

Meeting notes

Call: June 2, 2020

1) ICMA call with the European Commission

- On May 27, ICMA joined a virtual meeting with the European Commission. This was a regular meeting between ICMA's CEO and Andrea Beltramello from VP Dombrovskis' cabinet. As well as sharing information and observations from the recent Covid-19 market turbulence, the meeting was also an opportunity to discuss ICMA's recent [letter](#) to the Commission and ESMA outlining the industry's growing concerns related to the implementation of the CSDR mandatory buy-in provisions. The meeting was joined by Patrick Pearson who heads DG FISMA's Financial Markets Infrastructure unit.
- The European Commission confirmed that it was aware of the potential impacts of the buy-in provisions for market pricing and liquidity, both in more benign markets as well as in stressed conditions. They further confirmed that over the past weeks they have engaged in discussion with multiple industry bodies and individual firms on this topic, and have also been presented with helpful data and analysis (including the ICMA [Impact Study](#) of November 2019).
- They suggested that they intended to review the CSDR mandatory buy-in provisions as part of a broader exercise of regulatory review and potential recalibration in light of lessons learned from the recent crisis. They also understood that any revisions would need to be communicated to the industry soon, given the ongoing work required to support implementation.
- In the meantime, they did not provide any indication of when the much-needed Level 3 guidance to support implementation would be provided.
- AFME confirmed that these were very similar messages to those coming out of their recent discussions with the Commission on this topic, and agreed with ICMA's assessment that while the industry should continue to hope and push for the best (i.e. a meaningful delay to review the regulation), it should also continue to plan for the worst (i.e. implementation in February 2021).
- Questions were also raised about the usefulness of data and analysis to support the industry's arguments (ICMA confirmed that the Commission felt that this was vitally important) and also what the industry could do as a next step to help the authorities in their consideration of the buy-in provisions (ICMA suggested that any additional analysis would be helpful to this end).

2) GMRA CSDR-SD Annex

- On May 22, ICMA circulated a table of headline issues requiring member feedback to progress the work we are undertaking on CSDR documentation solutions. This was in recognition of the fact that firms had already indicated to ICMA that they needed at least 3-4 months lead time to undertake the contractual remediation work required by CSDR (in addition to time required to produce the documents, obtain associated legal opinions, and potentially establish a mechanism through which contracts can be amended): most urgently with respect to the drafting of the GMRA CSDR Annex (part of the SFT SD Annex work). Given that Level 3 guidance to support implementation while addressing important commercial considerations was still not forthcoming from the regulators, this meant that ICMA would need to push ahead without such guidance, producing a contractual solution to assist with compliance with Article 25, without providing for the enhancements sought by the industry. The feedback from members would therefore also provide a mandate for ICMA to progress with this work as a more limited offering.
- With respect to scope, while there was a clear indication that firms would like open-SFTs to be confirmed as out of scope (as per the previously submitted Q&As), there is reluctance to proceed on this basis without clarification from the regulators. However, scope was not necessarily something that should hold back the contractual work if provisions simply refer to the Regulation, and that any clarification on applicability could possibly be provided separately at a later date.
- With respect to symmetrical settlement of the buy-in and cash compensation differential payments, feedback was more nuanced. While there was consensus that this was highly desirable from a commercial perspective, it was unclear whether this would present a regulatory compliance issue. Many indicated that proceeding on an elective basis, rather than having symmetrical payment flows 'hardwired' into agreements, could be problematic. Firstly, it might be difficult negotiating such provisions on an individual contract basis. Secondly, it was not ideal having the potential for different approaches, depending on the counterparty, particularly from an operational perspective.
- With respect to the inclusion of a pass-on mechanism, again, market feedback was very clear that this was highly desirable, but that firms would struggle to apply such a provision without clear regulatory guidance.
- With respect to the ability to assign buy-in related costs to linked, but different transaction types (and contractual arrangements), while there was broad agreement on the principle, there was no consensus on what this would mean in practice. For instance, defining the costs arising from a buy-in, beyond those related to agent fees or general transaction costs, is not straightforward,¹ and there appear to be a variety of interpretations. While the GMSLA provides for the possibility of assigning buy-in costs in the mini close-out process, nobody has been able

¹ At the simplest level, the cost of a buy-in incurred by the failing party will be the difference between the buy-in price and the price at which they subsequently re-sell or mark the position. However, evidencing this is not necessarily easy, and the resale price or mark could be open to question. (Note that the difference between the buy-in price and the original transaction price is not the cost of the buy-in and is therefore irrelevant for the purposes of this discussion.)

to point to any supporting market best practice or any practical application of this. And even if agreement on defining the cost of a buy-in could be reached, there remains the challenge of evidencing this.

- Based on the feedback and as result of the lack of relevant regulatory guidance on headline issues, it would therefore seem that ICMA has a mandate to proceed with the necessary contractual work, but that this – at least in the case of developing the GMRA Annex, if not more broadly – would be in a more streamlined fashion than previously anticipated, or requested, and without addressing many of the commercial considerations that the industry had previously highlighted. Should regulatory guidance on critical issues be forthcoming at a later stage, it may then be possible to provide additional, complementary documentation/remediation mechanisms to that which supports basic compliance. ICMA highlighted that it would continue active dialogue with the authorities to seek the relevant regulatory clarifications.
 - Questions focused on the lack of required guidance from the regulators (in some cases drawing comparisons with SFTR), and largely confirming that in the absence of helpful responses to the industry's Q&A, it would be difficult to produce contractual solutions that addressed the regulations most pressing and challenging impacts.
- **As a next step the ICMA CSDR Legal Workstream, jointly with ISLA's Legal Working Group, would schedule a joint meeting to scope out a workplan for finalizing the GMRA/GMSLA CSDR Annexes, albeit with more limited scope than had originally been hoped.**

3) Updating the ICMA Buy-in Rules

- On May 7, following a series of Working Group calls focused specifically on considerations related to updating the ICMA Buy-in Rules, ICMA circulated a draft outline of the proposed considerations, and potential questions, for the forthcoming consultation on the revised Rules, requesting feedback. ICMA confirmed that to date there had been fairly limited response.
- ICMA reminded the Group that the proposed revisions to the Buy-in Rules essentially consisted of two stages: (i) a purely contractual buy-in (known as the 'pre-extension period', or PEP, buy-in) that could be executed up until the end of the relevant extension period; and (ii) a CSDR compliant buy-in.
- In the case of the former, there were no regulatory requirements, and accordingly the buy-in was intended largely to replicate the existing buy-in process, including symmetrical differential payments, a pass-on mechanism, and the ability to negotiate cash settlement. The only limitation would be a more compressed timeframe in which to initiate and complete the process.
- In the case of the latter, while the ability to add helpful commercial overlays was also constrained by the ongoing lack of regulatory guidance on critical issues, there was slightly more flexibility than in the case of the GMRA Annex due to the fact that the ICMA Rules are largely applied in a similar way to a protocol, in that they apply through ICMA membership and/or incorporation by reference. Accordingly, it should be possible to move ahead with the projected

consultation on the assumption that the critical industry requests for Level 3 guidance are provided ahead of 'go live' in 2021, with the ability to adjust based on any eventual guidance, or lack thereof. This also meant that the Rules could be updated after the regulation is rolled-out, if necessary. However, it was also recognized that the ongoing lack of regulatory clarification was not particularly helpful with respect to developing operational processes and related technology builds, nor in establishing related market best practices.

- **There were no additional comments or suggestions, and ICMA committed to drafting a consultation outline ahead of the next Working Group call.**

4) AOB

- ICMA reminded the Group that for the past few months it had also been running a Workstream focused on outlining market best practice for determining the applicable reference price in the case of cash compensation for illiquid bonds. The Group has produced a [briefing note](#) detailing the perceived inadequacies of the RTS provisions and the potential market-based solutions being explored, as well as the challenges facing such solutions. ICMA has shared this with ESMA and offered to discuss the issues raised in more detail, but had yet to hear back.
- ICMA urged members to continue to share their bilateral interactions with the authorities on CSDR-SD, as well as providing suggestions for possible further data and analysis that could help regulators in assessing the likely impacts and consequences of the mandatory buy-in regime.

Andy Hill, ICMA, June 2020