



DIGITAL DEVELOPMENTS IN THE CAPITAL MARKETS – SUMMER 2021

- THOUGHT LEADERSHIP

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Blockchain and distributed ledger technology (DLT) have the potential to transform how securities are issued, traded and settled. However, the adoption of technology in the capital markets has not matched take-up in other areas of finance and trade and, so far, is used for enhancing existing elements of the process rather than replacing it with something new. In this briefing we explore the reasons for this and share our experience of some of the developments in this area and other uses of technology in the capital markets.

Traditional structures and new technologies

Conceptually, a bond is a straightforward instrument: an investor agrees to lend the issuer money for a specific period and in return for doing so the investor receives interest payments until the bond reaches its maturity date, at which point the issuer repays the principal amount of the bond. However, underlying this simple arrangement is a complex legal structure and process.

In many jurisdictions it is necessary to separate the legal and beneficial ownership of the security in order to facilitate its convenient issue and trading on a cross-border basis through the international central securities depositories (ICSDs). As a result, a lengthy chain of custody may exist between the legal owner of the bond (usually a financial institution acting as a common depositary or safekeeper) and the ultimate beneficial owner (the investor). The legal analysis of ownership in this structure becomes critical when an investor needs to assert its legal rights or take enforcement action against the issuer and/or third parties.

Further complexity is added in respect of payment and information flows from the issuer to the paying agent and ICSDs, through to the custody chain and finally on to the investor. Practical issues arise in terms of timing, with prescribed periods for various actions, from those relating to payment of funds and interest to corporate actions, such as the giving of notices or the exercise of holders' rights. This intricate web of custody arrangements and intermediaries leads to costs at many levels in the security's structure, including custody, clearing and agency fees, which are borne by market participants.

Innovators see the current securities issuance process as ripe for refinement through technology. Some commentators have argued for a complete overhaul of market infrastructure using DLT, and believe that it could remove the need for ICSDs entirely, resulting in what is commonly referred to as a "native digital bond" (see Glossary and Terminology).

There have been significant developments in this respect. Recently, the Union Bank of the Philippines successfully completed a "proof of concept" for the issuance of a retail bond on a digital platform leveraging blockchain technology for bond tokenisation, and in April 2021 the European Investment Bank issued a tokenised bond which innovatively made use of a digital Euro provided by the Banque de France for the cash settlement leg. In other cases, a more limited use of technology has been adopted and specific elements of the bond issuance process have had a tech makeover, with efforts to streamline document production and the custodian and agent interface.

This activity is promising, although most of the examples so far have been test cases, with digital bonds issued in sandbox experiments and as proof of concept exercises, designed to showcase the technology's potential, rather than being applied at a commercial level and on a widespread basis. The market has yet to see a native blockchain bond, with most issuances so far relying on the use of a tokenised security, which means that elements of the traditional structure and custody arrangements remain in place (see Glossary and Terminology).

GLOSSARY AND TERMINOLOGY

Blockchain

A type of DLT in which the data is set out and built up in successive blocks, where each new block of data verifies the content of the previous block. It is known for being the technology underlying Bitcoin but has been integrated into many other transaction and asset types. Most NFTs (as discussed below) are minted on the Ethereum blockchain.

Cryptoasset

A digital asset created using cryptography. Cryptocurrencies are a subset of cryptoassets with money-like functionality. The term token is often used synonymously with cryptoasset.

Distributed ledger technology (DLT)

DLT is a decentralised peer-to-peer data storage system where participating computers (known as nodes) hold and maintain identical copies of the ledger. Data integrity is achieved through public-private key cryptography, so that an individual node cannot tamper with the information recorded in the ledger by rewriting the transaction.

Non-fungible token (NFT)

An NFT is a unique cryptoasset that represents rights to an underlying "tokenised", often digital asset, which is created and transferred using DLT. This contrasts with many existing cryptoassets, including cryptocurrencies like Bitcoin, which are fungible

or interchangeable.

Smart contract

A smart contract is commonly defined as an agreement written in computer code with automated performance. Smart contracts are automatable and enforceable either by legal enforcement of rights and obligations (though they may not always amount to legal contracts) or via tamper-proof execution of computer code.

Token

A token is a digital entry on a DLT register or other digital infrastructure where a person is recorded as owning a unit or other entitlement. Tokens may represent a permission to control a resource native to the DLT platform, rights granted to the holder, or a "real world" asset. The latter is commonly referred to as the "tokenisation" of underlying assets.

Security tokens

Security tokens represent a traditional physical transferable security on a given blockchain. This means that certain elements of the token issuance occur outside of the blockchain ("off-chain") while other elements occur on the blockchain ("on-chain").

Off-chain elements: the bond documentation and global note are typically issued off-chain and held through a standard arrangement with an ICSD, nominee and custodians. Similarly, the subscription payments for the relevant security are typically made in fiat money. This might then be recorded as exchanged for digital currency such as Central Bank Digital Currencies ("CBDCs") or any other cryptoasset.

On-chain elements: the role of the registrar or common depositary is replaced by the blockchain and the token representing interests in the relevant bond is created on-chain. This is supplemented by necessary smart contracts that may facilitate settlement, identification of suitable investors and other practical benefits.

Native Digital Securities

Native digital securities are issued entirely on the blockchain in the form of digital tokens, unlike security tokens. This means that the roles of the ICSD, CSD, nominee and custodians are replaced by the blockchain: legal title to securities transferred directly on the ledger, payments made via smart contracts in cryptocurrency or tokens directly by the issuer to the investors, and notices delivered to investors, and corporate actions carried out by investors, directly via the blockchain.

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Any new structure would require significant investment in infrastructure, risk analysis, legal advice and market education.



Challenges to a capital markets fintech reinvention?

There are several reasons why, to date, there has not been a more extensive technological overhaul of the capital markets, and we outline some of the key factors here.

Existing systems and processes

Electronification and tech is already widely used in the issuance and settlement of securities, including the electronic trading of instruments through the ICSDs. The existing intermediated system, involving an immobilised global note, is wellestablished and underpins a vast universe of transactions. This has meant there is less urgency to introduce new tech, even though the complex custody arrangements and settlement inefficiencies have been cited as areas where improvements could be made.

Legal structure of the securities

In many jurisdictions, the more innovative structures would not fit within existing laws and regulations and would be reliant on the enactment of new legislation. For example, a native digital bond issuance would require legislation allowing for the issue of dematerialised securities. In the UK. the Uncertificated Securities Regulations 2001 requires that securities are issued on a "relevant system". While this wording covers computer-based systems, and therefore could be wide enough to permit the use of DLT, these regulations also require the operator of the "relevant system" to be approved by the Bank of England. Currently, CREST is the only approved operator for the transfer of dematerialised securities in the UK. Whilst there are jurisdictions with legal frameworks that do provide for the issuance of dematerialised securities, in many cases this is only a helpful starting point, and further legislation would be required in order to bring securities issued on the blockchain within the scope of existing dematerialised regimes. For example, in Europe and the UK, regulatory requirements are such that an issuer established in the EU/UK that issues or has issued transferable securities which are admitted to trading or traded on trading venues must arrange

for such securities to be held via CSDs. CSDs need to be recognised by the Bank of England and must meet various regulatory requirements in order to do so. The UK and the EU have proposed new sandbox / pilot regimes that will explore how blockchain-based systems could meet these requirements, or whether changes to current requirements may be needed to enable blockchain-based financial market infrastructure to develop.

Extent of change across many areas of law and interaction with existing regulation

The City of London Law Society (CLLS) said the cost of wholesale reform of the intermediated securities system would be "immense" because it would require changes to large parts of UK securities, company, trust and contract law. This statement was made in the context of disintermediation; however, changing the process of securities issue and settlement through the use of DLT would require the same extensive reform.

The application of the existing regulatory framework and securities laws to any new structure would require significant investment in infrastructure, risk analysis, legal advice and market education. There was a timely reminder of the application of existing regulations this April when the German regulator (BaFin) published a notice stating that there is reasonable suspicion that a "Binance" group company in Germany has offered security tokens without the requisite prospectus.

Furthermore, those seeking to provide DLT platforms may trigger regulatory authorisation requirements, depending on the specific features of the service provided. By way of illustration, platforms that facilitate the buying and selling of securities may qualify as multilateral trading facilities under the Markets in Financial Instruments Directive. Platforms that facilitate the transfer of payments may be providing regulated payment services and come within the scope of the Payment Services Directive, and the provision of a settlement service, the recording of securities in a book-entry system or the maintaining of securities accounts may trigger licensing requirements as a CSD under the Central

Securities Depositaries Regulation. Other regulatory frameworks may also be relevant, including the European Market Infrastructure Regulation

Settlement process and availability of cryptocurrency or stable coin

One of the potential benefits of using DLT in securities transactions is that the securities could be transferred directly on the ledger almost instantaneously. This is sometimes referred to as "atomic settlement" and could allow native securities or tokenised interests in securities, to avoid the traditional T+2 settlement cycle, if the payment leg of the transaction can also be solved.

It is market practice to transfer securities on a delivery versus payment (DvP) basis where legal interests in securities arise simultaneously with the payment for that legal interest so that the counterparty risk of one party not meeting their obligations to deliver (the interest in securities or the payment) is minimised. Currently, DvP is achieved through agents that are connected to relevant messaging protocols (e.g., SWIFT) for the payment leg and the securities leg of a transaction. Supporters for innovation often argue that the use of DLT smart contracts could simplify the settlement process by creating a smart contract that would only transfer the native security or the token once the buyer deposits the requisite amount of cryptocurrency. This assumes a platform in which both the native security or the token as well as the cryptoasset for payment reside on the same network. However, this so-called "single ledger" approach is not simple to implement. Whilst there are many industry-led initiatives making various proposals including connected approaches, where one network's smart contracts can read/write to another network either directly or through intermediaries, or disconnected approaches through technology or intermediaries, it is more likely in the medium term that there will be different DLT protocols for different purposes and uses.

The creation of stable digital currencies that can be used for settlement, such as CBDCs, is another important aspect here. Centralised payment networks such as those operated by central banks may develop to serve a variety of delivery scenarios and could maximise efficiency for those who are able to use them and ensure liquidity is not trapped in singleuse payments networks; for example, through the use of CBDCs. Finding a solution to ensure that a form of DvP can be achieved will be a key part of any transition to native digital issuance, although limited access to CBDCs or other cryptoassets may mean that custodians continue to play a key role and fiat currency is always somewhere in the system. Many investors may not yet have the requisite infrastructure to participate in a native digital bond issue, such as electronic wallets, and the ability to hold cryptoassets directly.

Market support and participant buy-in

The cost/benefit analysis may not be proven just yet. To gain international acceptance there will need to be widespread support from market participants for any significant change. Currently, there is a lack of consensus as to the benefits, from both a cost and efficiency perspective, that could be achieved through tech. Even with market consensus as to the optimal outcome, the complete removal of identified inefficiencies may not be achieved. Dematerialisation, for example, may not result in the elimination of the need for intermediaries entirely, as discussed, particularly if stable coin and cryptocurrencies are not widely held and investors use custodians to hold their native digital bonds.

Environment impact of technology

While so far, the environmental impact of certain technologies may not have been a key reason for their limited adoption, environment considerations may become more important. There are valid concerns about the high energy consumption of some aspects of blockchain and DLT technology – for example, the proof of work protocols – and the EU Commission has flagged (in its <u>Strategy for Financing the Transition to a Sustainable</u>

Economy published on 6 July 2021) data centres and DLT, in particular cryptoassets, as requiring careful

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consideration to ensure such technologies can effectively contribute to the transition to a low carbon economy. It is not only the technology that is used but the type of trading that will result if it is adopted that could be a concern. A prime example is the potential for disintermediation using DLT, which although having some advantages would also result in many more multiples of transactions on a bilateral basis. One of the advantages of the current intermediated structure is the ability for custodians and financial institutions to use omnibus accounts to settle trades and for investors to hold multijurisdictional portfolios through one intermediary, thereby vastly reducing the number of transactions and energy that these consume.

CLIFFORD CHANCE CASE STUDIES

In addition to the case studies below we also outline in the final paragraph some recent developments that utilise technology to improve efficiencies and streamline processes.

R3 and Wethaq

Capital markets have become increasingly global. There has been significant growth in the portfolio of products on offer, including Islamic finance products such as sukuk instruments. These can be uniquely complex to document and structure, and reliance on regional conventions and historic infrastructure also reduces the efficiency of the issuance process. Blockchain technology, DLT and smart clauses can help to create efficiencies in these transactions.

In 2019, Clifford Chance supported Dubai-based fintech Wethaq Capital Markets to create the world's first "Smart Sukuk Platform", based on R3's Corda blockchain, and issue a smart sukuk pilot. The project brought together DLT, legal technology, smart contract technology and innovative structuring to create a central platform for the issuance of sukuk al-ijara instruments.

What's the future for capital markets?

While the factors discussed in this briefing may explain the slower take-up of tech in this area, the potential benefits of using DLT in the capital markets are clear, even if widespread native digital bond issuance is some way off. The continued confidence of market participants in the workings of the capital markets is critical when so much value is at stake, and so specific solutions to alleviate some of the issues within the system could prove to be the most effective innovations for the time being. Steps to enhance certain processes would be welcomed enthusiastically, but anything more radical will need to demonstrate clear financial benefits and operational efficiencies to gain widespread support.

In the Wethaq ecosystem, issuers, investors and advisors can utilise the Wethag platform to procure bookbuilding, agree terms of issuance and prepare automated draft documentation. The pilot issuance successfully demonstrated the proof of concept of the Wethaq system: (i) the use of a permissioned distributed ledger for the facilitation of the sukuk issuance and administration; (ii) the interoperation of the Wethaq settlement system with existing settlement infrastructures and payment gateways; (iii) compliance with the existing regulatory framework; and (iv) the ability of market participants to interact with each other within the platform.

On an automated basis through the platform, Wethaq undertakes the functions of registrar, trustee-delegate, paying agent, calculation agent and transfer agent. These functions range from maintaining the definitive register of sukuk certificate holdings, undertaking certain duties on behalf of sukukholders and in relation to trust assets in certain circumstances (in its role as delegate), making calculations and payments as agent in relation to other obligations of the issuer / fundraiser. As part of its automation focus, Wethaq codes and deploys 'smart clauses' to assist with its performance of these functions.

For a more detailed discussion on the Wethaq platform, see our earlier briefing entitled <u>"Innovating in Sukuk Capital</u><u>Markets"</u>.

Fintechs seeking to disrupt the UK equity capital markets

2020 was a near record-breaking year for initial public offerings (IPOs) and follow-on share issuances in the UK, with more IPOs than in any year bar 2007, and an increase of 60 per cent. compared with 2019 in funds raised by secondary issuances on the London Stock Exchange. Whilst access to the UK primary capital markets during that period remained overwhelmingly limited to institutional investors, 2020 saw fintech disruptors achieve several key breakthroughs towards their goal of broadening access to the UK equity markets to retail investors.

Retail investors are generally restricted from participating in follow-on share offerings principally due to regulatory constraints. Under the UK prospectus regime, a listed company which decides to issue further shares to the public must publish a prospectus - a costly and time-consuming task - unless it ensures that the funds sought from retail investors in the UK do not exceed a maximum cap of EUR 8 million (c. GBP 7 million). Taken together with the need to keep price-sensitive transaction information confidential, the strict timelines companies work towards on such transactions, and the obligations on investment banks to carry out thorough anti-money laundering and know your customer checks, it becomes easy to understand why companies are reluctant to extend their follow-on share offerings to the public.

This reluctance led to the development of PrimaryBid, a fintech founded in 2016, which started by enabling individuals to access follow-on offerings on the same terms as institutional investors (including price discounts). PrimaryBid acts as an intermediary and uses its app/website to take orders from its users in a matter of hours from the launch of a capital raise, thereby dovetailing the strict timelines governing these transactions. It has seen its profile greatly increase during the pandemic, owing to the flurry of global corporate fundraisings. PrimaryBid's first transaction involving a FTSE 100 company was Compass Group's share placing, on which Clifford Chance acted for the underwriters. This transaction established a contractual framework to enable the co-existence of the retail offering, run by PrimaryBid and the separate institutional offering, run by the underwriters. The framework developed on that transaction has since been used on subsequent transactions, including for FTSE 100 companies Taylor Wimpey and Segro. PrimaryBid also established a foothold in the IPO market by partnering with PensionBee and Deliveroo to allow their customers to participate in their IPOs - over 70,000 Deliveroo customers signed up to buy GBP50 million worth of shares through the PrimaryBid platform.

Similarly, Rex, broker Peel Hunt's platform for stockbrokers and wealth managers to place shares with customers, enabled retail participation on several capital raises during that time, including Warehouse REIT and Octopus Renewables.

The conclusions reached by Lord Hill in his examination of the UK listing regime earlier this year, and which the Chancellor agreed to take forward in his response in April may put further wind in the sails of the trend towards increased inclusion of retail investors fintechs now being a key driver of this. Among the report's recommendations were that UK regulators consider: the actions needed to increase retail participation for share issuances, for both IPOs and follow-on offerings; raising the prospectus exemption thresholds to allow more retail investors to participate in capital raisings; and re-examining additional requirements, such as mandated minimum offer periods imposed by the applicable prospectus regulations for retail offerings (which preclude the possibility of shortening the offer period to de-risk the transaction, thereby dissuading issuers from including retail investors in their offerings). We would expect fintech disruptors, such as those described above, to be the beneficiaries of any such implemented reforms.

Olam security token

In 2020 SGX. Temasek and HSBC ran a successful pilot of a tokenised S\$400 million bond issuance (followed by an additional S\$100 million tap of the same bond) by Olam International on a fixed income digital asset issuance platform. Clifford Chance advised the banks on the original issuance, and the transaction parties subsequently replicated the transaction on the platform. The tokenised bond pilot focused on the automation of posttrade and asset-servicing processes rather than the issuance and settlement processes. This is (as we have mentioned earlier) in line with the move to improve aspects of transactions rather than undertaking a complete redesign of the issuance process.

This pilot provides a blueprint for a fully digital end-to-end process for the Asia bond market. Further efficiencies are possible in the upstream issuance process and timely information exchange with ecosystem participants such as arrangers, paving agents and legal counsel. Ultimately, the parties concluded that a full end-to-end solution can be achieved through upstream platform partnerships, the addition of payment networks and a regulatory framework supporting electronic (i.e. dematerialised) securities. It is, however, a positive sign that the tokenised bond was able to comply with the relevant regulatory and SGX listing requirements usually reserved for conventional bonds.

eppf

The platform developed by european primary placement facility (eppf) S.A. (eppf) utilises legal technology and straight-through processing to improve access to funding via the debt capital markets for local authorities, corporates, governments and projects.

eppf aims to offer fast and efficient access to the international capital markets using two primary entry routes to cater to the needs of both debut or infrequent issuers and established, regular bond issuers. For established issuers, eppf converts existing debt issuance programme and transaction documentation into a machine-readable format. Settlement is available on the eppf platform though a central securities depository or on an Ethereum-based blockchain solution and the machine-readable format of the documentation then allows data to be retrieved efficiently and facilitates investor communications throughout the life of the bond. The platform can also be used for liability management exercises.

For new or infrequent bond issuers, eppf creates standardised documentation and relies on mandatory provisions of Luxembourg law. Luxembourg securitisation law allows eppf to create pools of assets and liabilities (Compartments) which are searegated from other assets and liabilities within eppf's broader structure. Each Compartment is allocated to an individual issue using the platform. A borrower wishing to access the market using the eppf platform can rent a Compartment from eppf for the purposes of the transaction and utilise eppf's standard form documentation which can be produced at speed. The Compartment issues securities to the market and then lends the proceeds of the issuance to the underlying borrowing entity.

In 2020, Clifford Chance advised RBC Capital Markets, eppf and Centrus, on a debut issue by the London Borough of Sutton, using the new issuer route of the eppf platform. When seeking to access the capital markets, UK local authorities have historically encountered difficulties. As they are not 'companies' they do not benefit from the UK-quoted eurobond exemption and face deducting income tax from payments of yearly interest arising in the United Kingdom if they are to issue eurobonds directly. In addition, it is unlikely that UK local authorities have constitutional powers that extend to incorporating special purpose vehicles for issuance purposes.

These specific concerns were addressed by the Compartment structure and the eppf platform. The London Borough of Sutton entered into a simple bilateral loan agreement with eppf and relied on the abovementioned mandatory provisions of Luxembourg law to ensure a clean "pass-through" of credit risk to bondholders. Although there are clear advantages for local authorities looking to access the capital markets, the eppf technology can be deployed across any sector to achieve time and cost benefits over a traditional documentation process.

Data Standardisation and Straight-Through Processing (STP)

Alongside conversations on fintech, DLT, blockchain and digital bonds there are many tech initiatives also relating to non-digital debt securities. With continued pressure on improving efficiency and reducing operational risk across the market, straight-through processing or "STP" (i.e. the ability to automate the bond issuance process from end-to- end without any manual intervention) has become one of the focal points for traditional debt securities.

With a number of tech vendors eager to bring primary market issuances to into a new technological era and with a view to achieving full or partial STP, many view data standardisation and the creation of a unified global data standard, as one of the first steps. There is an abundance of data being created and shared in the market but it is in a format that makes it inefficient – and sometimes even impossible – to be deployed for a specific purpose.

STP is not a new concept. The SWIFT messaging network, for example, is used every day to transfer money globally. Communications between banks are largely standardised, ensuring timely settlement of payments and the reduction of operational risk stemming from the manual re-entry of information at each stage of the transaction.

To achieve full STP, each participant in the transaction chain (including issuers, dealers, legal advisors, agents, common depositaries, etc.) must be able to send, receive and interpret information automatically. Sophisticated automation in the primary bond market is reliant on information being standardised and suitably structured to allow for clean interactions across various different systems. Greater data standardisation will inevitably lead to greater opportunities outside of the issuance process as well. One example of this is regulatory reporting, where the process of re-structuring raw data for reporting purposes can be significantly reduced if the raw data is already structured, from its creation, in a form that is acceptable to regulatory bodies. In theory, this would result in reporting to the regulator quicker, with greater accuracy, at lower cost and perhaps without the need for any human intervention.

However, data standardisation and STP in the primary bond market is challenging: the size and span of the global bond market makes achieving STP in the primary bond market very difficult to achieve, with concepts that span different jurisdictions and products lacking convergence. Existing attempts to develop a unified global data standard are generally localised both geographically and within product types which stifles its expandability and uptake. Market participants (both individually and as groups) may also have diverging practical and technical requirements.

In spite of these obstacles, the market is taking positive steps in the direction of STP. Nivaura are working with both The London Stock Exchange Group on a multi-dealer marketplace (LSEG Flow) and DBS Bank on FIX – a digital fixed income execution marketplace. These platforms are underpinned by GLML, a new global data standard owned, created and maintained by the GLML Foundation (of which Clifford Chance is a participant). Origin have worked with Clearstream and the Luxembourg Stock Exchange to develop an interface data standard (Airbrush). Marketnode, an SGX & Tamasek Holdings JV is building a digital asset issuance platform which aims to provide the infrastructure for market participants to connect. All of these initiatives are contributing to making this a vibrant area, with potentially massive implications for the primary markets across all digital and non-digital asset types.



The bond market is taking very positive steps towards developing comprehensive data standards.



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