

DCM Round Up: September 2022

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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ESG / SUSTAINABILITY

FCA publications on Sustainable Bonds and ESG integration in the UK capital markets

On 29 June the FCA published its [Feedback Statement \(FS22/4\) on ESG Integration in UK Capital Markets](#) and the connected [Primary Market Bulletin \(PMB 41\)](#). Together these outline the FCA's current approach on sustainable bonds. In summary the FCA (1) recommends compliance with ICMA principles on use of proceeds disclosure and has no current intention to further regulate; (2) notes that frameworks should not use more definitive language on use of proceeds than that in the prospectus and consideration should be given to how the framework interacts with the advertisement regime; (3) recommends that the ICMA Guidelines on External Reviewers are followed; and (4) is of the view that regulation of ESG data and rating providers should be brought within its regulatory perimeter. More

detail is found in the attached email we sent at the time. To reiterate it is unlikely that the FCA's statements on frameworks and the advertisement regime will affect market practice but they do serve as a reminder about the need to continue with existing best practice.

Update on UK Green Taxonomy timeline

The May 2022 FCA [grid of UK regulatory initiatives](#) gives the following deadlines on the UK green taxonomy: end of 2022 for finalisation of the Climate Change Adaptation and Mitigation technical screening criteria and end of 2023 for the remaining technical screening criteria.

EU Green Bond Regulation

On 20 May the European Commission Committee on Economic and Monetary Affairs published its [report on the proposal for a Regulation on European green bonds](#). The key proposals in the report would significantly extend the scope of the regulation to include all sustainable labelled bonds and sustainability linked bonds and increase disclosure requirements. The Trilogue discussions are continuing and current indications are they are unlikely to complete until early 2023. See also our [briefing](#).

Corporate sustainability disclosure developments

Corporate sustainability disclosure and reporting is likely to be a hot topic in the upcoming months. In the EU the Corporate Sustainability Reporting Directive (CSRD) was [agreed](#) between the European Parliament and Council in July and this version is likely to be finalised without further amendment by the end of the year. CSRD will impose increased and more detailed sustainability disclosure obligations on a greater range of entities, including in certain situations non-EU issuers. Reporting entities will also be obliged to comply with European sustainability standards being developed and have auditors provide assurance opinions on their sustainability reports. The CSRD obligations will be implemented on a staggered basis starting in relation to financial years beginning on or after 1 January 2024. Our [briefing](#) summarises the original CSRD provisions and we will be producing updated materials in due course.

Separately the International Sustainability Standards Board (ISSB) is also developing a set of global baseline sustainability standards based primarily on the Task Force for Climate-related Disclosures (TCFD) recommendations. The ISSB has consulted on [drafts](#) and plans to provide final drafts by end of the year. The UK has already implemented a requirement for UK entities to comply with the TCFD recommendations for financial years starting 6 April 2022 (see [briefing](#)) but is expected to adopt the ISSB standards when finalised.

A key issue in the implementation of these corporate reporting standards and others (e.g. the [SEC proposals](#) mentioned in our May Round Up) is how they can be used cross jurisdictionally to avoid unnecessary work and costs for reporting entities and ensure broad international comparability. In particular, the ISSB standards and European standards take different views on how sustainability impacts are considered. The draft European standards continue to use the concept of "double materiality" (already established under the Non-Financial Reporting Directive) in other words an entity must report both on how sustainability matters affect it as an organisation and how its activities have a sustainability impact on broader stakeholders, people and the environment. The ISSB only requires reporting in accordance with the first of these measures.

MiFID Product Governance sustainability related amendments

You may be aware that a **change** to the MiFID 2 Product Governance regime becomes effective in November that will require manufacturers and distributors to specify any sustainability related objectives of the relevant product being manufactured/distributed. Current thinking is that the existing ICMA approach to the determination of target markets and the legends used in documents will be unaffected. This view remains subject to final publication of the ESMA guidelines (a draft version was published in its July **consultation**), any further regulatory developments and/or changes in market practices, particularly on the part of investors.

ECB Corporate Sector Purchase Plan (CSPP)

In September the ECB updated its **CSPP FAQs** to specify that its CSPP purchases will be “tilted towards” issuers with better climate performance (see FAQ 2.4) in order to align with the Eurosystem's aims to decarbonise its corporate bond holdings.

Updated ICMA sustainable bond materials

Following its AGM in June the ICMA GBP published a number of new and updated sustainable bond materials. These include an updated Sustainability Linked Bonds (SLB) Q&A, a new SLB KPI registry and a new Issuer Pre-issuance Checklist for green bonds/programmes, each of which are available **here**.

ESG monthly newsletter

This is a 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 AND UK REGULATORY DEVELOPMENTS

EU: ESMA MAR questions on Market Sounding

ESMA's July update to its MAR **Q&A** included guidance on the Article 11(a) market sounding exemption. Article 11(a) provides (in brief) that where securities are offered only to qualified investors communicating information to those investors for the purposes of negotiating the contractual terms and conditions of their participation in the issue shall not constitute market sounding.

The ESMA Q&A Qu 9.2 confirms that this exemption should be interpreted narrowly and only relates to the initial discussions with qualified investors and not any subsequent investors contacted after the terms and conditions have been agreed. It notes Recital 6 of MAR which clarifies that the aim of the communication of information in that negotiation phase is to structure and complete the transaction as a whole and not to gauge interest of potential investors in a pre-determined transaction.

EU: ESEF company reporting

We continue to receive questions on the applicability of the European Single Electronic Format (ESEF) requirements for issuers on EU regulated markets to prepare reports in specified electronic format. Therefore, as a reminder we thought it would be useful to note that these requirements were implemented via the Transparency Directive so issuers which are exempt from the Transparency Directive obligations (due to only having wholesale debt admitted to EU regulated markets) are also exempt from these ESEF requirements. Issuers who are otherwise required to comply may find this [ESMA guidance](#) useful.

UK: Bank of England buyback programme

Following the decision by the Bank of England's Monetary Policy Committee in February 2022 to reduce its stock of corporate bonds, in May the Bank published a [Market Notice](#) setting out its high level approach to the unwinding of the Corporate Bond Purchase Scheme (CBPS) and in August [published](#) the operational details of this sales programme. The first auctions started on 19 September and the Bank aims to unwind the full stock of CBPS holdings by end 2023/beginning 2024.

More specifically the August Market Notice states that the Bank will consider on a case by case basis requests from issuers to buy back their own bonds. It includes details of how issuers can submit buyback requests and other information on how buybacks will be undertaken.

UK: New UK Financial Services and Markets Bill

On 20 July a new [Financial Services and Markets Bill](#) was introduced into UK Parliament and is expected to become law by the end of the current Parliamentary session in May 2023. The Bill will repeal several pieces of EU retained law and deliver a comprehensive model of financial services regulation for the UK. Specifically, the bill will allow HM Treasury to repeal the onshored EU prospectus regime and reform the UK prospectus regime in line with the outcomes of the UK Prospectus Regime Review. There are few details of the potential changes to the prospectus regime in the Bill save for that all powers for these reforms will be delegated to the FCA. The regime will only be repealed once the new regime is ready to be implemented to allow for an orderly transition.

For more detail see our short [briefing](#) or our [Topic Guide](#) on our Financial Markets Toolkit.

FCA Consumer Duty

The FCA is introducing a new consumer duty which will impose additional obligations when dealing with retail customers. Some carve-outs from the FCA's definition of "retail market business" will remove certain debt products from scope - including "wholesale" debt (threshold: GBP 50,000), those targeted at professionals only, and various "vanilla" products. Nonetheless, ahead of 31 October, banks need to assess which of their DCM products might potentially fall within scope. You may therefore find this Clifford Chance [briefing](#) to be useful. It looks at the final rules and guidance and sets out the timeline for application (broadly, Summer 2023).

UK: FCA Technical Note

In May the FCA published a Technical Note on Guidelines on disclosure requirements under the

Prospectus Regulation and Guidance on specialist issuers ([TN/619.1](#)). This is the FCA's adaptation of the [ESMA Guidelines](#) which was not "onshored" in the UK as the ESMA Guidelines did not apply in the EU until 4 May 2021 (i.e. after the Brexit Implementation Date). For the avoidance of doubt TN/619.1 substantially replicates the content of the ESMA Guidelines, with minor changes which are described more fully in FCA commentary from 2021 in FCA's June 2021 consultation ([PMB 34](#)).

UK: ESEF company reporting

The FCA rules require issuers of securities admitted to trading on a regulated market to publish their annual financial reports in a structured XHTML web browser format for financial years beginning on or after 1 January 2022 (DTR 4.1) however, issuers that only have wholesale securities admitted to trading will be exempt (DTR 4.4.2). In addition, issuers with older debt securities issued before 31 December 2010 with a Euro 50,000 denomination (the previous wholesale requirement) are likely to benefit from the transitional provisions in the FCA Handbook set out in Item 19 of DTR TP1.

We have included this item (previously mentioned in earlier Round Ups) for completeness given that we mention the EU ESEF provisions above.

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LIBOR / BENCHMARKS / RFRs

FCA Statement on transition of LIBOR-linked bonds

On 16 August the FCA published a [statement](#) which encourages market participants to continue transition of LIBOR-linked bonds.

FCA Consultation (CP22/11) on winding down synthetic GBP LIBOR and USD LIBOR

On 30 June the FCA launched a [consultation on winding down synthetic GBP LIBOR and USD LIBOR](#). In relation to:

- *Synthetic GBP LIBOR* - the consultation sought views on whether 1 and 6 month settings can cease in an orderly fashion at the end of March 2023 and when it will be possible for the 3 month setting to cease; and
- *USD LIBOR* – the consultation considers the usage of USD LIBOR and considerations for a potential synthetic USD LIBOR.

The consultation closed on 24 August and the FCA has not yet indicated when it will respond.

EU Commission consultation on use of third country benchmarks

On 20 May the EU Commission launched a [consultation on the regime applicable to the use of benchmarks administered in a third country](#). The consultation sought views on potential improvements to the function of the EU Benchmarks Regulation. The outcome of the consultation (which closed on 12 August 2022) will be used by the Commission to propose a review of the rules applicable to financial benchmarks administered outside the EU which is expected to be published Q4 2022.

ESMA's **response** to the Commission's consultation proposed improvements to the benchmark regime framework as well as the EU benchmark labels. In particular, ESMA proposed that the restrictions on the use of third country benchmarks should be removed and agreed that an EU ESG benchmark label would be valuable.

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FINTECH AND DIGITAL BONDS

Regulators across the world are continuing to focus on the development of digital capital markets and consider potential regulatory change to facilitate digital bond issuance. We have prepared two client briefings looking at these developments in the EU and the UK

The EU Pilot Regime

The EU Pilot Regime is a new European regulation pursuant to which for an initial three year period starting in March 2023, operators of DLT market infrastructures will be given the opportunity under the EU Pilot Regime to experiment with the use of DLT in issuance and post-trade processes, free from certain regulatory constraints. This is expected to give rise to an increase in the volume of issuances of financial instruments that are issued, recorded, transferred and stored using DLT in Europe.

See our briefing: [The EU Pilot Regime: accelerating the development of a digital capital market in Europe](#)

The UK FMI sandbox

The UK equivalent of the EU Pilot Regime, the 'FMI sandbox', is at an earlier stage of development but the underlying goals are similar and it is expected to be even more wide-ranging and flexible than the European initiative. The FMI sandbox is expected to be live from the second half of 2023.

See our briefing: [Innovation in the UK Capital Markets: the FMI sandbox takes shape](#)

Should you have any questions in relation to these subjects or would be interested in a presentation to hear more, please get in touch with Alexander Tollast in our Paris office (alexander.tollast@cliffordchance.com / DD +33 1 4405 5157) or your usual Clifford Chance contact.

ICMA FAQs on DLT and blockchain in bond markets

On 22 September ICMA published its first set of **FAQs** on distributed ledger technology (DLT) and blockchain in capital markets. These are to raise awareness and clarify some of the fundamental questions being asked on these topics. The FAQs are designed to serve as an entry point for non-experts to gain a basic understanding of DLT bonds and their impact on capital markets.

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HK SFC CODE

Paragraph 21 of the **Code of Conduct** for Persons Licensed by or Registered with the Securities and Futures Commission (Code) became effective in Hong Kong on 5 August 2022. Paragraph 21 clarifies the roles played by intermediaries in DCM transactions and sets out the standards of conduct expected of them in bookbuilding, pricing, allocation and placing activities.

The conduct of any: (i) bookbuilding activities (defined as the collating of investors' orders, including indications of interest, in an offering in order to facilitate the price determination and the allocation of debt securities to investors or the process of assessing demand and making allocations) Hong Kong, or (ii) placing activities (defined as the marketing or distributing of debt securities to investors pursuant to those bookbuilding activities) in Hong Kong, or (iii) advising, guiding and assisting the issuer client in those bookbuilding and placing activities in Hong Kong, would be subject to the Code.

From the perspective of UK, European and US deals, a nexus with Hong Kong (such as through syndicate members being based in Hong Kong, or through activities outlined above being conducted in Hong Kong) which may be driven by deal currency or other factors, might necessitate consideration of Code compliance requirements in the deal execution processes and documentation on transactions.

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SANCTIONS

There are a number of already announced sanctions measures relevant to capital markets that are summarised in our **Clifford Chance briefing**. As the situation continues to evolve and new sanctions are introduced our briefing will be updated so please do reach-out to us if you do not receive an updated version automatically through other Clifford Chance distribution channels.

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LISTING COMPARISON

Please find attached our Listing Comparison which covers the main regulated and exchange regulated markets in London, Luxembourg and Ireland.

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Clare Burgess

Partner

020 7006 1727

Paul Deakins

Partner

020 7006 2099

Julia Machin

Knowledge Director

020 7006 2370

Kate Vyvyan

Partner

020 7006 1940

Deborah Zandstra

Partner

020 7006 8234

Visit our Financial Markets Toolkit

Andrew Coats

Partner

020 7006 2574

Matt Fairclough

Partner

020 7006 1717

Simon Sinclair

Partner

020 7006 2977

Jessica Walker

Knowledge Director

020 7006 2880

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