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TREASURY ESSENTIALS

Need to know for treasurers and their teams

DECEMBER 2024 / INTRODUCTION

Welcome to this edition of Treasury Essentials, our bi-annual publication which seeks to provide insight into topical legal issues of relevance to finance and treasury teams.

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When we released our previous edition of this publication back in June, we noted the then pending UK and US elections and associated uncertainty for various treasury priorities. Six months on, following the result of the US election, it's fair to say that a high degree of geopolitical and macroeconomic uncertainty remains. Closer to home, there is at least a bit more clarity following the new Labour Government's budget, although there's no denying that the picture for business is mixed.

In this edition of Treasury Essentials, we have decided to take a step away from elections and budgets and focus on other developments over the last few months that you might have missed. Firstly, we take stock of the sustainable finance market, discuss the outcome of the Transition Finance Market Review, a review mandated by the previous UK Government to consider the barriers to scaling transition finance, and provide an overview of the Loan Market Association's new drafting for green loans.

We also mark the end of LIBOR, years in the making, considering where attention now needs to turn on the wider topic of benchmark reform, before turning finally to look at progress on prospectus regime reform in both the UK and EU.

I hope you enjoy this edition of Treasury Essentials. If you would like to explore any of the topics covered in more detail, or if you have any thoughts/feedback on this or previous editions of Treasury Essentials, please get in touch with your usual Slaughter and May contact or a member of the Treasury Essentials team. If any of your colleagues or contacts would like to receive this publication, please click here.

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SUSTAINABLE FINANCE RE-EXAMINED

During the course of 2023, doubts about the benefits of ESG-labelled debt (otherwise known as "ESG fatigue") became increasingly prevalent among finance and treasury teams. This year, we have seen these doubts translate into action. A number of larger corporates, many of them early-adopters of sustainable finance structures, have recently chosen to dispense with the ESG labels on their loans and/or bonds, or are seriously considering whether to do so. The reasons behind these decisions are business and context-specific, but there are some common themes.

What are the drivers for labelled issuance and how have they changed? What are the key challenges from the borrower/issuer perspective and what can be done to open up the market? And importantly, what does this mean for the future of sustainable finance?

These include the costs involved in structuring and administering sustainable debt terms when balanced against the absence of any meaningful price savings. Businesses also may have concerns about risk exposure as the contractual commitments required to attract a sustainability label evolve and become more onerous.

Debt market conditions have also been a factor for some. In a year punctuated by global election activity, refinancing and issuance windows have been constrained. Companies looking to come to market particularly in the second half of this year have, in a number of cases, concluded that timetables simply did not allow for the negotiation of sustainability terms.

In light of all this, we consider it time to re-examine the role of ESG-labelled finance in corporate capital structures. We ask: What are the drivers for labelled issuance and how have they changed? What are the key challenges from the borrower/issuer perspective and what can be done to open up the market? And importantly, what does this mean for the future of sustainable finance? Click here to read more.

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TWIN PEAKS – TRANSITION FINANCE AND THE AGENDA FOR GROWTH

"Transition finance" has been in successive UK Governments' sights as an opportunity for the UK. An ambition to make the UK a global leader in transition finance was part of the Sunak Government's 2023 Green Finance Strategy. The Transition Finance Market Review (**TFMR**) was subsequently mandated in early 2024 to conduct an independent review of the barriers to scaling transition finance. This ambition has gathered momentum since the UK election.

Labour's vision for a "modern industrial strategy" earmarks the growth potential of the UK's financial services sector and notes its role in the race to net zero. The development of a robust transition finance market, with London at its heart, is an opportunity to scale the twin peaks of economic growth and effective decarbonisation.

In October 2024, the TFMR reported on its findings. Its report (the **Report**) articulates an ambitious range of strategies, policies, pathways and investment signals, all aimed at bringing investors and companies together such that volumes of "transition" finance increase. The Report is thoughtful and comprehensive, but not an easy read. This reflects the complexity of the task, which now sits with Government and other stakeholders to digest and take forward.

The TFMR's numerous recommendations will impact corporate funding options, in that the policy and financial sector response will shape capital flows. The Report looks at unlocking transition capital at "activity level" (specific purpose financing). It also looks at how the financial sector can support decarbonisation in the context of "entity level" general purpose financing, including for higher emitters.

Our latest Treasury Insights briefing considers the implications of the Government's ambitions for the "transition finance market" for finance and treasury teams, including the key elements of the Report's recommendations to consider monitoring or engaging with in more detail. Click here to read more.

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LOAN MARKET ASSOCIATION LAUNCHES DRAFT PROVISIONS FOR GREEN LOANS

On 7 November 2024, the Loan Market Association (**LMA**) published draft provisions for green loans, a set of template provisions for insertion into an LMA-based facility agreement to turn it into a green loan (the **Green Loan Drafting**).

While modelled on the LMA's previously published draft provisions for sustainability-linked loans (**SLLs**) (discussed in further detail in our Borrower's Guide to SLL terms), the Green Loan Drafting differs in a number of important respects, reflecting key differences between the two products – green loans being those where the proceeds are to be applied exclusively towards green projects, as compared with SLLs which have no restrictions on the use of proceeds, but where instead the margin is tied to the borrower's sustainability performance over the term of the loan measured against one or more KPIs.

Despite their differences, both sets of drafting share a common purpose – to promote drafting consistency, streamline negotiation and ensure that the documentation aligns with, and reflects, the requirements of the voluntary guidelines that underpin the relevant product market (being the Green Loan Principles for green loans and the Sustainability-Linked Loan Principles for SLLs).

The drafting in both cases is, however, a starting point only. In the absence of market consensus on a number of points, the Green Loan Drafting (much like the SLL drafting although perhaps to a lesser extent) contains a number of blanks, square brackets and placeholders, and will therefore need to be, and indeed is expected by the LMA to be, customised and negotiated on a case-by-case basis.

Despite this, the Green Loan Drafting is no doubt a positive step forward for the sustainable lending market, in particular given that green loans are often used to finance green projects that are of insufficient size to support a green bond issuance.

The drafting itself, for the most part, covers territory that is broadly familiar in the market, in terms of the provisions required to turn a facility agreement into a green loan. The devil, as ever, is however in the detail. Our recent client briefing explores the key features of the Green Loan Drafting, noting where the outstanding areas of negotiation lie and key points for corporate borrowers to keep in mind. Click here to read more.

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AS LIBOR COMES TO AN END, BENCHMARK TRANSITION EFFORTS CONTINUE

Over seven years after Andrew Bailey, the then Chief Executive of the FCA, set the LIBOR transition train in motion with his now infamous speech on the future of LIBOR, LIBOR is finally no more. On 30 September 2024, the final remaining synthetic USD LIBOR settings were published for the last time and with that LIBOR came to an end. This milestone came and went without much fanfare, other than a joint press release from the UK regulators to mark the occasion, testament to the colossal efforts of the regulators, industry associations, professional advisers and most importantly end users in ensuring a smooth transition away from LIBOR. The focus for these groups now turns to ensuring the continued use of the most robust reference rates for the ex-LIBOR currencies.

The end of LIBOR does not, however, signal the end of the benchmark transition project. Efforts to transition away from interbank offered rates continue in non-LIBOR currency jurisdictions around the world. By way of example, in Poland, a second public consultation aimed at selecting alternative indices to WIBOR has recently closed and in South Africa, work to transition away from JIBAR continues in full swing. The impact of all this on corporate treasury teams will ultimately depend on the jurisdictions in which they operate and the currencies in which they borrow.

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Benchmark transition efforts have taken a different turn in the euro market where EURIBOR looks set to be with us for some time yet. The focus in this space has been on future proofing documentation so that in the event EURIBOR is permanently discontinued at some point in the future, we do not face years of work to smoothly transition away from EURIBOR in the same way as we did for LIBOR. The Working Group on Euro Risk-Free Rates (the **Euro Working Group**) has been at pains to emphasise the importance of including robust fallbacks from EURIBOR in documentation entered into today.

In the loan market, the Euro Working Group has recommended that loans entered into today include a fall back in the event that EURIBOR is permanently discontinued to either (i) compounded €STR (being the euro risk-free rate) or (ii) term €STR (followed by a further fall back to compounded €STR). These alternative recommendations are both supported by drafting from the Loan Market Association (**LMA**). The LMA recommended form facility agreements now include, as the default position, a fallback from EURIBOR to compounded €STR via a rate switch mechanic in the event that EURIBOR is permanently discontinued. There is separate LMA drafting, still in exposure draft form at the time of writing, which documents the alternative recommendation of a two-step fallback from EURIBOR to term €STR in the first instance, followed by compounded €STR. See our previous briefing for a full discussion of the Euro Working Group recommendations and associated LMA drafting.

Despite the fact that the Euro Working Group recommendations were published over three years ago (followed by further guidance specifically for the corporate lending market published last year) and the fact that LMA drafting to support these recommendations has been available for some time now, implementation of the recommendations in the loan market remains low. It seems that the lack of a firm deadline for implementation set by the regulators, coupled with the fact that there is no indication that EURIBOR will be discontinued at any point in the near term, has resulted in a fair amount of inertia. Put simply, market participants do not see any immediate risk in maintaining the status quo of a fallback from EURIBOR to cost of funds rather than a more robust risk-free rate.

While it is hard to argue with this, it is worth pointing out that implementation of the Euro Working Group's recommendations entails limited risk for market participants – in fact, the recommendations seek to ensure that any fallback rate is robust and workable, in a way that it has been acknowledged for some time that cost of funds is not.

The LMA is acutely aware of the slow market uptake in this area and has set up a dedicated task force to consider how to tackle perceived barriers to implementation. It is working on a set of FAQs to tackle some common misconceptions, as well as a single currency euro facility agreement template to help with fallback implementation. It remains to be seen how far these initiatives will go in encouraging implementation of the Euro Working Group's recommendations. What is clear is that neither the regulators, industry associations, professional advisers nor ultimate end users, will be keen for a repeat of the near decade long project to transition away from LIBOR. In the eyes of the Euro Working Group, implementation of robust €STR-based fallbacks from EURIBOR is the key to avoid this.

First English judgment on LIBOR transition – Standard Chartered Plc v Guaranty Nominees Ltd & Others

On 15 October 2024, the High Court handed down judgment in a case brought under the Financial Markets Test Case Scheme by Standard Chartered in relation to perpetual preference shares issued by Standard Chartered in 2006, the terms of which used USD LIBOR to calculate dividends.

In the absence of a clear and unambiguous fallback in the terms of the preference shares following the cessation of synthetic USD LIBOR, Standard Chartered (advised by Slaughter and May) asked the Court to determine what reference rate should be used to calculate dividends on the preference shares going forward and, specifically, whether Term SOFR plus the ISDA spread adjustment was an appropriate alternative.

The Court agreed that it was, despite opposition from certain investors who argued the cessation of USD LIBOR required Standard Chartered to redeem the preference shares in full. Although the parties had not necessarily considered the complete cessation of LIBOR back in 2006, the Court concluded that they would have intended that a reasonable alternative rate be used in its place rather than LIBOR being so fundamental that the contract could not continue in its absence.

The judgment may provide much needed certainty for issuers with outstanding legacy LIBOR contracts with ambiguous or inadequate fallbacks. For further information, see our briefing here.

PROGRESS ON PROSPECTUS REFORMS: UK AND EU

The UK and EU prospectus regimes are in the process of being reformed, impacting issuers of securities listed on UK and EU regulated markets. The changes to both regimes represent targeted refinements for debt securities, however, in the UK, the form of the rules will change significantly with the UK Prospectus Regulation being repealed and replaced by the new public offers and admissions to trading regime. The UK prospectus regime reforms are expected to be finalised by the second half of 2025. Meanwhile, some reforms to the EU prospectus regime are already applicable following the EU Listing Act entering into force earlier in December. Below we look at the progress of the reforms, focusing on key highlights for issuers of debt securities.

> **The changes to both the UK and EU regime represent targeted refinements for debt securities, however, in the UK, the form of the rules will change significantly.**

The UK Prospectus Regime: FCA consults on its powers under new regime

On 26 July 2024, the Financial Conduct Authority (**FCA**) published a consultation paper (CP24/12) relating to the exercise of its powers under the new public offers and admissions to trading regime. The consultation follows the Public Offers and Admissions to Trading Regulations (**POATRS**) which were made by Parliament in January 2024 and provide a new framework to replace the UK Prospectus Regulation and give the FCA greater discretion to set new rules in this area (see our previous briefing on the POATRS here).

A summary of the key proposals from CP24/12 for the debt capital markets is set out below (please see our briefing for further detail):

- **Sustainability Related Disclosures in Prospectuses:** the FCA sets out specific proposals in relation to prospectuses for sustainability-labelled debt securities (both use of proceeds bonds and sustainability-linked bonds) which are mostly framed as voluntary disclosure rules to "preserve some flexibility for issuers".
- **Future Incorporation by Reference:** similar to what is proposed under the EU Listing Act (see below), the FCA proposes to allow future incorporation by reference of financial information in MTN base prospectuses, without the need to supplement.
- **Supplements:** the FCA proposes to allow more flexibility in what can be included in supplements for debt securities so that there are fewer cases where the prospectus has to be updated in its entirety or a drawdown prospectus has to be produced.
- **Prospectus Content Requirements and Summaries:** the content requirements for prospectuses remain broadly the same with some additional flexibility being proposed for summaries.
- **Protected Forward-Looking Statements:** details are set out in relation to how the new "Protected Forward-Looking Statements" regime will work - the regime establishes a different liability threshold (based on fraud or recklessness) for certain categories of forward-looking statements.
- **Further Issuances:** the FCA proposes to increase the threshold for triggering a prospectus for further issuances from 20 per cent. (of existing fungible securities) to 75 per cent. across all asset classes.
- **Retail Issuance:** the FCA had previously outlined plans for incentivising issuance of retail bonds and has stated that a further consultation will follow in the first quarter of 2025.

The EU Prospectus Regime: EU Listing Act enters into force and ESMA consults on further details

EU Listing Act enters into force

On 4 December 2024, a package of reforms known as the EU Listing Act (the **EU Listing Act**) entered into force (20 days after being published in the EU Official Journal). The EU Listing Act aims to make the EU public capital markets more attractive and facilitate the listing of companies of all sizes, including SMEs, on European stock exchanges.

The package comprises a regulation amending the EU Prospectus Regulation, the EU Market Abuse Regulation, EU MiFIR and a directive amending EU MiFID II and repealing the EU Listing Directive. It also introduces a new directive on multiple vote share structures. The changes to the EU Prospectus Regulation and EU Market Abuse Regulation will be of particular interest to issuers of debt securities.

Reforms are due to be implemented on a staggered basis. Some changes started to apply immediately following the EU Listing Act's entry into force on 4 December 2024. Other changes will apply 15 or 18 months later.

One key change for debt issuers that already applies is that issuers will no longer be required to publish a supplement to a base prospectus in order to update annual or interim financial information if it is within the 12-month validity period for base prospectuses (i.e. future incorporation of financial information will be permitted). Issuers may continue to publish supplements voluntarily for this purpose if they wish to do so.

Other changes that already apply include expansion of the existing prospectus exemptions, in particular the exemptions for issuance of fungible securities. These and other changes impacting the debt capital markets are discussed in further detail in our briefing.

ESMA consultation paper on technical advice related to the EU Prospectus Regulation

Several provisions in the EU Listing Act require the Commission to adopt delegated acts. As a result, in June 2024, the Commission requested technical advice from the European Securities and Markets Authority (**ESMA**). In October 2024, ESMA published a consultation paper relating to the content and format of prospectuses, including a building block of additional information to be included in prospectuses for non-equity securities that "are advertised as taking into account ESG factors or pursuing ESG objectives." Our briefing referred to above sets out the key highlights for the debt capital markets.

Further consultations are expected to follow on other aspects of the EU Listing Act in due course.

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KEY CONTACTS

If you would like to discuss any of the above in more detail, please contact your relationship partner or email one of our Treasury Essentials team.

You can find previous editions of Treasury Essentials here.

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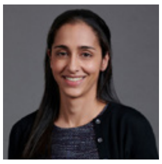

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