 

Primary Markets

by Ruari Ewing and Charlotte Bellamy

Impact of COVID-19 on primary markets

Introduction

COVID-19 Primary market participants have, like others, been adjusting to the new environment caused by the COVID-19 pandemic. A few successful new Eurobond transactions in the initial social distancing stages indicated that most banks' syndicate desks seemed to be able to operate effectively through home working – and just as significantly that most investors were also able to do so. There have been reports about the need for issuer pragmatism in terms of market access, and one reported use of a new US "straight to launch" accelerated approach of going from initial price thoughts straight to final terms, by skipping the price guidance stage.

ICMA has facilitated discussions among primary market members on some of the practical challenges presented by the COVID-19 pandemic. This article seeks to summarise some of the key market practice points that have emerged.

Force majeure

The ICMA Primary Market Handbook includes in Appendix A9 a standard form force majeure clause for use in subscription agreements for syndicated offers of international bonds in the primary market. Having discussed with members of the ICMA Legal & Documentation Committee and others, ICMA is not intending to make any changes to the form of language in the light of the COVID-19 pandemic. ICMA has published a short note explaining how this clause would be expected to operate in the context of the current crisis, as well as the background and historic use of this clause.

Due diligence and risk factors

Underwriters, issuers and guarantors of new bond issues will need to consider carefully the impact of the COVID-19 pandemic on the issuer and any guarantors' ability to fulfil their obligations under any new issue of bonds. This is likely to impact underwriters' due diligence; and issuers and guarantors will wish to ensure that, in particular where the Prospectus Regulation applies, risk factor disclosure is specific to the issuer and/or guarantor(s) and not generic in nature.

Transaction timetables

Underwriters and issuers will need to consider the impact of social distancing arrangements, including numerous transaction parties working from home, on transaction timetables. Not only is this relevant for the underwriters and issuers themselves, but other parties such as national competent authorities who may be involved in approving offering documentation, stock exchanges, agents, ICSDs, law firms, auditors and others. ICMA is not aware of any particular parties highlighting the possibility of delays to usual processes as a result of the COVID-19 pandemic, and some organisations are confirming that their timetables should not be affected by the crisis. Nevertheless, ICMA members have reported ad hoc delays to, for example, prospectus approvals.

ICMA has facilitated discussions among primary market members on some of the practical challenges presented by the COVID-19 pandemic.

Auditors' comfort packages

The COVID-19 pandemic is also likely to have an impact upon the ability of auditors to carry out audits as they normally would. The impact upon this for companies' audited financial statements is not clear, but it may be the case that auditors need to issue qualified audit opinions. On 21 March 2020, the UK FCA requested UK companies to delay the announcement of their preliminary financial statements for at least two weeks. On 26 March 2020, the UK FCA, FRC and PRA announced a series of actions to ensure information continues to flow to investors and support the continued functioning of the UK's capital markets. This includes: (a) a statement by the FCA allowing listed companies an extra two months to publish their audited annual financial reports; (b) guidance from the FRC for companies preparing financial statements in the current uncertain environment. This is complemented by guidance from the PRA regarding the approach that should be taken by banks, building societies and PRA-designated investment firms in assessing expected loss provisions under IFRS9; and (c) guidance from the FRC for audit firms seeking to overcome challenges in obtaining audit evidence.

The Committee of European Audit Oversight Bodies (CEAOB) issued a statement on 24 March 2020 on the impact of COVID-19 on audited financial statements, including the statement that "auditors may need to postpone the issuance of their audit report, and where this is not possible or not likely to resolve the issue, auditors may need to modify their audit report to reflect that they have not been able to obtain the necessary audit evidence." On 25 March 2020, ESMA issued guidance on accounting implications of COVID-19 and the EBA issued a related statement. And on 27 March 2020 ESMA released a statement notably as to its expectation that EU national regulators, during this COVID-19 period, not prioritise supervisory actions against issuers in respect of certain upcoming Transparency Directive deadlines regarding financial reports.

Audit firms have flagged the possibility that the COVID-19 pandemic may mean that companies will not prepare management accounts on a basis consistent with the accounting policies normally adopted in preparing their audited accounts. If that were to be the case, then the auditors would be unlikely to be able to carry out the typical procedures related to comparing amounts shown in management accounts in the manner they would have previously (as envisaged in the ICMA standard form of comfort letter set out at Appendix A2 of the ICMA Primary Market Handbook).

Signing arrangements

- *Syndicate / dealer panels signing:* Under usual circumstances, documentation for a new bond issue or programme update would be signed on behalf of the syndicate or dealer panel by one bank pursuant to a signing authority provided to it by each other bank in the syndicate or dealer panel. Given current working from home and other social distancing arrangements, it seems likely that banks will start to sign documentation individually to avoid the logistical challenges associated with coordinating such signing authorities. Considerations associated with this include (a) communicating this to law firms drafting the relevant documentation and (b) communicating this to other relevant transaction parties providing documentation to the syndicate or dealer panel such as auditors.
- *Signing generally:* Working from home and social distancing may also impact upon the ability of some transaction parties to sign and/or deliver documentation in "wet ink". Market participants have been exploring with their legal advisors the validity and practicability of other methods of signing documentation, noting that various factors need to be considered including the governing law of the document, the jurisdiction of incorporation of the relevant parties and the type of document.

Possible closures of financial centres

While it is not envisaged that any changes need to be made to standard provisions in bond terms and conditions relating to payments, market participants will wish to consider the practical implications of possible closures of financial centres and how relevant definitions in documentation relating to payments would work in that scenario, in particular where there are associated swap or other transactions.

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Bank of England's COVID Corporate Financing Facility (CCFF) and ICMA ECP documentation

Following the announcement of the Bank of England's Covid Corporate Financing Facility (CCFF) and in the interest of supporting the overall market, ICMA has made generally available to non-ICMA members the euro commercial paper (ECP) materials from the ICMA Primary Market Handbook (previously available only to ICMA members and ICMA Primary Market Handbook subscribers). The Bank of England has confirmed that it will accept commercial paper with standard features that is issued using ICMA standard documentation. To support companies seeking to set up CP programmes quickly, the Bank will accept simplified versions of the commercial paper documentation, based on the ICMA standard, which are available on the Bank website (blacklined against the ICMA versions, where relevant) and encourages companies to use those pre-approved versions wherever possible.

The relevant ICMA materials are:

- Appendix A7, Part I - Dealer Agreement;
- Appendix A7, Part II - Information Memorandum (not necessary for CCFF purposes);
- Appendix A7, Part III - Global Note;
- MiFID II Product Governance and Euro Commercial Paper;
- Chapter 12 - ECP Recommendations;
- Chapter 2 - MTN Recommendations (cross-references from Chapter 12).

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ICMA Primary Market Handbook updates

On 25 March 2020, ICMA published:

- amendments to Appendix A8, *Final terms and pricing supplement;*
- a new Appendix A12a, *Product governance (MiFID II) language*;
- amendments to Appendix A13, *Selling restrictions and legends (EEA PRIIPS Regulation, EEA Prospectus Regulation, UK)*, previously entitled *Selling restrictions and legends (EEA PRIIPs Regulation, EEA Prospectus Directive, UK)*;
- amendments to Appendix A16, *Sub-€100,000 denomination bonds under the EEA Prospectus Regulation and retail cascade legends*, previously entitled *Sub-€100,000 denomination bonds under the EEA Prospectus Directive and retail cascade legends*; and
- amendments to various other references to the Prospectus Directive, the Market Abuse Directive and the EEA.

in the ICMA Primary Market Handbook. The purposes of the amendments are as follows.

- In the case of Appendix A8:
  - to cater for the implementation of the Prospectus Regulation and the UK's exit from the European Union;
  - to reflect that the Insurance Mediation Directive has been superseded by the Insurance Distribution Directive; and
  - to include language relating to the MiFID II product governance regime and notes relating to the cessation of LIBOR.
- In the case of Appendix A12a, to set out standard language relating to the MiFID II product governance regime.
- In the case of Appendices A13 and A16:
  - to cater for the implementation of the Prospectus Regulation and the UK's exit from the European Union; and
  - to reflect that the Insurance Mediation Directive has been superseded by the Insurance Distribution Directive.
- In the case of amendments to various other references to the Prospectus Directive, to reflect the implementation of the Prospectus Regulation, which superseded the Prospectus Directive.
- In the case of amendments to various other references to the Market Abuse Directive, to reflect the implementation

of the Market Abuse Regulation, which superseded the Market Abuse Directive.

- In the case of amendments to various other references to the EEA, to reflect the UK's exit from the European Union.

The amendments to the ICMA Primary Market Handbook are available on the ICMA Primary Market Handbook Amendments/archive webpage.

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Other primary market developments

A few other developments concerning ICMA's primary markets' work are set out below.

- *ESA's PRIIPs consultation:* On 13 January and as anticipated in the last edition of this Quarterly Report, ICMA responded to the ESAs' October 2019 consultation on PRIIPs KID amendments, with the primary market aspects focusing on the product scope of PRIIPs.
- *IOSCO consultation on DCM conflicts:* On 4 February and as anticipated in the last edition of this Quarterly Report, ICMA responded to IOSCO's December 2019 consultation on conflicts of interest and conduct risks in debt capital raising, notably explaining international investment grade syndication (including in terms of borrower objectives, transaction disclosure, allocations, pricing and typical deal-flow generally) and commenting on the consistency of proposed IOSCO guidance in this respect.
- *HKEX consultation on Chapter 37:* On 7 February, ICMA responded to an HKEX consultation on its review of Chapter 37 listing (debt issues to professional investors only), supporting most of the HKEX proposals (though querying both differentiation of disclosure requirements between high net worth and institutional investors and HKEX publication of disclosure guidance).
- *UK consultation on AMLD5 and bond trusts:* On 21 February, ICMA responded (by supporting a response from ICMSA) to a UK HMRC and HM Treasury consultation on the Fifth Money Laundering Directive and Trust Registration Service (since the AMLD5 requirement for all express trusts to be registered in a central national register can have potential implications for trustees of bond trusts).
- *European Commission consultation on crypto-assets:* On 18 March, ICMA responded to a European Commission consultation on crypto-assets (covering inter alia aspects of the EU's prospectus, market abuse and MiFID regimes). See further report in the FinTech section of this Quarterly Report.
- *European Commission consultation on MiFID II:* The European Commission is broadly consulting on the MiFID II regime, including on its investor protection aspects that ICMA has been previously dealing with (notably in terms of product governance, inducements / costs & charges and allocation justification recording). The consultation includes a suggestion for a new category of semi-professional clients. It is unclear whether the European Commission will provide flexibility, in light of COVID-19, regarding the formal 20 April deadline.

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