

A low-angle, upward-looking photograph of several modern skyscrapers with glass facades. The buildings are arranged in a way that they converge towards the top of the frame, creating a sense of height and scale. The sky is a deep blue with some white clouds. The lighting suggests it might be late afternoon or early morning, as the glass reflects a warm, golden light.

Linklaters

Banking Legal Outlook 2023

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As 2022 draws to a close, the Linklaters Banking practice looks back at key legal developments in the loan markets over 2022 and looks forward to those expected in 2023.



Key legal developments

LIBOR transition

On 4 January 2022, the Financial Conduct Authority published a statement noting publication had ceased for:

- > all euro and Swiss franc LIBOR settings;
- > the overnight/spot next, 1-week, 2-month and 12-month sterling and yen LIBOR settings; and
- > the 1-week and 2-month US dollar LIBOR settings.

The remaining 1-month, 3-month and 6-month sterling and yen LIBOR settings continued to be published on a synthetic basis for use in legacy contracts only. The synthetic yen LIBOR settings cease to be published at the end of 2022.

The process of transitioning existing contracts away from US dollar LIBOR continued over 2022. In relation to cash products, this process has been supported by the LIBOR legacy playbook published by the US Alternative Reference Rates Committee in July 2022.

For the position on US dollar LIBOR and sterling LIBOR, see the '[Outlook for 2023](#)'.

ICE Term SOFR

On 16 March 2022, ICE Benchmark Administration Limited announced that it had launched ICE Term SOFR Reference Rates for 1-month, 3-month, 6-month and 12-month tenors, using data from SOFR-linked interest rate derivatives. This offers market participants an alternative to CME Group's Term SOFR, which the US Alternative Reference Rates Committee recommended in July 2021.

New and updated Term SOFR drafting in Loan Market Association facilities agreements

On 12 October 2022, the Loan Market Association published a new exposure draft facilities agreement for the investment grade market in which interest on US dollar loans is calculated by reference to Term SOFR. The Term SOFR provisions are based on those contained in an existing exposure draft facilities agreement for use in developing markets which has also been updated.

EMMI launches euro forward-looking term rate, 'EFTERM'

On 14 November 2022, the European Money Markets Institute launched a new euro forward-looking term rate, 'EFTERM', for 1-week, 1-month, 3-month, 6-month and 12-month tenors. ICE Benchmark Administration Limited has been appointed as the calculation agent for the new rate.

National Security and Investment Act 2021

The National Security and Investment Act 2021 (the "**NSI Act**") came into force on 4 January 2022. It implemented a new screening regime for acquisitions of certain entities and assets located in, or which have a sufficient connection to, the UK.

There are two pillars to the regime. First, a mandatory notification regime in respect of the acquisition of control of entities active in 17 high-risk sectors. Second, a call-in power in respect of the acquisition of control of entities or assets which could pose a risk to national security. There are significant sanctions for non-compliance.

The NSI Act may impact loans funding the acquisition of relevant entities or assets and contractual provisions may be required to address certain risks. In June 2022, the Loan Market Association published updated recommended forms of security agreement for real estate finance transactions which limit the exercise of voting rights by a security agent where the NSI Act applies. The updated documents make clear that voting rights do not automatically transfer to the security agent upon the security becoming enforceable if that would give rise to a notifiable acquisition under the NSI Act. Equivalent changes have been adopted by the market in security documents for other types of transaction.



Register of overseas entities with an interest in UK real estate

The Economic Crime (Transparency and Enforcement) Act 2022 (the “**ECTEA**”) was passed on 15 March 2022. Among other things, this introduced a new register of overseas entities which own (having acquired since 1 January 1999 in England and Wales and since 8 December 2014 in Scotland) or wish to buy, sell, let (as landlord or tenant, for more than seven years) or grant security over UK real estate. Details of the ‘registrable beneficial owners’ of relevant overseas entities must be included on the register.

The register was created with effect from 1 August 2022 and new requirements designed to compel the registration of relevant overseas entities took effect on 5 September 2022. A transitional period applies until 31 January 2023, explained in more detail in the ‘**Outlook for 2023**’.

Failure to comply is a criminal offence, punishable by imprisonment or a fine (or both).

The regime has implications for all financings where an overseas entity grants security over UK real estate, whether or not that security is registered at the Land Registry.

Renewed focus on sanctions provisions

Wide-ranging sanctions imposed by the international community in response to the conflict in Ukraine led to a renewed focus on sanctions provisions often found in loan documentation.

Facilities agreements have typically included provisions addressing the risk that borrowers become the subject of sanctions. However, the entities sanctioned in response to the conflict in Ukraine include certain financial institutions that were active in the international syndicated loan markets.

Some facilities agreements now contemplate the potential for a lender or other finance party to become a sanctioned entity and it is common to see non-exhaustive lists of sanctioned jurisdictions expanded to include the ‘so-called people’s republics of Donetsk and Luhansk’.

Revlon decision on erroneous payments overturned on appeal

The *Revlon* litigation in the US determined whether lenders could retain a substantial payment from a facility agent made in error. An earlier decision that they could was overturned on appeal in September 2022.

The Loan Market Association published a recommended form of erroneous payment clause in June 2021 prior to the appeal. This clause provides express contractual protection for facility agents where an erroneous payment is made. Whether or not market participants choose to include it is unlikely to be affected by the earlier decision having been overturned on appeal.

New Loan Market Association model form credit risk insurance policy

In August 2022, the Loan Market Association published a model form credit risk insurance policy prepared with the assistance of the Lloyd’s Market Association and the International Underwriting Association. The model form concerns single borrower credit risk arising from a facilities agreement and has been prepared with reference to certain regulatory requirements for unfunded credit protection.

High Court decisions on the power of a sole director to bind the company

Two High Court decisions over the course of 2022 brought into question whether a sole director has the power to bind a company whose articles are based on the Model Articles.

In *Re Fore Fitness Investments Holdings Ltd, Hashmi v Lorimer-Wing* [2022] EWHC 191, the High Court held that a single director did not have the power to direct the relevant company’s actions. This was on the basis that the company’s articles of association, which were based on an amended form of the Model Articles, specified that the quorum of board meetings was two directors.

However, in a later decision in 2022, *Re Active Wear Ltd* [2022] EWHC 2340 (Ch), the High Court took a different view. Here the company had only ever had one director and its articles of association were based on the Model Articles in unamended form. The High Court held that in these particular circumstances, a sole director did have the power to manage the affairs of the company.

It is prudent when dealing with a sole director company with articles of association based on the Model Articles to make amendments to clarify the power of the sole director to bind the company. It may also be appropriate to ratify actions taken by the sole director before those amendments are made.



Loan Market Association ESG initiatives in 2022

The Loan Market Association pursued a wide range of ESG-related initiatives throughout 2022.

In March 2022, minor updates were made to the Sustainability-Linked Loan Principles and accompanying Guidance, which now “recommend” rather than “encourage” borrowers to seek input from an external third party as to the appropriateness of ESG KPIs and related targets. Also in March 2022, new guidance was published on the application of the Sustainability-Linked Loan Principles to Real Estate Finance transactions.

In July 2022, the Loan Market Association published its Introduction to the Sustainability Coordinator Role. This highlighted the varied scope of the role as well as documentary points to consider, such as whether it is appropriate to include protections for sustainability coordinators similar to those afforded to other finance parties.

The Loan Market Association also released a series of articles over the summer of 2022 intended to protect the integrity of sustainability-linked loans which focused largely on the selection of robust and material KPIs and related targets. The Loan Market Association announced the launch of a joint article with CarbonChain exploring how the sustainability-linked loan product can be used in trade finance in November 2022.

The LMA’s ESG initiatives were not limited to the sustainability-linked loan market. New Guidance on the Social Loan Principles was released in March 2022. This is to be read alongside the Social Loan Principles which were published in April 2021. The LMA also published new Guidance for Green, Social and Sustainability-Linked Loans External Reviews in March 2022. This explains the types of ESG external review available to the market together with minimum ethical and professional standards for the organisations providing these reviews. In October 2022, the LMA announced the launch of its second edition of the Guide for Company Advisers to ESG Disclosure in Leveraged Finance Transactions, produced in conjunction with the European Leveraged Finance Association.

Basel 4 implementation

The Basel Committee on Banking Supervision published the Basel 3.1 standards, commonly referred to as Basel 4, on 7 December 2017. The new standards are expected to increase regulatory capital requirements, particularly for certain larger firms, and will require adjustments to processes and systems accordingly. Among other things, the new standards (i) make changes to the standardised approach to credit risk which will affect reliance on external ratings, the treatment of real estate loans, undrawn commitments and certain specialised lending activities and (ii) reduce the ability to use internal models for certain exposure types and the benefits of using internal models more generally as opposed to using the standardised approach.

Basel 4 was originally expected to be implemented from 1 January 2022 (subsequently delayed to 1 January 2023 due to Covid-19), but is now set to be introduced from 1 January 2025 in the EU and UK. In the EU, this will be achieved through CRR3. In the UK, the Prudential Regulation Authority and HM Treasury are consulting on the implementation of the new standards. The consultation which contains the substantive Basel 4 rules closes on 31 March 2023.

See also the ‘[Outlook for 2023](#)’.

Outlook for 2023

LIBOR transition

Publication of the remaining US dollar LIBOR settings ceases immediately after 30 June 2023. The Financial Conduct Authority is consulting on whether to require LIBOR's administrator, ICE Benchmark Administration Limited, to publish 1-month, 3-month and 6-month US dollar LIBOR settings on a synthetic basis until the end of September 2024.

Publication of the 1-month and 6-month synthetic sterling LIBOR settings will cease immediately after 31 March 2023. The Financial Conduct Authority intends to continue to require ICE Benchmark Administration Limited to publish the 3-month synthetic sterling LIBOR setting until the end of March 2024.

See also the '[Key legal developments](#)'.

€STR-based fallbacks to EURIBOR

The working group on euro risk-free rates recommended in May 2021 that market participants include €STR-based fallbacks in relevant agreements. However, those recommendations did not lead to a widespread change in practice in the syndicated loan markets.

Revised terms of reference for the working group published in February 2022 stated that, among other things, the working group is expected to foster interest rate reform in the EU by identifying potential impediments to the timely adoption of EURIBOR fallback provisions by EU supervised entities and to put forward recommendations and best practices to assist in overcoming such impediments. It is possible that further recommendations and guidance will be published by the working group in 2023 accordingly.

End of transitional period under the Economic Crime (Transparency and Enforcement) Act 2022

The Economic Crime (Transparency and Enforcement) Act 2022 (the "**ECTEA**") provides for a transitional period until 31 January 2023. Overseas entities which own UK real estate must apply to join the new register maintained by Companies House where the UK real estate was acquired on or after 1 January 1999 in England and Wales (or 8 December 2014 in Scotland) and before 1 August 2022. Failure to do so is a criminal offence, punishable by imprisonment or a fine (or both).

The ECTEA also includes anti-avoidance provisions designed to prevent an overseas entity from avoiding the disclosure requirements of the ECTEA by disposing of UK real estate between the date the draft legislation was first introduced on 28 February 2022 and the end of the transitional period on 31 January 2023.

See also the '[Key legal developments](#)'.

Replacement of TARGET2

The real-time gross settlement system for euro, TARGET2, will be replaced by a new system called T2 on 20 March 2023. Definitions of TARGET2 in facilities agreements have evolved accordingly and it is likely that the Loan Market Association will update its recommended forms of facilities agreements in time.





Changes to pensions notifiable events regime

The notifiable events regime imposes obligations on a trustee and employer (and in certain cases others) to notify the UK's Pensions Regulator of certain events and activities. The regime exists to provide the Pensions Regulator with early warning of possible calls on the Pension Protection Fund.

It is expected that the notifiable events regime will be extended to include three new notifiable events, requiring companies with defined benefit pension schemes to notify the Pensions Regulator of:

- > any decision in principle to grant relevant security which would result in the secured creditor being ranked above the pension scheme in the order of priority for debt recovery;
- > any decision in principle to dispose of more than 25 per cent of the company's business or assets; and
- > any decision in principle to effect a change in control of the company.

Failure to notify could result in a civil penalty of up to £1,000,000.

The changes may be relevant on transactions involving companies which have a defined benefit pension scheme which is in deficit.

Changes to the UK's leverage, liquidity and capital rules and preparations for the implementation of Basel 4

Changes to the UK's leverage ratio framework and related reporting and disclosure requirements take effect on 1 January 2023. Among other things, a wider group of UK banks will be subject to a binding leverage ratio requirement (rather than just a reporting requirement).

The Prudential Regulation Authority has announced certain changes to the liquidity coverage ratio and net stable funding ratio frameworks expected to be made in the first half of 2023.

The Prudential Regulation Authority has also made its previously announced supervisory expectations in respect of the quality and simplicity of UK banks' and certain investment firms' Common Equity Tier 1 (or CET1) capital structures stricter, effective from 1 January 2023.

Market participants are also set to continue preparations for the implementation of Basel 4 from 1 January 2025. The Prudential Regulation Authority and HM Treasury are consulting on the implementation of the new standards. The consultation which contains the substantive Basel 4 rules closes on 31 March 2023.

See also the 'Key legal developments'.

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