

Clifford Chance DCM Round Up: January 2021

Welcome to our periodic round up of key developments for DCM. Further details on some of these topics can also be found on the [Financial Markets Toolkit](#).

For a more detailed service please contact one of our experts, who can discuss in detail how these developments will affect your business and transactions.

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FCA Consultation on Powers under Financial Services Bill

The FCA has published two consultations requesting feedback on its policy for the use of its powers under the proposed Financial Services Bill to manage the orderly wind down of critical benchmarks which are no longer representative. The [Article 23A consultation](#) considers the circumstances in which the FCA may designate a critical benchmark as non-representative (an "**Article 23A Benchmark**") and prohibit its use by supervised entities save in very limited "tough legacy" contexts. The [Article 23 D consultation](#) considers the FCA's powers to direct the administrator to make changes to an Article 23A Benchmark so that it remains a viable and robust rate for limited legacy use. At this stage key issues remain uncertain, in particular the scope of tough legacy uses that will

be permitted, and whether any legislative or regulatory protection will be provided in order to give greater confidence to market participants to rely on the amended benchmark in private contracts.

EU Benchmark Regulation

The EU Parliament [adopted](#) the EU BMR [amendments](#) in the plenary session on 19 January 2021. The amended BMR grants the EU Commission the power to designate, upon the occurrence of a cessation event affecting a critical benchmark, one or more replacement benchmarks for contracts with no fallback provisions or no suitable fallback provisions. Such a power would be applicable to any contract or financial instrument governed by the law of an EU Member States, and also to contracts between parties domiciled in EU Member States but governed by the law of a third country where such a jurisdiction does not provide an appropriate statutory regime for the orderly wind down of the relevant benchmark. It remains to be determined whether the UK regime proposed in the Financial Services Bill will be deemed suitable by the European Commission in providing for an orderly wind down of LIBOR, and how the Commission will interpret the issue of whether fallbacks are adequate. It is expected that the amended BMR will be published in the Official Journal of the European Union in early 2021 and that, in accordance with the requirements of the amended BMR, the EU Commission will subsequently hold a public consultation prior to its exercise of its powers.

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BREXIT

UK prospectus and UK PRIIPs exemptions

As part of its on-shoring of the EU Prospectus Regulation ([Regulation \(EU\) 2017/1129](#) – EU PD3), the UK chose to broaden the EU PD3 prospectus exemption for sovereigns, local authorities, public international bodies and central banks. Under the [UK prospectus regime](#), the exemption is not restricted to EEA entities but applies to all third country entities. This should make it simpler for such entities to list debt securities on the London Stock Exchange as the FCA will not need to approve the prospectus, turnaround times will be faster and there will be no FCA vetting fee. *(Note: The UK regime was on-shored via various UK SIs. For licensing reasons, we are not able to send a direct link to the consolidated version, but contact us for further information.)*

This exemption is also reflected in the [on-shored UK PRIIPs regime](#), because it cross-refers to the UK prospectus regime exemption. Having said that, the broader UK PRIIPs exemption is likely to be of limited benefit in practice. That is because it is likely that it will be necessary to consider both the EU PRIIPs [and](#) the UK PRIIPs regimes in any offering because of possible investor locations. For the avoidance of doubt, the EU PRIIPs regime is unchanged and exempts only EEA entities by reference to the EU PD3 exemptions.

Contractual recognition of bail-in – transitional relief

From 1 Jan 2021, the PRA Rulebook and the FCA Handbook require a contractual recognition of bail-in (CROB) clause in any affected EEA law governed or other third country law governed document to which a UK entity subject to the UK bail-in legislation is a party. There are, however, transitional provisions to 31 March 2022 for EEA law (but not other 3rd country law) contracts other than bonds. (Links: [PRA RULEBOOK: \(EU EXIT\) INSTRUMENT 2020](#); [PRA transitional direction](#); [IFPRU 11.6](#); [FCA prudential transitional direction](#)).

Contractual recognition of bail-in – policy approaches

Whilst it is early days, it is worth noting slightly different approaches to transitional provisions emerging in different product areas – notably, capital markets and loans. In bond markets, CROB clauses are not widely expected to be included in EEA law contracts other than bonds before March 2022, relying on the transitional provisions. In contrast, some loan parties are choosing to include CROB now in EEA law facility agreements if they will run past 31 March 2022, notwithstanding the transitional relief, to avoid debates after 31 March 2022 as to whether an amendment is material.

ECB eligibility

As mentioned in our October 2020 Capital Markets [briefing](#), Brexit had eligibility implications for UK entities. The ECB has updated its [webpage](#) on collateral to include a short summary of “Changes in collateral eligibility following the United Kingdom's withdrawal from the EU”. Whilst the list is not exhaustive and does not contain unexpected commentary, there are three things worth highlighting. Amongst other things, it confirms that: a) unsecured bank bonds (UBBs) issued by UK banks are no longer eligible pursuant to Article 81a; b) debt instruments listed on the London Stock Exchange must also be admitted to trading on at least one acceptable market for ECB purposes in order to be eligible, assuming other criteria are met; and c) based on the United Kingdom's status as a non-EEA G10 country, euro-denominated debt instruments issued by entities established in the United Kingdom, but which do not fall into an excluded categories, will continue to be accepted as eligible collateral (in line with Article 70 of the “[General framework](#)”).

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SUSTAINABILITY / ESG

Climate Transition Finance Handbook

ICMA published its [Climate Transition Finance Handbook](#) in December 2020. This sets out voluntary guidance and common expectations on the practices and disclosures for DCM issuances for climate transition-related purposes, i.e. to support the issuer's corporate strategy to transform to a low carbon business model. The Handbook can be used for both use of proceeds bonds and general corporate bonds that are aligned to the ICMA Sustainability-Linked Bond Principles. There are four key elements: (1) the issuer's climate transition strategy and governance; (2) the business model environmental materiality; (3) climate transition strategy to be 'science-based' and (4) implementation

transparency. Each element is further described in terms of its rationale, suggested disclosure and independent review and verification.

EU Taxonomy Regulation

The EU Commission published [draft legislation](#) containing the detailed technical screening criteria used to identify activities that fall within the climate change mitigation and climate change objectives under the Taxonomy Regulation. The draft legislation was open for consultation until 18 December 2020 and the final regulations were due to be published by 31 December 2020 but this deadline has been missed. Our Clifford Chance briefing [European Commission consults on Taxonomy 'Technical Screening Criteria' for climate mitigation and adaptation](#) looks at the draft legislation in more detail.

UK sustainability statements and FCA TCFD "comply or explain" listing rule

In November 2020 the UK Government and regulators made a number of public statements regarding the UK's commitment to ESG and sustainability. These included the UK's intention to issue a sovereign green bond in 2021, the possibility that the UK will develop its own version of the EU Taxonomy of sustainable activities and the PRA launch of climate stress testing in June 2021. Our Clifford Chance briefing [The UK, sustainable finance and climate regulation: the next steps](#) looks at these announcements. This briefing from November 2020 refers to a proposed FCA listing rule change and the FCA published its [final rule and policy statement](#) in December 2020. The listing rule takes effect as of 1 January 2021 and requires premium listed equity issuers to give a 'comply or explain' statement as to their adherence with the recommendations of the TCFD (Task Force on Climate-related Financial Disclosures) in their annual financial report.

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OTHER

Capital Markets Recovery Package – Product Governance

An [exception to the MiFID II product governance](#) regime has been finalised as part of the Commission's measures under its [Capital Markets Recovery Package](#). This will exclude all bonds with make wholes and bonds marketed or distributed only to eligible counterparties from the key product governance requirements. The EU legislative procedure needs to be finalised in the usual way and the changes implemented by member states into national law so they are unlikely to be effective until Q2/3 2021. Once in force we expect these changes will have an impact on the standard documentation and legends seen in DCM transactions. Note there is no corresponding change being made to the EU PRIIPs regime at this stage.

There is no confirmation as yet that the UK will make similar exceptions to the UK product governance regime.

Electronic signatures

The Law Society [Q&A on how to use electronic signatures and compete virtual executions](#) was published in January 2021. This looks at commonly asked questions such as does a witness need to be physically present when attesting a document, can a PA apply an electronic signature on behalf of a signatory and can minutes of board meetings and written shareholder/board resolutions of UK companies be signed with an e-signature.

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[David Bickerton](#)

Partner

020 7006 2317

[Clare Burgess](#)

Partner

020 7006 1727

[Andrew Coats](#)

Partner

020 7006 2574

[Paul Deakins](#)

Partner

020 7006 2099

[David Dunnigan](#)

Partner

020 7006 2702

[Matt Fairclough](#)

Partner

020 7006 1717

[Julia Machin](#)

Knowledge Director

020 7006 2370

[Simon Sinclair](#)

Partner

020 7006 2977

[Kate Vyvyan](#)

Partner

020 7006 1940

[Jessica Walker](#)

Knowledge Director

020 7006 2880

[Deborah Zandstra](#)

Partner

020 7006 8234

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