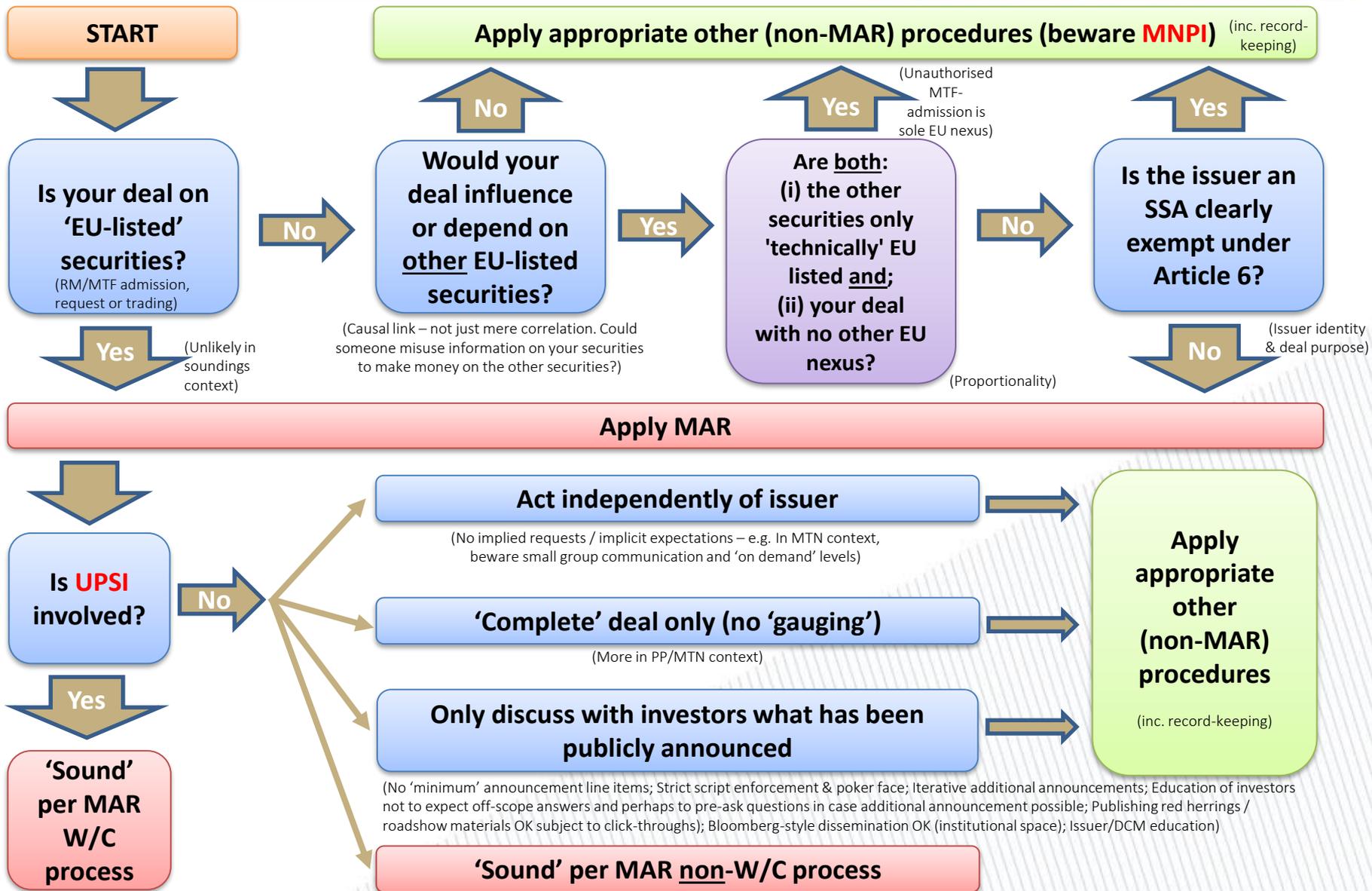
ESMA Final Report #66/#67 (Sep 2015)

*“66. [...] [Sounding] **includes** “where [sounder], in order to prepare **a transaction in which it is acting at the request of [issuer]**, sounds out potential investors with a view to determining the characteristics of the transaction. [Sounder] is acting at the request of [issuer] **if it is taking part in the transaction under [issuer’s] mandate**, including where the instructions are oral or written and where they are issued as part of discussions which [sounder] has initiated with [issuer] or in connection with a request for proposal by [issuer]. [...] ESMA recommends that [sounders] keep **records of the instructions or the mandate** received in order to **evidence that they are acting on behalf** of [issuer] [...].*

*67. Situations where [sounder] **questions** investors on its own initiative, **without being mandated** by [issuer], should **not be considered as** market soundings [...]. These forms of **questioning/enquiry** are often used to assess whether the time is right to pitch an idea to an issuer. The aim is then to gauge potential investors’ appetite for a potential corporate finance transaction, with the aim of promoting it to [issuer] if appropriate. However, **since it is not made at the request of [issuer]** the [sounder] should **not be considered to be acting on behalf of [issuer]**.”*

K. Soundings – Practical simplified consensus approach by banks to each investor interaction

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L. Red, Yellow, Green

'Judgment' to treat as inside

→ MAR **Wallcrossed** procedure

'Judgment' not inside (even if conservative)

→ MAR **non-wallcrossed** procedure

Outside MAR or

outside sounding definition (no 'judgment')

→ **Other appropriate** procedure



M. Other MAR primary market aspects

Stabilisation

- **Basically same** regime as current MAD but again **more procedurally onerous**
- Additional **'mid-stab' announcement** of stabilisation trade 'details' within 7 days
- **Regulator reporting impact** of scope extension to 149-odd MTFs
- **Potential extra-territoriality** impacting Asia/US re. unsolicited MTF onboarding? (But MAR scope interest where no real EEA-nexus beyond MTF admission?)
- **ICMA Primary Market Handbook** stabilisation materials update pending (available in draft)

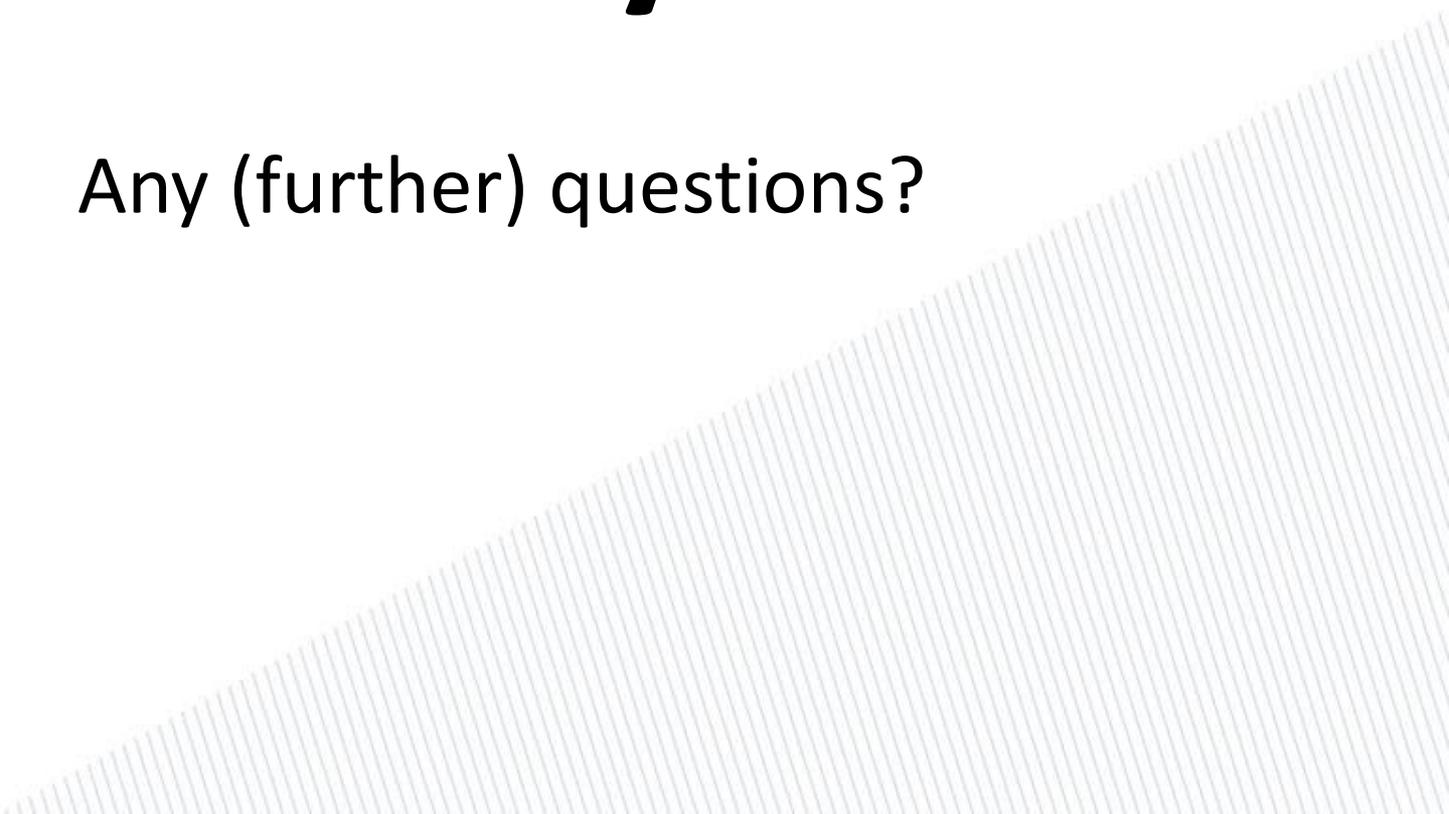
Investment recommendations

- Mainly debated in secondary market context
- Expectation that new issue communication to buy-side is primarily factual whether as to new issue (prospectus-based) or comparables (market data)

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Thank you

Any (further) questions?

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