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NOTE ON STATUTORY DEMATERIALISATION ACROSS THE EUROPEAN UNION

At the meeting of the Legal Certainty Group in April 21st it was decided that one possible ‘key’ to unlocking the material exposed in the answers to the questionnaires might be to study the extent to which there exists statutory dematerialisation. The present note comprises an introductory explanation of the concept of “dematerialisation” and a list of the legislation that regulates securities in dematerialised form in each member state of the European Union (based on the answers to the questionnaire for each of the laws of the Member States).

INTRODUCTION

The meaning of ‘dematerialisation’ is not exactly fixed. Its varying uses reveal that, to some, it is a process and, to others, a state.

In the former sense, dematerialisation is the process by which securities in physical form are converted into electronic securities. For this purpose the investor must first have opened an account with an account provider. The investor then requests for the dematerialisation of his securities so that the dematerialised holdings can be credited into that account. Thus the physical certificates are converted into electronic securities identified by balances maintained in its account with an account provider. Normally the securities held in dematerialised form are fungible, that is to say they do not bear any distinguishing features.

To others, dematerialisation is a state that can apply not only to securities that were once physical, but also to securities as issued, that is to say ‘electronic-only’ securities. In this sense, dematerialisation is a situation where the electronic means exist for giving effect to holdings and transfer of securities, in a way that has legal validity.

Overall, it is said that the benefits of having a dematerialised or book-entry holding, through an account, are: modernism - electronic transactions take full account of modern IT facilities; velocity of transactions - the transfer of securities by mere accounting entries allows for a rapid and efficient disposition of those interests; increase of security - risks associated with physical certificates such as delay or loss in

transit, theft and mutilation are eliminated; the concept of an “odd lot” in respect of dematerialised securities stands abolished, as any amount can be a market lot. Sometimes, dematerialised securities attract lower margin and lower rates of interest compared to physical securities.

A distinction must sometimes be drawn between dematerialisation and immobilisation: although both are the two broad models allowing for electronic settlement, **immobilisation** entails securities in paper form and the use of depositaries, which are linked to a settlement system. Securities constituted by paper instruments or represented by paper certificates are immobilised in the sense that they do not move and are held by the depositary at all times. **Dematerialisation** (when used in apposition to immobilisation) involves dispensing with paper instruments and certificates altogether. No paper is issued, immobilised or otherwise. These dematerialised securities are constituted and exist only in the form of electronic records maintained by a clearing system. In both structures, however, transfers are effected by debiting and crediting the accounts.

Book-entry holdings permit both quick and efficient settlement by removing the need for paperwork, and allowing for the synchronisation of the delivery of securities with the payment of a corresponding cash sum (called delivery versus payment, or DVP). By improving the speed and efficiency of settlement, book-entry systems not only support the development of securities financial markets but also enhance the liquidity of these markets and facilitate the use of securities collateral to manage counterparty risks, thereby increasing the efficiency of trading and settlement.

This note refers only to dematerialisation of securities regulated by legislation in each Member State.

LEGISLATION

BELGIUM

-Act of January 2, 1991 (*dematerialised debt instruments of the Kingdom of Belgium and other public sector entities*).

-Act of July 22, 1991 (*short or medium term dematerialised debt instruments called “billets de trésorerie” and “certificates de depot” issued by Belgian or foreign issuers specifically issuing these securities under the regime of this Act*).

-Articles 468 et seq. of the Company Code (*dematerialised securities of certain Belgian companies*).

At present, new legislation relating to dematerialisation is being drafted in Belgium.

THE CZECH REPUBLIC

-Act n.256/2004 Coll., on capital market undertakings, which provides for any fungible securities to be issued as dematerialised in the central registry of securities operated by CSD.

At the time of this note the CSD has not started its operation, therefore dematerialised securities are, for the time being, registered in the Securities Centre, a public law company governed by a transient legislation, Act n.591/1991 on securities, under its

wording in force before the entry into force of the Capital Market Undertakings Act on 1 May 2004.

DENMARK

-The Securities Trading Act. (*Securities held through the Danish Central Securities Depository (CSD) are dematerialised securities, and are called “book-entry securities” or “electronic securities” (“fondsaktiver”) .The Act does not apply to securities accounts that are not CSD-accounts*).

GERMANY

-Securities Deposit Act

Securities in dematerialised form exist in Germany with respect to Federal Bonds and bonds issued by any State of the Federal Republic of Germany (Lander); such bonds are issued by entry in the Federal Debt Register or in the register of the respective State:

-Law on the Reform of the Law governing the Federal Debt Register and the Administration of Federal Debts of 11 December 2001 (Bundeswertpapierverwaltungsgesetz, BGBI. (2001) I, 3519, with respect to Federal Bonds.

-Section 2 of Ordinance regarding Administration and Purchase of Registered Debt of the Reich of 5 January 1940 (RGBI. (1940) I, 30); and

-Section 2 of the Second Ordinance regarding the Treatment of Bonds of the German Reich in Banking and Stock Exchange Trading of 18 April 1942 (RGL. (1942) I, 183), which ordinances are still applicable pursuant to Art. 2 of the Law amending the Securities Deposit Act, dated 24 May 1972 (BGBL. (1972) I, 801), both ordinances with respect to State Bonds.

Since 1998, the ECB is permitted to issue fully dematerialised debt certificates (similar to the German Federal Debt) in Germany, as a consequence of the headquarters agreement between the Federal Republic of Germany and the ECB.

ESTONIA

-Law of Obligations Act, in force since 1 July 2002. (*Section 2 of the # 917 includes under the term “securities” also the rights (“book-entry securities”) which, in the cases provided by law, are expressed and transferred only by the making of a registry entry. This is known as so-called “modern concept” of securities and is intended to cover those financial instruments that are registered with the Central Register*).

-The Securities Market Act, in force since 1 January 2002

-The Estonian Central Register of Securities Act, in force since 1 January 2001.

GREECE

-Law 2396/1996 introduced the dematerialisation of shares issued by Greek Sociétés Anonymes listed in the Athens Exchange as well as in any Stock Exchange operating in Greece. The dematerialisation procedure lasted until the end of 1999, and from 2000 all shares listed have been dematerialised, in book-entry form and are registered in the records of the Dematerialised Securities System (the “DSS”).

-Law 2533/1997 extends the application of rules of dematerialisation of shares to all kind of corporate bonds and debentures in Greece or governed by Greek Law, except for Government bonds.

-Law 2198/1994 provides for optional dematerialisation of government securities. By virtue of the said law, Greek Government bonds, treasury bills and any other securities issued by the Greek state which are dematerialised are registered, in book-entry form, within the System for Monitoring Transactions in Securities in electronic Book-Entry (the “BoGS”).

-The BoGS Operating Regulation provides for specific rules, of regulatory nature, regarding the operation of the BoGS as well as for the clearing and settlement of transactions on Greek Government bonds.

-The DSS Operating Regulation provides for specific rules, of regulatory nature, in respect of the DSS operation.

-The Dematerialised Securities Stock Exchange Transactions Regulation provides for the clearing and settlement of transactions in respect of securities held within the DSS.

SPAIN

-Royal Decree 116/1992 of securities held by means of book-entry and clearing and settlement of Stock Exchange transactions (Real Decreto 116/1992, de 14 de febrero, sobre valores representados mediante anotaciones en cuenta y compensación y liquidación de operaciones bursátiles). (When securities are going to be listed in a Spanish Regulated Market (the Public Debt Market, the four Stock Exchanges and AIAF Fixed Rate Market) they must be represented by means of book-entries).

-The Companies Act (Real Decreto Legislativo 1564/1989, de 22 de diciembre, por el que se aprueba el texto refundido de la Ley de Sociedades Anónimas), art. 9.

-The Securities Market Act (Ley 24/1988, de 28 de Julio, del Mercado de Valores), arts. 5-12.

-Royal Decree 505/1987, creating a book-entry system for Public Debt Securities (Real Decreto 505/1987, de 3 de abril, de creación de un sistema de anotaciones en cuenta para la Deuda del Estado).

-Ministerial Order of 19 May 1987 developing Royal Decree 505/1987 (Orden Ministerial de 19 de mayo de 1987).

-Ministerial Order of 21 July 1992, on requisites and procedures for participating in the IBERCLEAR system. (Orden Ministerial de 21 de julio de 1992).

- Ministerial Order of 27 March 2003, authorising the merge of CADE and SCLV to form IBERCLEAR and approving IBERCLEAR internal Regulations. (Orden Ministerial de 27 de marzo de 2003).

FRANCE

-Dematerialisation Law n° 81-1160 dated 30 December 1981, codified in Article L.211-4 of the Monetary and Financial Code (all securities issued in France and subject to French Law are dematerialised).

IRELAND

-The Companies Act 1990. Irish Law recognises the distinction between securities represented by physical certificates and securities that are dematerialised, such as securities enabled for holding and transfer through that part of CREST which relates to the settlement of Irish securities. But unlike the position in the UK, electronic transfer of title is not available for Irish securities in uncertificated or dematerialised form in CREST Ireland. The carrying out of debit/credit instructions within the CREST Ireland system will not affect legal title.

-(Uncertificated Securities) Regulations 1996 (the “CREST Regulations”), which provides the legal framework for paperless securities settlement systems. These Regulations disapply the provisions of Irish Law which would otherwise prohibit or inhibit paperless transfers of securities through CREST Ireland.

-The Stock Exchange Act 1995.

-The Stock Transfer Act 1990.

ITALY

-Legislative Decree No.58 of 1998, the Financial Law Consolidated Act, which governs the central depository system and immobilised financial instruments represented by book-entry.

-Legislative Decree No.213 of 1998 (Euro Decree), which provides for a system of mandatory dematerialisation with regard to financial instruments traded or intended to be traded on regulated markets as well as to financial instruments widespread among the public.

-Consob Regulation no. 11768 of 23 December 1998.

-Regulation on the Centralised Management Activities and Ancillary Services issued by Monte Titoli S.p.A. on 18 November 2004, which is the Italian CSD Regulation. Monte Titoli S.p.A. is the sole CSD and registrar in Italy and the manager of the Italian settlement system.

-Regulation of the Italian Clearing and Settlement System of 5 August 2004.

-Italian Stock Exchange Regulation of 5 November 2004.

CYPRUS

-Securities and Stock Exchange (Central Depository and Central Registry of Securities) Law of 1996 (all listed securities, their transfers, pledges and liens are registered in this CSD and are dematerialised).

-Securities and Stock Exchange (Inserting, Trading and Settlement) Regulations of 2001.

LATVIA

-The Law on Financial Instrument Market (according to the Latvian Commercial Law, securities can be issued in dematerialised or materialised form, but only dematerialised form is permitted if the securities are meant for public circulation or admitted to a regulated market).

-The Commercial Law.

-The Latvian Central Depository Rules and Regulations.

LITHUANIA

-Law on Securities Market of 17 December 2001, Law No.IX-655. Financial instruments which are eligible for transfer within the Securities Settlement System are absolutely dematerialised. There is no immobilisation of securities in Lithuania. All dematerialised securities issued in Lithuania are registered, i.e. it is possible to identify their legal owner by the personal securities account identification system.

-Rules on the Accounting of Securities and their Circulation approved by 29 December 2003 Resolution No. 22 of the Lithuanian Securities Commission.

-Rules of Trade of the Vilnius Stock Exchange.

-Rules of Securities Settlement System, approved by the Board of the Central Securities Depository of Lithuania. (All securities circulating in the SSS are dematerialised).

-Civil Code of 18 July 2000 (art. 1.101)

LUXEMBOURG

-The law of 1 August 2001 concerning the circulation of securities and other fungible instruments (the “Securities Act”), which constitutes the Luxembourg legal framework for the clearing and settlement of securities and which regulates securities and other financial instruments within the broadest possible sense, whether they be materialised or dematerialised.

-The amended law of 10 August 1915 on commercial companies (the “Companies Act”), by which, securities may be issued in bearer form, registered form, or, for certain type of companies, in dematerialised form.

HUNGARY

-Act 120 of 2001 on the capital market (the Capital Market Act), which contains the main rules on dematerialisation. Securities can exist in physical form or can be dematerialised. Dematerialised securities are by law registered securities and cannot later be transformed into physical form.

-Act 112 of 1996 on credit institutions and financial enterprises.

-Gov. Reg. No. 284/2001.

MALTA

-Shares or bonds of a company listed on the Malta Stock Exchange (MSE) fall within the framework of the Central Securities Depository (CSD) and are dematerialised. The CSD is regulated by the By-laws of the MSE and there is a degree of uncertainty as to whether the By-laws of the MSE have the status of Law. This places the whole dematerialisation process as being outside the parameters of the Law. There is no ad-hoc law regulating the process of dematerialisation.

THE NETHERLANDS

-Securities Giro Administration and Transfer Act (“Wet giraal effectenverkeer”). (Securities subject to this Act are specifically designated by Euroclear Netherlands, the Central Securities Depository provided for in the Act, as falling under the Act. One can assume that these securities are dematerialised, however, this report says nothing about dematerialisation).

At present, new legislation relating to dematerialisation is being drafted in the Netherlands.

AUSTRIA

Austria does not know about dematerialised securities. A certain type of government bonds comes close to dematerialisation. In that case book entries have another legal importance, based on specific legislation (which one?).

POLAND

-The Law on the Public Trading in Securities of 21 August 1997. Securities in public trading (also securities traded in the regulated market) are dematerialised.

However, certain type of securities exist in dematerialised form irrespective of whether they are admitted to public trading or not: bonds, bank securities, investment certificates issued by closed investment funds, debt securities issued by the Polish Treasury, etc. The following are their sources of law on dematerialisation:

- Bonds Act of 29 August 1995 (Polish O.J. 03.99.919), with subsequent amendments.
- Investment Funds Act of 27 May 2004 (Polish O.J. 04.146.1546), with subsequent amendments.
- Letters of Collateral and Mortgage Banks Act of 29 August 1997 (Polish O.J. 03.99.919), with subsequent amendments.
- Ustawa z dnia 29 sierpnia 1997 r. Prawo Bankowe (Polish O.J. 02.72.665), with subsequent amendments (for bank securities).
- Public Finance Act of 26 November 1998 (Polish O.J. 98.155.1014), with subsequent amendments, is the source of the following regulations which provide for dematerialisation of debt securities issued by the Polish Treasury:
 - Regulation of the Minister of Finance of 26 April 1999 on the conditions of issuance of treasury bonds offered in retail sale (Polish O.J. 99.38.369), with subsequent amendments.
 - Regulation of the Minister of Finance of 26 April 1999 on the conditions of issuance of treasury bonds offered through procurement (Polish O.J. 99.38.368), with subsequent amendments.
 - Regulation of the Minister of Finance of 26 August 1999 on the conditions of issuance of short-term treasury notes (Polish O.J. 99.74.831), with subsequent amendments.
 - Regulation of the Minister of Finance of 9 September 1999 on the conditions of issuance of treasury bonds in conversion of Treasury debt (Polish O.J. 99.74.834).
- Decree of the Council of Ministers of 3 September 2002 on the procedures and conditions to proceed for brokerage houses, banks conducting brokerage activities and banks keeping securities accounts.

PORTUGAL

- Decree-Law n.486/99, of November 13 (the Portuguese Securities Code). Securities are represented by book entries or by physical certificates depending on whether they are represented by registrations in an account or by paper documents. Securities listed on a regulated market must be book-entry securities integrated in a centralised securities system. The provisions relating to book-entry securities in a centralised system apply to securities represented by physical certificates when such securities are integrated in a centralised system, that is, are immobilised.
- The Portuguese Securities Markets Commission Regulations.
- The Portuguese Central Securities Depository Managing Entity Regulations.

SLOVENIA

- Dematerialised Securities Act (“ZNVP”), 1999. (All transferable securities shall be issued as dematerialised securities).
- The Securities Market Act, 2004.
- Operations rules of the Central Clearing and Depository Corporation Inc., Ljubljana (“KDD Rules”).

SLOVAKIA

-Act on Securities and Investment Services No.566/2001 Coll., as amended. (A security may have the form of a certificate or of an entry in a securities register established by the Act (“a security in book-entry form”). Bearer shares, shares in a closed-end mutual fund, bearer shares in open-end mutual funds, shares in co-operatives and treasury bills must have the form of book-entry securities).

-Act on the Stock Exchange No.429/2002 Coll., as amended.

-Act on Bookkeeping No.431/ 2002 Coll., as amended.

FINLAND

-Securities Market Act 495/1989, as amended. In accordance with the SMA, a security can be issued in a physical form (certificated) or in a dematerialised format as a book-entry security; securities traded in the Finnish market are predominantly incorporated in the book-entry system.

-Act on Book-Entry System (826/1991).

-Act on Book-Entry Accounts (827/1991).

SWEDEN

-The Financial Instruments Accounts Act (SFS 1998:1479) regulates the whole Swedish book-entry system together with the CSD’s own rulebook. Most of the securities traded in the financial markets, and all listed securities, are dematerialised with the CSD called VPC. However, Sweden is not totally dematerialised: since dematerialisation occurred in 1989, only a minority of public limited companies have incorporated their shares in the book-entry system.

-The Securities Operations Act (SFS 1991:981).

-The Companies Act (SFS 1975:1385), which contains rules regarding the transposition of a company to a “CSD-company” (a company with dematerialised shares).

ENGLAND AND WALES

-The Uncertificated Securities Regulations 2001 (SI 2001/3755) as amended, which creates the statutory regime for the dematerialisation of securities within the UK settlement system, CREST. Securities so dematerialised are known as uncertificated securities.

-The Financial Services and Markets Act 2000, which imposes a number of requirements on securities custodians operating in the UK.

-The Client Asset Sourcebook (CASS), which forms part of the Financial Services Authority Handbook, and contains the detailed financial services regulatory requirements relating to the custody arrangements, segregation, registration, recording and holding of client assets.