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...
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’ (RMs) to ‘multilateral trading facilities’ (MTFs) and (from 2018) to ‘organised trading facilities’ (OTFs)

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 background
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?)
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

**Start**

- **Is your deal on ‘EU-listed’ securities?**
  - Yes: (Unlikely in soundings context)
  - No: (Causal link – not just mere correlation. Could someone misuse information on your securities to make money on the other securities?)

**Apply MAR**

- **Act independently of issuer**
  - (No implied requests / implicit expectations – e.g. In MTN context, beware small group communication and ‘on demand’ levels)

- **‘Complete’ deal only (no ‘gauging’)**
  - (More in PP/MTN context)

- **Only discuss with investors what has been publicly announced**
  - (No ‘minimum’ announcement line items; Strict script enforcement & poker face; Iterative additional announcements; Education of investors not to expect off-scope answers and perhaps to pre-ask questions in case additional announcement possible; Publishing red herrings / roadshow materials OK subject to click-throughs); Bloomberg-style dissemination OK (institutional space); Issuer/DCM education)

- **‘Sound’ per MAR non-W/C process**

- **Is the issuer an SSA clearly exempt under Article 6?**
  - No: (Issuer identity & deal purpose)
  - Yes: (Proportionality)

**Apply appropriate other (non-MAR) procedures (beware MNPI)**

- (Unauthorised MTF-admission is sole EU nexus)

**Is UPSI involved?**

- No

- **‘Sound’ per MAR W/C process**

- Yes

- **Apply appropriate other (non-MAR) procedures (beware MNPI)**
  - (inc. record-keeping)
‘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?