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ICMA response, regarding bearer bonds, to Law Commission consultation paper *Digital assets: electronic trade documents*

The International Capital Market Association (ICMA) welcomes the above consultation and sets out its response to it in the annex to this letter.

ICMA promotes well-functioning cross-border capital markets, which are essential to fund sustainable economic growth. It is a not-for-profit membership association with offices in Zurich, London, Paris, Brussels, and Hong Kong, serving around 600 member firms in 60 countries. Among its members are private and official sector issuers, banks, broker-dealers, asset managers, pension funds, insurance companies, market infrastructure providers, central banks & law firms. It provides industry-driven standards and recommendations, prioritising four core fixed income market areas: primary, secondary, repo & collateral and sustainable finance. ICMA works with regulatory and governmental authorities, helping to ensure that financial regulation supports stable and efficient capital markets.
www.icmagroup.org

This response is primarily drafted on behalf of ICMA's primary market constituency comprised of underwriters that lead-manage cross-border syndicated bond issuance transactions throughout Europe and beyond. This constituency deliberates principally through:

- the [ICMA Primary Market Practices Committee](#), which gathers the heads / senior members of lead-managers' syndicate desks; and
- the [ICMA Legal and Documentation Committee](#), which gathers the heads / senior members of lead-managers' legal documentation / transaction management teams.

We would be pleased to discuss the ICMA response at your convenience.

Yours faithfully,



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Annex

ICMA notes:

- the Law Commission's focus on the provision of electronic title (where there is exclusive electronic access) for certain instruments that currently only exist under English law in physical bearer form (such as bills of lading); but
- that the provisional proposals do not include bearer bonds at least partly on the basis that "*In preliminary discussions with stakeholders, we were told that bearer bonds should not be part of this list as their legitimate commercial use has diminished and there was no call for them to be made electronic.*"

In this respect, ICMA notes that English-law bearer bonds are significantly used in the context of the international (Eurobond) markets¹ – albeit in immobilised global form (as briefly referenced in #3.76), notably held by a common depository or common safekeeper for the two International Central Securities Depositories (ICSDs), Euroclear and Clearstream.

It might seem surprising that market participants continue to favour what might appear to be relatively primitive paper/ink technology. However, English law bearer bonds are trusted to have a robust basis in the context of conflicts of laws that are relevant in a multi-jurisdictional environment and may also benefit from certain legacy regulatory advantages. Transitioning to a different form would require relevant participants to re-consider all the parameters – i.e. legal due diligence across relevant jurisdictions. However, bond issuance is conducted today on a highly competitive and commoditised basis, with tight timelines (often intra-day) and thin margins – leaving little capacity to focus on changes unless they are significant from a cost/benefit perspective (including further to legal/regulatory developments). Investors have finite time/resource to analyse the value of a new transaction and a borrower would not wish to unnecessarily make an investor's analysis of its offering more complicated than other bond offers. (Nor would a borrower wish to unnecessarily complicate decision-making for its own internal management.)

That said, ICMA is aware that undertaking physical custody of global bearer bonds is increasingly seen by some as an anachronistic burden – with COVID restrictions (e.g. impacting staff managing depository vaults) having further complicated delivery and acceptance into custody. In this respect there has been some initial consideration around how electronic custody / exclusive control might operate in relation to English law bearer bonds, but without any definite conclusion that ICMA is aware of.

The Law Commission's work should therefore include bearer bonds. English law bearer bonds are not the only form used in the international markets, but the availability of robust alternatives for market participants is a key component of market efficiency.

Incidentally, the consultation paper notes there are two types of bonds – bearer or registered. It may be worth recalling that these two forms are variants of 'materialised' bonds, with 'dematerialised' bonds being a distinct further form. The consultation paper also notes bearer bonds as the preferred form if bondholders wish to remain anonymous – this no longer quite the case, as immobilised bonds involve the same account entry procedures (including regulatory checks) for clearing system participants (and sub-custodians) regardless of their bearer (as narrated in #3.76) or registered form.

¹ The EMEA market segment had a turnover of circa USD 2.2 trillion in new capital raising in 2019 (Source: Dealogic 2019 full-year EMEA DCM volume).