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UK Securitisation Regulation: A New Era

The UK's proposed revocation of the current UK Securitisation Regulation and replacement with new UK rules is expected to come into force on 1 November 2024. The final rules from the regulators and amendments to the Securitisation Regulations 2024 were unveiled in late April, providing firms with a six-month window to familiarise themselves with the new regulatory landscape. This article explores the new framework and key departures from the current UK and EU frameworks.

A Smarter Securitisation Regulation

The UK Securitisation Regulation is part of the first wave of financial services regulation based on EU assimilated laws to be revoked and replaced by a new framework. This is part of the UK Government's proposal to build what is dubbed the "smarter regulatory framework" for financial services. The new regime represents a significant shift in the way that securitisation is regulated in the UK, by placing power to make and adjust rules in the hands of the regulators. This grants the Financial Conduct Authority ("**FCA**") and the Prudential Regulation Authority ("**PRA**") considerable power, and also flexibility – by contrast to the EU legislative framework where the European Supervisory Authorities cannot deviate from positions taken in the "level 1" text, the FCA and PRA will be able to adjust and evolve the rules through a process of consultation as the market develops and new factors arise.

The existing UK Securitisation Regulation is made up of the EU Securitisation Regulation¹ as amended by various statutory instruments² and the binding EU technical standards that were in existence on IP completion day³. These rules and regulations will be repealed entirely and replaced by the new framework, which is through a combination of primary and secondary legislation and regulator rules.

The Financial Services and Markets Act 2023

The Financial Services and Markets Act 2023 ("FSMA 2023"), which received Royal Assent on 29 June 2023, introduced amendments to The Financial Services and Markets Act 2000 (together, "FSMA"). FSMA will eventually revoke the body of EU retained (now assimilated) laws governing financial services and replace them with the new regulatory framework.

Additionally, FSMA 2023 established the designated activities regime ("DAR") and granted HM Treasury powers to designate certain activities relating to financial markets, exchanges, instruments, products, or investments to be subject to the DAR in secondary legislation. The DAR permits the FCA to supervise entities undertaking activities which are regulated, but where the entity does not require an authorisation from the regulator – an example is SME lending, which is not a regulated activity in the UK but where the originator of a SME ABS would be subject to supervision by the FCA in acting as an originator. The DAR is again a flexible regime, with the FCA having powers to adjust or permit derogations from the rules as appropriate to the circumstance.

FSMA 2023 also contains transitional amendments to certain assimilated EU laws, including the UK Securitisation Regulation, which permit the Treasury to designate other jurisdictions as overseas STS.

The Securitisation Regulations 2024⁴ ("SR 2024 SI")

The SR 2024 SI, enacted on 29 January 2024, designated the following activities as "designated activities" under FSMA:

- acting as an originator, sponsor, original lender or securitisation special purpose entity ("SSPE") in a securitisation; and

- selling a securitisation position to a retail client located in the United Kingdom.

The SR 2024 SI also:

- grants powers to the FCA to make rules relating to the securitisation designated activities and introduced a power of direction for the FCA in relation to authorised and unauthorised firms which are subject to the DAR. The FCA will be able to make specific directions to firms if rules are breached or likely to be breached;
- maintains the regulatory regime for securitisation repositories and third-party verifiers; and
- sets out the STS framework for UK STS securitisations.

The SR 2024 SI will permit an originator, sponsor or SSPE to designate a securitisation as STS where such securitisation is:

- an STS securitisation in the UK – such securitisation must meet the STS criteria set out in the FCA rules;
- a qualifying EU securitisation – these are EU STS securitisations which complied with the relevant EU Securitisation Regulation rules and were notified to the European Securities and Markets Authority (ESMA) prior to 11pm on 31 December 2024 and included on the ESMA STS list; and
- an overseas STS securitisation – such securitisation may only qualify once the Treasury has made regulations to designate that STS securitisations from that jurisdiction may be recognised as an "overseas STS securitisation".

Commencement

The Securitisation (Amendment) Regulations 2024 (the "Amendment SI") were made on 22 May 2024 which amends the SR 2024 SI. The Amendment SI specifies that the "main commencement day" for the rest of the provisions of the SR 2024 SI will occur on 1 November 2024.

The Amendment SI also sets out the prohibition on establishing a SSPE in a high-risk jurisdiction and due diligence requirements for occupational pension schemes. These provisions had been included in the draft form of the SR 2024 SI but were removed before that statutory instrument was laid in January so that the provisions could be consistent with the FCA and PRA rules which had not been finalised at that time.

Regulator rules

On 30 April 2024, the FCA and PRA released the final form of their rules on securitisation⁵. These rules contain the firm-facing requirements which apply to the entities which are regulated by those regulators and, by virtue of DAR, firms which undertake the securitisation designated activities.

The PRA's rules apply to PRA-authorized firms in respect of due diligence, risk retention, transparency, resecuritisation and credit granting requirements. The FCA rules apply to, among others, all "institutional investors" and "manufacturers" (which include the original lender, originator, sponsor and SSPE of securitisations) established in the UK, plus securitisation repositories and third-party verifiers. The FCA rules do not apply to PRA-authorized firms in respect of the areas that are covered in the PRA Rulebook.

Key Changes

The regulators' rules generally aim to maintain the current provisions of the UK Securitisation Regulation and align with the EU rules that came into effect post-IP completion day. While the regulators have refrained from making substantial policy changes, they have introduced some clarifications that will be welcome to market participants.

Firms may find it easier to follow rules laid out in the FCA Handbook and PRA Rulebook. Instead of searching for the "level 1" text as incorporated into UK law and numerous separate technical standards, the FCA and PRA rules will encompass most of the rules and guidance around securitisation. One drawback is the duplication of several rules between the FCA and PRA rules, and the due diligence obligations for occupational pension schemes will be contained in the SR 2024 SI (as amended by the Amending SI) because occupational pension schemes are not subject to supervision by the FCA or PRA. For transactions involving FCA regulated entities and PRA-authorized firms, both sets of rules will need to be considered. While the two sets of rules are largely similar, they are not identical, and potential divergence due to differing technical interpretations between the two rules remains to be seen. However, the regulators are required to have an objective of consistency in implementation of the rules.

The following sections delve into some of the key changes and clarifications to be introduced by the new rules.

Due Diligence

UK investors will no longer be required to verify that the originator, sponsor and SSPE are producing Article 7 reporting on the required templates. UK investors are currently required under the UK Securitisation Regulation⁶ to verify that Article 7 information has been made available in accordance with the frequency and modalities specified in Article 7. If the originator, sponsor or SSPE is established outside the UK, investors are required to verify that those entities have "where applicable" made available information which is "substantially the same" as that which would have been made available under Article 7 if such entities were established in the UK. Under the EU rules, an EU investor has to verify that the originator, sponsor or SSPE (wherever incorporated) has "where applicable" made available the Article 7 information.

This has long been a long-standing issue for UK and EU investors investing in non-UK and EU securitisations, as one interpretation of the rules requires foreign securitisations to comply fully with the Article 7 requirements, including reporting on the specified templates and disclosure to the reporting websites. Others have interpreted the reference to "where applicable" as effectively excluding foreign securitisations. The UK rules, post-Brexit, introduced some helpful clarifications but did not go far enough.

The new rules, however, will change the diligence requirement to a principles-based approach. Investors will need to ensure that the originator, sponsor or SSPE (wherever they are established) has made and has committed to make certain information available at the specified frequencies, but will no longer require the information reporting to be on the UK specified templates.

While this change offers more flexibility to investors, it's important to note that UK originators, sponsors and SSPEs will still need to comply with the separate transparency obligations to report on the relevant templates (see further below).

A new distinction between primary and secondary market investments will also be introduced. The original rules, seemingly drafted with primary investors in mind, required investors in secondary market securitisation positions to verify all the Article 7 reporting (which includes the requirement to make available transaction documents, prospectus and STS notification "before pricing"). The new rules will specify that for secondary market investments, investors only need to verify that those items have been provided in final form.

1. Regulation (EU) 2017/2402
 2. The form of the UK version of the Securitisation Regulation can be found [here](#).
 3. As at 11pm on 31 December 2020.
 4. SI 2024/102
 5. PS24/4 and PS7/24.

6. Article 5(1)(e) and (f) of the UK Securitisation Regulation.



Overseas AIFMs

A noteworthy and helpful detail for the funds industry is the revised definition of "institutional investor" in the SR 2024 SI and the PRA Rulebook. This narrows the scope of the definition as it relates to Alternative Investment Fund Managers ("AIFMs"), meaning that the UK due diligence requirements for investing in securitisations will only apply to UK authorised AIFMs. Non-UK authorised AIFMs investing in securitisations will no longer be subject to the due diligence requirements. This has implications for existing delegation arrangements. The new rules permit that where an institutional investor has delegated authority to another institutional investor (a "managing party") to make decisions to invest in a securitisation, the managing party will have the responsibility for complying with the due diligence requirements (rather than the delegating institutional investor).

The regulators clarified in their policy statements that the transfer of responsibility for compliance will only apply under the circumstances outlined in their rules, ie to another "institutional investor". Therefore, if a UK AIFM delegates responsibility for compliance with the due diligence rules to a non-UK AIFM, the responsibility will remain with the delegating party, as the latter is not considered an "institutional investor". Delegating parties will need to either find a new managing party or accept that responsibility for compliance does not shift.

Risk Retention

The new risk retention rules will align with some of the rules contained in the final EU Risk Retention RTS from July 2023⁷, and amendments to the EU Securitisation Regulations⁸ which were implemented in the EU post-IP completion day (ie after the UK's exit from the EU was complete). This alignment is particularly helpful given that the current risk retention RTS applicable in the UK is the old EU Capital Requirements Regulation RTS (the "UK CRR Risk Retention RTS")⁹ as there were no final EU rules on risk retention on IP completion day.

The new UK rules will permit the risk retainer in a non-performing exposure ("NPE") securitisation to hold the risk retention piece by reference to the net value of the NPE, ie by reference to the non-refundable purchase price discount applicable to the underlying exposures. However, unlike the EU rules, the UK rules will not permit the servicer of a NPE securitisation to hold the risk retention.

While the UK rules will allow for a change in the risk retainer in the event of the retainer's insolvency, they will not permit a transfer of the risk retention where the retainer is unable to continue acting as a retainer for legal reasons beyond its control and control of its shareholders. The rules will continue to maintain the rigidity around the ability to change the risk retainer as a result of, for example, a business restructuring or reorganisation of a risk retainer entity or its group. Despite requests for increased flexibility, regulators have declined to make changes, but

have noted that these suggestions may inform future policy development.

The FCA and PRA rules adjust the considerations regarding the sole purpose test. The EU rules require that all of the considerations (around wider business strategy and governance) need to apply in order for an entity not to be considered a sole purpose originator. By contrast, the FCA and PRA rules refer to the considerations to be "taken into account" when assessing the sole purpose test. However, the UK rules also omit the reference in the EU rules to an entity relying on the securitised exposures and retained interests "as its sole or predominant source of revenue". Overall, the adjustment to the UK rules should provide a measure of helpful flexibility in interpretation of the rules, but we do not expect the substantive outcome to change in most cases. As part of the overall application of the regulatory handbooks, a purposive approach remains appropriate in considering the effect of the rules.

The FCA and PRA rules introduce a requirement for the retainer to disclose to investors in the prospectus or transaction summary information relating to the risk retention. This includes the identity of the risk retainer, whether it retains as originator, sponsor or original lender, the modalities of the risk retention, the level of the retention at origination and commitment to retain on an ongoing basis. While this type of disclosure broadly reflects market practice, the rules now also expressly require disclosure of how an originator retainer meets the sole purpose test. The market's response to this particular

disclosure requirement in future prospectuses will be interesting to observe.

Transparency

The forthcoming transparency rules will largely mirror the current UK Securitisation Regulation, with the reporting templates remaining the same as the current templates¹⁰, barring some limited drafting changes.

The new rules provide helpful clarification regarding the obligation to provide documentation "before pricing". This language, present in both the UK and EU Securitisation Regulation, has been problematic due to its inapplicability to private transactions, which lack a separate "pricing" date. Additionally, in public securitisations, documents often are not in their final form prior to pricing.

To date, market participants have navigated this regulatory gap by interpreting "pricing" in private securitisations as the signing date for the transaction documents. For public securitisations, the industry has typically front-loaded the work to agree on near-final form transaction documents pre-pricing, rather than leaving some of the work to finalise documentation between pricing and closing.

The new UK rules will specify that the relevant documentation must be made available "before pricing or original commitment to invest in draft or initial form". Final versions of the relevant documentation will be made available at the latest 15 days after the closing of the transaction. This clarification addresses the disclosure requirement for private

securitisations, which do not have a "pricing" date, and also allows "draft or initial form" documentation to be made available. It will be interesting to see whether market practice will shift in terms of agreeing on near-final form transaction documents prior to pricing, given the new flexibility in the rules. This may depend on whether full compliance with both EU and UK rules is required at the outset, or if compliance is sought on a best or reasonable endeavours basis.

The EU and current UK rules allow the originator, sponsor and SSPE to provide a summary of the transaction documents instead of the documents themselves. This specific flexibility has not been carried over into the new UK rules. However, this reflects market practice where market participants typically prefer to disclose the full transaction documents rather than a summary in any case.

STS

The STS criteria will be contained in the FCA Handbook only. All relevant firms (including PRA-authorized firms) will therefore need to refer to the FCA rules for STS compliance.

The new rules maintain that a UK securitisation can achieve STS status if only the originator or sponsor are established in the United Kingdom. This offers greater flexibility compared to the EU rules, which require the originator, sponsor and SSPE to be established in the EU. Consequently, securitisations can achieve UK STS status even if the SSPE is established in, for example, Luxembourg or

Ireland, provided the originator/sponsor are established in the UK.

As mentioned above, EU STS will continue to be recognised as UK STS until 31 December 2024, and HM Treasury has the power to recognise overseas STS as UK STS. This may eventually broaden the options for UK investors in EU or overseas STS in the future, a benefit not reciprocated for EU investors in UK STS securitisations.

However, the new UK rules do not permit synthetic securitisations to achieve STS status, marking a significant divergence from the EU rules. HM Treasury indicated in its 2021 Treasury Report¹¹ that it and the regulators were not currently inclined to introduce synthetic STS in the UK.

Public/Private Securitisations

Market participants had hoped for clarification in the new UK rules for the definitions of public and private securitisations. However, the FCA and PRA have stated they will not include any changes in the current rules but plan to review this in a second consultation.

A "private" securitisation in the UK rules will continue to refer to a transaction where there is no FCA-approved prospectus. Where a UK public securitisation has notes listed in the EU (eg in Ireland, which is a common approach), such transaction is therefore technically a "private" securitisation because the prospectus would not be approved by the FCA. This creates an odd outcome in the UK rules where UK public securitisations treated as "private" because they have an EU listing do

7. Commission Delegated Regulation (EU) 2023/2175 of 7 July 2023.
 8. Implemented under Regulation (EU) 2021/557 of 31 March 2021.
 9. Commission Delegated Regulation (EU) No 625/2014 of 13 March 2014.

10. ie the Commission Delegated Regulation (EU) 2020/1224 and Commission Implementing Regulation (EU) 2020/1225 (the "Disclosure RTS and ITS").
 11. HM Treasury's Review of the Securitisation Regulation: Report and call for evidence response from December 2021.

not technically require disclosure via a UK securitisation repository. Where the UK securitisation also involves a UK originator, sponsor and SSPE, it is also not subject to the EU Securitisation Regulation. Market participants have therefore approached the use of a securitisation repository in the EU and the UK differently for such transactions, disclosing on both repository websites, just one of the relevant repository websites, or neither.

The joint PRA and FCA statement on the reporting of private securitisations under regulation 25 of the Securitisation Regulations 2018 currently requires a UK originator, sponsor or SSPE of private securitisations to provide a notification to the FCA or PRA (as relevant) in the format of the relevant template. The transitional provisions in the SR 2024 SI specify that any directions given under regulation 25 of the Securitisation Regulations 2018 will remain in force following the main commencement day for the new UK rules unless revoked, so for now the familiar private securitisations notification will continue to apply.

Transitional Provisions

Post- 1 November 2024

The FCA and PRA rules are stated to come into force on 1 November 2024, and they will only apply to securitisations (or new securitisation positions) on and from that date. The reference to new "securitisation positions" means that if market participants are amending existing securitisations from 1 November 2024, they will need to consider whether a new "securitisation position" has

been created, in which case the new rules would become applicable.

1 January 2019-31 October 2024

For securitisations between 1 January 2019 and 31 October 2024 (ie "pre-revocation securitisations"), the current UK rules will still apply. This includes the current UK Securitisation Regulation, the UK CRR Risk Retention RTS and the Disclosure RTS and ITS which applied prior to IP completion day. However, the rules specify that the change in the definition of "institutional investor" to refer to UK AIFMs, will apply to pre-revocation securitisations.

Pre-2019 transactions

Although this will not be relevant for most transactions at this point, the rules also contain transitional provisions that largely preserve the existing regime for pre-2019 securitisations.

STS

An STS transaction that was on the FCA STS list immediately prior to 1 November 2024 will continue to be STS, subject to the FCA's right to remove a transaction from the STS list for non-compliance.

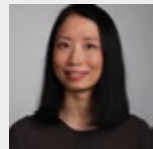
Next Steps

The new rules are expected to come into force on 1 November 2024. However, HM Treasury must pass a commencement order to bring into force the revocation of the current UK Securitisation Regulations and related technical standards, which have not yet been laid. It is anticipated that HM Treasury will make this commencement order later this

year. Both the FCA and PRA have specified in their policy statements that they will consider delaying or revoking the rules if the commencement order is not made.

The FCA and PRA also plan to consult on further changes to the securitisation rules in Q4 2024 / Q1 2025. This will include, among other things, a review of the definition of public and private securitisations, the reporting regime and ESG reporting.

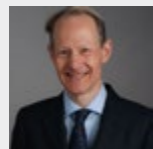
Your Key Contacts



Charlene Kong
Of Counsel,
London
T +44 20 7466 2782
charlene.kong@hsf.com



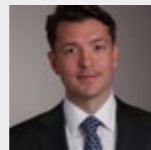
Michael Poulton
Partner,
London
T +44 20 7466 2777
michael.poulton@hsf.com



Jake Jackaman
Partner,
London
T +44 20 7466 2883
jake.jackaman@hsf.com



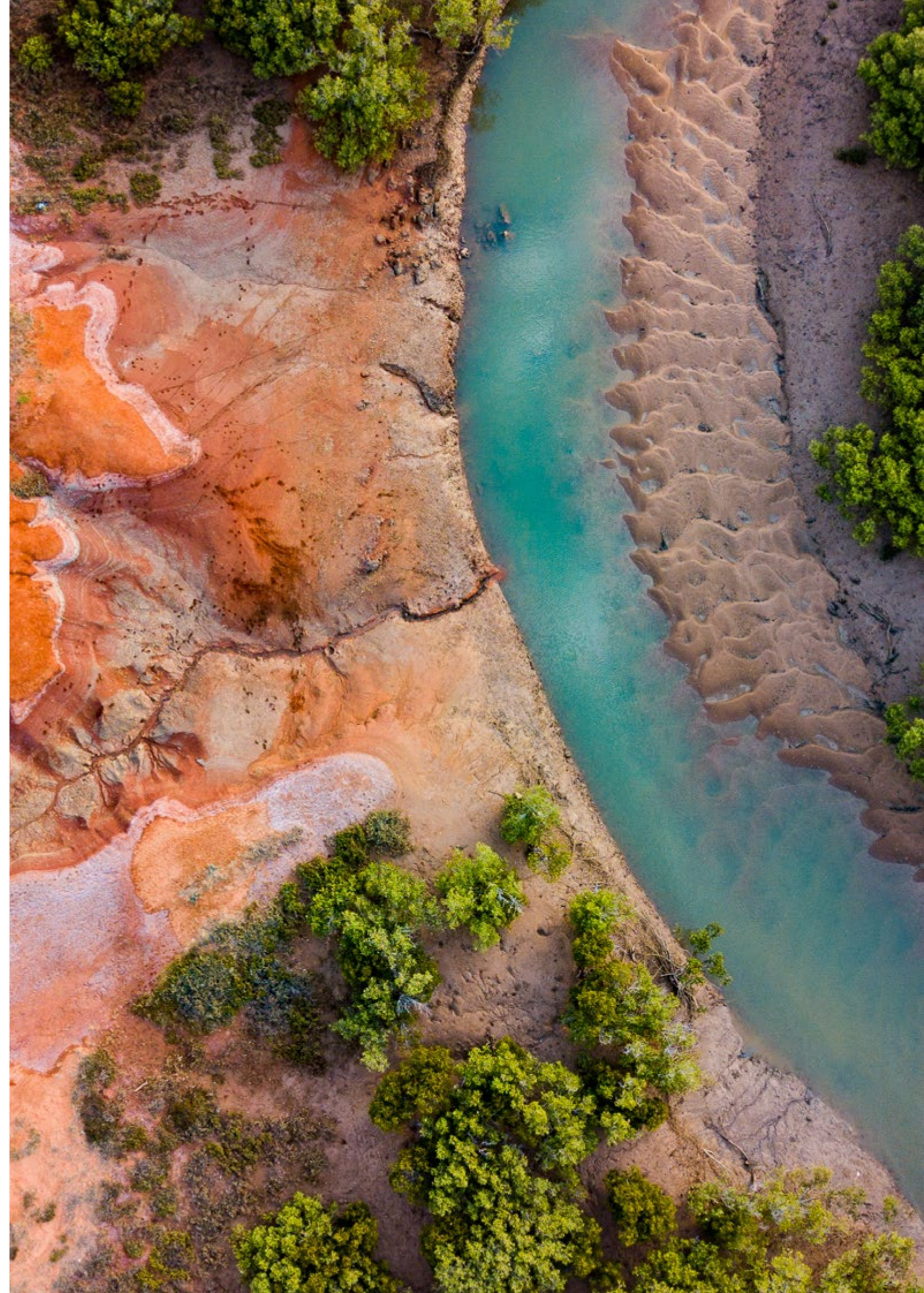
Joy Amis
Partner,
London
T+44 20 7466 2840
heike.schmitz@hsf.com



Ben Baker
Senior Associate
London
T +44 20 7466 3533
benjamin.baker@hsf.com



Victoria Salisbury
Associate,
London
T +44 20 7466 2643
victoria.salisbury@hsf.com



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