

DCM Round Up: September 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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LIBOR, BENCHMARKS AND RFRs

UK FCA powers

As a recap, the UK Financial Services Act 2021 made changes to the UK Benchmarks Regulation. These give the UK Financial Conduct Authority (**FCA**) power to designate certain critical benchmarks as being unrepresentative (Article 23A) and to require changes to be made (Article 23D), including to methodology (i.e. synthetic LIBOR). Furthermore, following designation, there is a prohibition on use by supervised entities (Article 23B), but the FCA was given powers to permit limited legacy use – i.e.

“tough legacy” (Article 23C). The FCA recently undertook [consultations](#) on proposed exercise of its powers, with further statements expected very shortly (likely, end of September):

- **Synthetic LIBOR:** In June the FCA consulted on its proposed decision to use its powers, under Article 23D(2) of the Benchmarks Regulation (**BMR**) as amended by the Financial Services Act 2021, to require ICE Benchmark Administration (**IBA**) to change the way 1-month, 3-month and 6-month sterling and Japanese yen LIBOR settings are determined beyond end-2021 ([CP21/19](#)). The consultation closed on 27 August. The FCA has indicated that it intends to publish a statement in relation to this consultation by end September. The consultation is based on the presumption that the FCA will compel the continued publication of these six LIBOR settings after 2021 to enable an orderly cessation of such LIBOR settings and included proposed method for calculating these 'synthetic' LIBOR settings.
- **Tough legacy:** The FCA issued a consultation ([CP21/15](#)) in May which closed in June. Its Statement of Policy and Feedback is due to be published in Q3 and is expected at the end of September.

Contractual continuity: UK Critical Benchmarks (References and Administrators' Liability) Bill

On 8 September, the UK Bill to address synthetic LIBOR and contractual continuity in contracts and arrangements was introduced into the House of Lords. The text of the Bill and accompanying 22 pages of Explanatory Notes are available [here](#). At its heart, it provides that references to an FCA designated benchmark in tough legacy contracts should be treated for all purposes as having always provided for the reference to have the meaning provided for within the legislation (that is, synthetic LIBOR). Our short, high level [briefing](#) (previously forwarded to you via an e-mail alert) provides context and highlights focus areas which we will be monitoring and assessing during the legislative process. In terms of timing, the second reading and debate of the Bill has been scheduled for 13 October, with the Committee stage scheduled for 26 October.

Alternative rates: credit sensitive rates and IOSCO compliance

On 8 September, IOSCO issued a [statement](#) about credit sensitive rates and its concerns that some of LIBOR's shortcomings may be replicated through rates lacking sufficient underlying transaction volume. The IOSCO statement was referenced in a [conference speech](#) on 17 September by Toby Williams from the FCA, who advised regulated firms to speak to its FCA supervisor before using credit sensitive rates. IOSCO principles were also referenced in a [conference speech](#) on 20 September by Gary Gensler from the SEC, who expressed concerns regarding the use of the BSBY rate.

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PROSPECTUS REGIME

HM Treasury's consultation on the prospectus regime and the wholesale markets review

HM Treasury published separate consultations on the following topics: (i) a [review of the UK prospectus regime](#) (the **Prospectus Regime Consultation**); and (ii) a [review of the wholesale markets](#) (the **Wholesale Markets Consultation**).

The following proposals, amongst others, are being considered under the Prospectus Regime Consultation: (a) whether the prohibition on the admission of securities to trading on a regulated market without the publication of an approved prospectus under section 85(2) of the UK Financial Services and Markets Act 2000 (**FSMA**) should be removed, and whether the FCA should be granted powers to create new rules in respect of such admission to trading and (b) whether the requirement of a prospectus for offers to the public in the UK should be removed in the case where the issuer already has securities admitted to trading on stock markets (or subject to an application for admission to a stock market) and scope for alternative obligations for other issuers.

The Prospectus Regime Consultation also considers the following topics: (i) granting of discretion/powers to the FCA regarding the nature and application of the relevant rules; (ii) recognition of prospectuses for a secondary listing in the UK (where prepared in accordance with overseas regulations); (iii) replacement of the liability standard under FSMA in relation to forward-looking statements; (iv) in connection with the "offer to the public", a proposed new exemption in respect of existing holders of securities; (v) alternative obligations where the securities are offered by an issuer; and (vi) public offers by overseas companies

The Wholesale Markets Consultation considers (amongst other things): (i) a new class of trading venue for smaller SMEs (i.e. small and medium-sized enterprises) and forms of investor protection for such a trading venue; (ii) disclosure requirements for small-sized issuers; and (iii) the current barriers to retail participation in capital markets.

These consultations closed in September.

ESMA updates its Q&A on the EU Prospectus Regulation Q&A

In July the European Securities and Markets Authority (**ESMA**) published updated versions of its Questions and Answers on the Prospectus Regulation (the [Q&A](#)). Certain new or updated questions may be of interest including:

Tripartite prospectuses

The Q&A clarifies that it is possible to supplement the information in an expired registration document (**RD**) or universal registration document (**URD**) that is used in a valid tripartite prospectus by supplementing the tripartite prospectus.

ESMA also notes that it is not possible to replace the original RD or URD with a new RD or URD in a tripartite prospectus, because this would result in a new tripartite prospectus. Therefore, an issuer may incorporate the information from the new RD or URD by reference into the existing tripartite prospectus via a supplement, to the extent that it qualifies as a significant new factor, material mistake or material inaccuracy.

Profit estimates

The Q&A also provide clarification in connection with the scope and meaning of profit estimates. Cumulative figures for the full financial year disclosed in quarter four reports should be considered as interim financial information (rather than a "profit estimate"). Furthermore, the reference to "for which results have not yet been published" (in connection with the publication of results for an annual financial period which has expired) in Article 1(c) of Commission Delegated Regulation (EU) 2019/980 means the publication of the final figures as approved by the issuer.

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ESG/SUSTAINABILITY

EU Green Bond Standard

In July the EU Commission published its proposals for an [EU Green Bond Standard](#). The proposals follow earlier reports published by the Technical Expert Group and are intended to build on existing market best practices, for example, the ICMA GBP. The key provisions are:

- the use of the green bond proceeds must be aligned with the EU Taxonomy;
- an external reviewer must provide both a "pre issuance" review confirming compliance with the EU Green Bond Standard and a "post-issuance" review of allocation reports;
- the issuer must comply with various reporting requirements i.e. yearly allocation reports and a post issuance impact report;
- external reviewers must register with ESMA and the proposals sets out the organisational requirements and processes applicable to external reviewers.

The Commission's proposals still need to be reviewed and agreed by the European Parliament and Council.

ICMA's updated Principles and new guidance

In June ICMA published a number of updates to its Principles (i.e. the [Green Bond Principles \(GBP\)](#), [Social Bond Principles](#) and [Sustainability Bond Guidelines](#)) and guidance.

The GBP 2021 edition includes: (i) two key recommendations for issuers to prepare a bond framework and to seek external reviews which are both designed to increase transparency alongside the four core components (Use of Proceeds, Process for Project Evaluation and Selection, Management of Proceeds, and Reporting); (ii) a recommendation of heightened transparency for issuer-level sustainability strategies and commitments; (iii) encouragement to supply information, if relevant, on the degree of alignment of projects with official or market-based taxonomies; and (iv) promotion of transparency on issuer processes to identify and manage perceived and known social and/or environmental risks. These changes also form part of the Social Bond Principles and the Sustainability Bond Guidelines (with the exception of the disclosure on the alignment with taxonomies for the Social Bond Principles).

The [ICMA Sustainable Finance](#) website also includes the Climate Transition Finance Handbook, the Harmonised Framework for Impact Reporting, the Guidelines for External Reviews, the GBP Guidance Handbook (which deals with commonly asked questions and market expectations relating to all the Principles) and further guidance (both new and updated).

FCA's consultation on extending climate related disclosure requirements and certain ESG matters

In June the FCA consulted on proposals to extend the application of its climate-related disclosures listing rule to standard listed companies and also sought views on broader ESG topics in capital markets ([CP21/18](#)). The consultation closed on 10 September.

The Consultation has two limbs, focusing on: (i) the extension of the FCA's TCFD (Task Force on Climate-Related Financial Disclosure) aligned 'comply or explain' listing rule, and (ii) integration of ESG in the UK capital markets by considering the following topics (amongst others): (a) ESG prospectus disclosure for debt securities, (b) the role of verifiers and second party opinion providers and its regulatory oversight, and (c) ESG data and rating providers and its oversight.

A Clifford Chance briefing on the Consultation is available [here](#).

European Commission Green Bond Framework

In September the [European Commission](#) adopted a [Green Bond Framework](#). This aligns with the ICMA Principles and as far as feasible with the Commission's EU Green Bond Standard. The Commission aims to finance 30% of NextGeneration EU through green bond issuance of up to Euro 250 billion. The first green bond is intended to be issued in October.

ESG monthly newsletter

This is short section on recent ESG Developments. If you are interested in this topic we also prepare more detailed monthly newsletters. Recent editions (and details of how to subscribe) are available [here](#).

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EU REGULATORY DEVELOPMENTS

Article 55 BRRD: impracticality delegated regulation

The Article 55 BRRD [Delegated Regulation \(EU\) 2021/1527](#) (adopted in May) was published in the Official Journal on 17 September. Article 1 of the Delegated Regulation specifies the conditions under which it would be impracticable to include a contractual recognition of bail-in (CROB) provision. However, this is unlikely to be relevant for DCM transactions.

Article 71a BRRD: contractual stay

The contractual stay [Delegated Regulation 2021/1340](#) (adopted in April) was published in the Official Journal on 16 August. The Delegated Regulation specifies content for contractual stay clauses and will be relevant for EEA entities to include in third country law contracts (including English law contracts).

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OTHER

Market abuse - when does information become public, treatment of rumours

The 16 September Advocate-General's opinion in Mr A.v Autorité des marchés financiers (Financial Markets Authority, France) C 302/20 may be of interest. It discusses the treatment of market rumours and when information becomes public. The case relates to a 2011 journalist's article and was referred by the Court of Appeal in Paris. The Advocate-General's opinion is available [here](#) and [here](#).

Briefings

We have prepared a number of briefings that may be of interest:

- [Digital developments in the Capital Markets](#): if you or any of your colleagues are interested in Fintech developments please let us know so that we can send you any relevant updates.
- [How to Enforce a Foreign Judgment in England](#)
- [EU financial services horizon scanner](#)
- Listing Comparison table: an updated version is attached.

Reminders

The [2021 ISDA Definitions](#) are due to become effective on 4 October.

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