



MAR briefing call for ICMA members: Market practices for pre-sounding bond issuance

Ruari Ewing, ICMA – 27 January 2017



Presentation outline

Presentation format / questions

- The briefing call will be initially with participants being in mute/listen-only mode, followed by oral Q&A.
- Written questions can also be sent at any time during, or ahead of, the call to questions@icmagroup.org.

Recording

- A 48 hour recording of the call will be made available to registrants following the call – an e-mail will be sent subsequently in this respect.

Presenter

- Senior Director, ICMA Market Practice and Regulatory Policy team (ICMA since 2007, previously a debt capital markets transaction lawyer)
- 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.

International Capital Market Association (ICMA) formed in 1969

- 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
- 386 full members and 123 associate members – across 58 countries
- About 40 staff across Zurich (seat), London, Paris and Hong Kong

Operations

- 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 legislation (PR, PRIIPs, MAR, MiFID II); CMU; Brexit; Italy Art.129 reporting; FICC Market Standards Board; green bonds; private placements; automation...

MAR background

Market Abuse Regulation

- Replaced MAD from 3 July (indirect Directive → direct Regulation)
- ‘Level 1’ [main regulation](#) + ‘Level 2’ technical standards ([substantive](#) and [templates](#)) + ‘Level 3’ ESMA [investor guidelines](#)
- Evolving topic – law firm interpretations, national/industry initiatives...
- No ESMA Q&A (so far)
- Also scope extension from ‘regulated markets’ (**RM**s) to ‘multilateral trading facilities’ (**MTF**s) and (from 2018) to ‘organised trading facilities’ (**OTF**s)

ICMA focus

- **Not auctions:** Cross-border syndicated bond issuance (commoditised segment)
- **Not legal interpretation:** Industry representations / commercial consensus approach

Key points

- **Heavier** inside information process + **New** process for non-inside information
- Investors **declining** sounding
- Potential **exemption** for supra/sovereign/agency (SSA) issuers
- Other **alternatives** (early announcement...)

MAR / inside information recap

MAR scope:

- RM/**MTF** instruments
- Other instruments whose price/value depends, or has an effect on, RM/**MTF** instruments' price/value
- MTF aspect **new** (also OTF instruments from 2018)

(ESMA focus?)

Broadly **unchanged** from pre-July MAD:

Prohibited unlawful disclosure of inside information

except *“in the **normal exercise of an employment, a profession or duties**”*

Inside information:

- **precise** (enables conclusion on possible effect – inc. ‘intermediate’ steps in a process)
- **not public**
- **likely significant** effect on **price**

Sounding inside information

New 'sounding' concept: "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 "in the normal exercise..." and so not unlawful (so safer)
- Inside information **procedures**
 - broadly/conceptually consistent with pre-July good practices
 - but more procedurally onerous, inc. required information exchange + detailed records
- **Notify investor if information ceasing to be inside**
 - In the bank's assessment (and investor cannot rely)
 - Timing trigger – need to release sales, investor request, issuer notice?
 - If communicating rationale, check not constituting further inside information
- Soundings **after deal announcement** rely (as pre-July) on "in the normal exercise ..." only (but follow process anyway?)
- ➔ **Investors continuing to be wary** (impact price guidance? 'private side' investors?)

Sounding non-inside information

New **'sounding'** concept: *“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”*

- **New procedure** where **no inside information**
 - **Odd** in prohibition-driven regime (and 'Level 1' vs 'Level 2' scope?)
 - **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 and frequent / short exchanges?
 - **Investors wary** (currently) of being sounded on this basis (or on private info generally?)
 - Investor **logistics**? (recording non-inside rationale etc. / internal procedure updating)
 - Investor **perception**? (emphasising historic individual responsibility for assessing information)
- ➔ Again impact price guidance, unless outside scope of MAR sounding or MAR altogether?

Sounding procedures generally

1. *Bank **reasoned record** of whether sounded information is inside or not
 2. '**Standard set of information**' between bank and investor
 - 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 (**use prohibition / confidentiality*)
 - e) Each person responsible for own assessment
 - 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**
 4. Investor **reasoned record** of whether sounded information is inside or not
- And **policies/training**, 5 year ***records**, and record of investors generally **refusing soundings**

Falling out of scope

New 'sounding' concept: “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

- Not RM/MTF instruments or others depending/affecting price/value (*ESMA focus?*)
- EEA-linked supra/sovereign/agency (SSA) transactions if for public debt management policy

▪ Falling-out of sounding definition scope (issuer practice change?)

- Interpret in light of procedure purpose (no subjective judgment)
- not acting ‘on issuer behalf’: limited/no prior interaction (reverse enquiry and independent ‘fishing’), so publication or general communication to whole street (direct or via platforms)
- not ‘gauging’ interest: ‘hitting’ levels / concluding deal
- not prior to ‘announcement’: no residual non-public information (*ESMA focus?*)

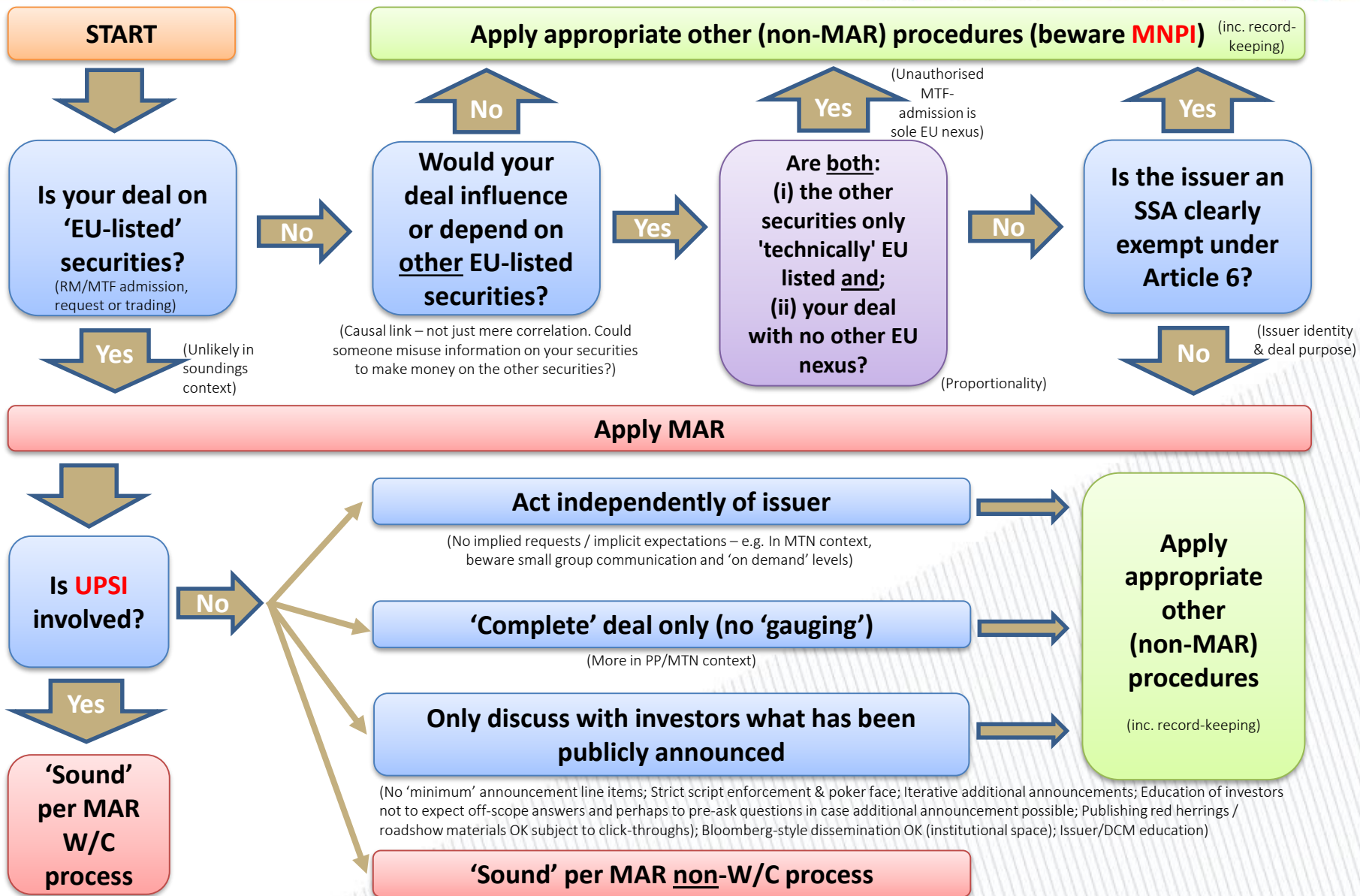
EEA-linked SSAs

- 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 Member States, or person acting on its behalf
- member making up the federation (in the case of federal 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 Member States to mobilise funding and provide financial assistance for members experiencing or threatened by severe financing problems

(Commission empowered to add some non-EEA public bodies / central banks, subject to reporting by January 2016 on international treatment of non-EEA central banks and public debt management bodies)

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

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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





Thank you

Any (further) questions?

