

## DCM Round Up: January 2023

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.

- UK EDINBURGH REFORMS
- EU LISTING ACT PROPOSALS
- OTHER EU AND UK REGULATORY DEVELOPMENTS
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### UK EDINBURGH REFORMS AND REUL BILL

#### The 'Edinburgh reforms'

On 9 December the UK Government announced a package of over 30 measures to reform financial services regulation. The 'Edinburgh reforms' include the **Government's plans** for the repeal and reform of retained EU law on financial services under the Financial Services and Markets Bill (**FSM Bill**). The FSM Bill will repeal retained EU law on financial services and will give HM Treasury powers to amend, restate and replace that law and the new regulatory framework envisages that a greater part of UK regulation will take the form of rules made by the UK regulators. The most important reforms from a DCM perspective are the proposed changes to the UK prospectus regime, but there are a number of other points of note relating to the PRIIPs regime and ESG regulation (see ESG/Sustainability below).

The draft 'illustrative' statutory instrument (the [Financial Services and Markets Act 2000 \(Public Offers and Admissions to Trading\) Regulations 2023](#)) sets out the proposed changes to the UK prospectus regime which would be replaced by new rules using the designated activities regime and other powers under the FSM Bill.

The statutory instrument would create a new prohibition on public offers of 'relevant securities' in the UK. This would be subject to a range of mostly familiar exemptions and exclusions, e.g. for offers of securities to professional investors or in large denominations (GBP 50,000 or more) and for offers of securities issued by sovereigns, local authorities and charities.

A prospectus would still be required for admission to trading of 'transferable securities' on a UK regulated market or UK primary multilateral trading facility (such as the International Securities Market). The FCA would be given powers to specify the content requirements for prospectuses admitted to the regulated market with some changes to today's rules. For debt, for example, the 'prospect' of the issuer would include 'creditworthiness' and it is not clear how the FCA will use its rule making powers to differentiate between 'wholesale' and 'retail' disclosure. The FCA is due to consult on this in 2023. For prospectuses admitted to a UK primary multilateral trading facility, the content requirements would be continue to be specified by the operator of the MTF, although the FCA would have the ability to set some overarching rules (for example, in relation to the responsibility for the prospectus, compensation for statements in prospectuses and withdrawal rights).

The policy note accompanying the illustrative statutory instrument also indicates that the Government is still considering the proposal in its March 2022 consultation response to allow offers into the UK of securities listed on certain overseas markets using offering materials approved by an overseas regulator.

The Packaged Retail and Insurance-based Investment Products (**PRIPs**) Regulation is included as part of 'Tranche 2' of the Government's repeal and reform programme of the Edinburgh Reforms. The intention is to replace the UK PRIPs regime with tailored UK retail disclosure framework under which the retail disclosure requirements would be contained in FCA rules as opposed to legislation (see HMT's [PRIPs and UK Retail Disclosure consultation paper](#) and the [FCA's Future Disclosure Framework Discussion Paper](#)).

### **UK Retained EU Law (Revocation and Reform) Bill**

For completeness, it is worth noting that while the FSM Bill gives the powers to revoke, amend and restate retained EU law relating to financial services and markets, the remainder of retained EU law is being addressed by the UK Retained EU Law (Revocation and Reform) Bill. The REUL Bill is intended to complement the FSM Bill. Our briefing [UK retained EU law \(Revocation and Reform\) Bill – What happens to retained EU law?](#) provides an overview of the REUL Bill and how it will affect different categories of retained EU law.

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## EU LISTING ACT PROPOSALS

On 7 December the European Commission published its **EU Listing Act proposal**. It forms part of the **CMU project** and has an overall aim to make capital raising easier for companies – especially for SMEs. Proposals include not only changes to the listing regime (including repeal of EU CARD), but also to the EU Prospectus Regulation, EU MAR and EU MiFID, amongst others.

On the prospectus side, many EU prospectus regime concepts would remain intact – including, for example, the wholesale and retail delineation for disclosure requirements and most of the current public offer and admission to trading exemptions.

Proposals intended to alleviate "cumbersome" and "costly" requirements include a mix of "bigger picture" alleviations, as well as more granular prospectus changes. The former category includes the expansion of secondary issuance exemptions (such as, increasing the current Article 1(5) "admission to trading" exemption threshold from 20% to 40% and setting out in Article 1(4) a parallel 40% "offer to the public" exemption, as well as introducing into Articles 1(4) and (5) a new, broader and uncapped exemption from the requirement for a prospectus for certain fungible securities, subject to various confirmations and filings) and measures to facilitate determination of equivalence of third country prospectuses. More detailed prospectus content proposals include: removal of the need for an issuer to rank risk factors; barring generic risk factors; stricter guidance on prospectus length and ordering; as well as new measures relating to supplements – such as, removing the need to supplement for an annual report – and mandatory incorporation by reference.

The EU legislative review process is already **underway** but timing is unclear. In terms of public feedback, the Commission gave an 8-week deadline for comments. The deadline is currently **early March**, but will continue to move until translations of the proposal are available.

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## EU AND UK REGULATORY DEVELOPMENTS

### **EU: Central Securities Depositories Regulation (CSDR)**

The EU CSDR regulates central securities depositories (CSDs) and various aspects of securities settlement. While CSDR entered into force in September 2014, its implementation has been staggered over several years.

From 1 January 2023 EEA issuers of transferable securities admitted to trading or traded on an EEA trading venue (e.g. a regulated market, MTF or OTF) must ensure those securities are in book entry form (Article 3(1)). Issuers will have under 1 January 2025 to move any existing securities into book entry form. In addition, Article 3(2) already requires that all transactions in transferable securities (e.g. trading of transferable securities) on an EEA trading venue are recorded in book entry form in a CSD. Note that this applies to both EEA and third country issuers. Book entry form means immobilised or dematerialised. Bond holds in global form in a CSD are considered to be immobilised.

Separately, Article 25 of CSDR allows a third country CSD to provide services within the EEA. However,

where a third country CSDs provides 'core services' (i.e. acts as a registrar or holds at the "top tier") in relation to financial instruments constituted under the laws of an EEA state the third country CSD must be 'recognised' by ESMA. It is not clear if this will also apply to financial instruments constituted under the laws of an EEA state issued by a non-EEA issuer. No third country CSDs have yet been recognised by ESMA but transitional provisions are in effect which allow third country CSDs to provide these core services under pre-existing national regimes.

## **UK: CSDR**

The UK 'on-shored' much of CSDR including Article 3(2) and Article 25 but not Article 3(1) (which only comes into effect on 1 January 2023). Under 'on-shored' Article 3(2) where transferable securities are trading on a UK trading venue they must be recorded in book entry form in a CSD. Under 'on-shored' Article 25 non-UK CSDs need to apply for recognition to provide notary and/or central maintenance services in relation to financial instruments constituted under English law to UK issuers. The Bank of England was granted powers to make recognition decisions but has not yet done so. An interim transitional regime is in place under which fourteen CSDs (including Euroclear, Clearstream and DTC) that have notified the Bank of England that they intend to provide services under Article 25 have been granted temporary recognition pending recognition decisions.

## **UK: Market Abuse Regulation – UK FCA's Primary Market Bulletin (PMB) 42**

The UK FCA's **PMB 42** published on 12 December 2022 covered a wide range of issues, including climate-related financial disclosures, SPACs, short-selling and market abuse.

In the context of market abuse, and following the **fine** of the former chairman of Convatec by the UK FCA, PMB 42 contains commentary and practical advice on some key themes relating to breach of Article 10 (*unlawful disclosure of inside information*) of MAR. PMB 42 emphasises the requirement to make disclosure of inside information via appropriate channels (and not via social media or as part of marketing materials). It also comments on the role of systems and controls and recommends that issuers consider whether their written policies and procedures adequately address the risk of improper disclosure of inside information via use of social media channels.

Separately, PMB 42 also highlights the relationship between the UK National Security and Investment Act 2021, the Listing Rules and UK MAR and reminds issuers of the need to consider their continuing obligations to disclose inside information when transactions are subject to NSIA review or assessment.

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## **LIBOR / BENCHMARKS / RFRs**

### **UK FCA developments**

A brief reminder of relevant dates for UK FCA's synthetic LIBOR deadlines and wind-down proposals:

- Japanese yen synthetic LIBOR ceased at end December 2022;
- 1- and 6-month synthetic sterling LIBOR settings will cease at end-March 2023;

- the UK FCA intends to use its powers to compel IBA to continue to publish 3-month sterling LIBOR until end-March 2024; and
- the UK FCA is consulting on 1-, 3- and 6-month synthetic US dollar LIBOR settings, which would cease at end-September 2024. The FCA consultation [CP/21](#) closed on 6 January 2023.

For further information, see the relevant UK FCA [webpage](#).

### **US Federal Reserve Board final implementing regulations**

On 16 December 2022, the US Federal Reserve Board [adopted](#) final [implementing regulations](#) under the Adjustable Interest Rate (LIBOR) Act. These implementing regulations identify benchmark rates based on SOFR that will replace USD LIBOR in certain US law governed tough legacy contracts after June 30, 2023.

### **Financial Stability Board Progress Report**

On 16 December 2022, the Financial Stability Board published a [report](#) ("Progress Report on LIBOR and Other Benchmarks Transition Issues: Reaching the finishing line of LIBOR transition and securing robust reference rates for the future") which includes an overview of LIBOR transition efforts, covering success to date and remaining transition steps.

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## **ESG/SUSTAINABILITY**

### **EU Listing Act proposals**

In keeping with the EU direction of travel on sustainability legislation the EU Listing Act makes specific reference to ESG matters. The proposal amends Article 13 (*Minimum information and format*) so that the following should be taken into account when developing the prospectus content requirements (i) whether the issuer is required to provide sustainability reports (under the Corporate Sustainability Reporting Directive) and (ii) whether debt securities are advertised as taking ESG factors into account or pursuing ESG objectives. At this stage it is unclear whether this means the previously noted Commission workstream of preparing a prospectus regulation annex for green and sustainable bonds will continue or if this will be rolled into the Listing Act changes. We hope to get clarity from the Commission on this in early 2023.

### **UK Edinburgh reforms**

While there was little detail in the [reform package](#) there were several announcements relevant to ESG. The Government intends to publish its updated Green Finance Strategy in early 2023 (updating its 2019 Green Finance Strategy) and this will address four key themes: capturing the opportunity of green finance; mobilising finance for the UK's energy security, climate and environmental objectives; greening the financial system; and leading internationally. In addition, the Taxonomy Regulation is included as part of the Government's repeal and reform programme and is one of the topics that it expects to make

significant progress on during 2023. HM Treasury has also **announced** that it will use its powers under the FSM Bill to repeal the statutory requirement under the Taxonomy Regulation to make technical screening criteria regulations by 1 January 2023, allowing the Government more time to develop the UK green taxonomy. The Government is considering bringing ESG ratings providers within the regulatory perimeter and intends to issue a consultation on this proposal in Q1 2023. HM Treasury will also join the industry-led ESG data and ratings **code of conduct working group**, recently convened by the FCA, as an observer.

### **EU Greenwashing – ESA's call for evidence**

On 15 November the European Supervisory Authorities (the ESAs) launched a **call for evidence** on greenwashing following the mandate from the European Commission in May 2022. Responses are due by 10 January 2023. The call for evidence seeks input on potential greenwashing practices in the whole EU financial sector, including banking, insurance and financial markets, and which may be relevant to various segments of the sustainable investment value chain and of the financial product lifecycle. While the term used is 'greenwashing' the intention is to cover all environmental, social and governance concerns/risks and also any greenwashing practices both within and outside of the current EU sustainable finance regulatory framework.

The call for evidence demonstrates the current concerns around greenwashing and the potential negative impact on the continued expansion of sustainable financing and products. It is likely to be a prelude to some form of regulatory recommendations or actions in due course.

### **UK FCA Greenwashing consultation**

In October the FCA published a consultation (**CP22/20 on Sustainability Disclosure Requirements and Investment labels**) on new rules to clamp down on 'greenwashing' by increasing the transparency around the sustainability credentials of investment products. While the new rules are primarily aimed at asset managers the proposal does include an overarching 'anti-greenwashing' rule that will apply to all regulated firms requiring that all that sustainability-related claims must be clear, fair and not misleading. Although the 'clear, fair and not misleading' rule already exists the FCA believes it is necessary to link it directly to sustainability claims and explains that this will also provide it with an explicit rule on which to challenge firms on potential greenwashing and take the appropriate enforcement action.

Introduction of this rule should reinforce already existing best practice but managers will need to give careful consideration that the prospectus and any marketing material is clear, fair and not misleading as to the green or sustainable aspects.

For more details on the FCA consultation see our briefing **UK asset managers face new rules to clamp down on 'greenwashing'**.

### **Clifford Chance greenwashing briefing**

Greenwashing promises to be one of the hot topics in the ESG space in the coming months. See our detailed briefing **The Rise of Consumer Complaints, litigation and enforcement actions to curb greenwashing** which looks at greenwashing in financial products and services in a number of jurisdictions. The briefing mentions the EU ESA's call for evidence and the FCA's greenwashing consultation.

## EU: CSRD

As anticipated the **Corporate Sustainability Reporting Directive** (CSRD) has been published in the Official Journal. The CSRD amends the Non-financial Reporting Directive (NFRD) to introduce more detailed reporting requirements for companies on how their business model affects their sustainability and on how external sustainability factors influence their activities. The obligations will enter into force on a staggered basis beginning for financial years starting on or after 1 January 2024 for those entities already subject to the EU Non Financial Reporting Directive.

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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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