Dematerialised securities under Luxembourg law.

The law on dematerialised securities (the “Law”) of 6 April 2013 has the aim of modernising the Luxembourg law by introducing the possibility to issue dematerialised securities.

The Law only applies to the dematerialisation of Luxembourg law governed equity securities issued by Luxembourg capital companies (e.g. S.A., SCA) or FCP (“fonds commun de placement”) as well as of Luxembourg law governed debt securities issued either by Luxembourg issuers or non-Luxembourg issuers.

Dematerialised securities are a new additional category of securities co-existing in parallel with the traditional bearer and registered securities.

The Luxembourg legislator took the opportunity to implement into Luxembourg law certain principles arising from the Unidroit Convention on Substantive Rules for Intermediated Securities dated 9 October 2009 (the “Unidroit Convention”) and to take into account existing preliminary work on the draft EU directive on legal certainty of securities holding and transactions (the “Securities Law Directive”).

The aim of this note is to provide you with a short overview of the main changes and new requirements that will be relevant for issuers wishing to issue dematerialised securities and/or to convert existing equity securities into dematerialised form. This note also highlights certain changes and new requirements to other pieces legislation in this context.

Part I - Issuance of dematerialised securities and conversion into dematerialised securities

I. Issuance of dematerialised securities

Procedure

Centralisation: the issuance of dematerialised securities (equity and debt) must be registered in an “issue account” (“compte d’émission”) held with one single securities settlement system (within the meaning of the Luxembourg law of 10 November 2009 on payment services) (“organisme de liquidation”) or one single central account holder.

Part II - Amending provisions of existing laws

I. Law of 5 April 1993 on the financial sector, as amended

II. Law of 10 August 1915 on commercial companies, as amended

III. Law of 1 August 2001 on the circulation of securities and other financial instruments, as amended

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(licensed by the Luxembourg regulator, the “Commission de Surveillance du Secteur Financier”) (“teneur de compte central”) appointed by the management body of the issuer. The holding of dematerialised securities may be realised through a chain of detention involving one or more intermediaries (“teneurs de comptes”) between the securities settlement system/central account holder and the ultimate holders of the dematerialised securities.

> Additional requirements for dematerialised shares: amendment of the issuer’s articles of incorporation and publication and filing requirements (i.e., the name and the address of the securities settlement system or the central account holder must be published in a newspaper with national circulation or, if any, on the website of the issuer and for a Luxembourg issuer must be filed with the Luxembourg Register of Commerce and Companies (for publication purposes in the Luxembourg Official Gazette, the Mémorial C)).

Transfer
Dematerialised securities will be evidenced by a book entry. Transfer of dematerialised securities is effected by book entry transfer between accounts.

Exercise of shareholders’ rights
The Luxembourg or foreign intermediaries (“teneurs de compte”) will issue certificates relating to dematerialised securities for the exercise of the shareholders’ rights against the issuer and third parties, such certificates will state if they hold the securities for their own account or act as proxy for another person.

Integrity of the system – no seizure
The “issue account” cannot be seized, put under escrow or whatsoever blocked by the account holder, a counterparty or any third party. The securities therein cannot be subject to netting and are not part of the insolvency estate of the securities settlement system or central account holder.

Payments
Payments by the issuer to a securities settlement system or a central account holder are discharging the issuer. Payments by these entities to the accounts of their account holders are giving good discharge to them.

II. Conversion into dematerialised securities

Procedure
> Amendments to the issuer’s articles of incorporation: the articles shall provide (i) the new option for the issuer to issue dematerialised securities, (ii) a description of the securities subject to the conversion, (iii) whether the conversion is optional or mandatory for the shareholders, (iv) the conversion procedure and (v) if the conversion is mandatory, the timing for conversion (minimum delay for mandatory conversion: 2 years) and the sanctions applicable for non presentation of the securities subject to the dematerialisation.
Effectiveness: Bearer securities are converted into dematerialised form once physically delivered for book entry to a Luxembourg or foreign intermediary (“teneur de compte”), to the securities settlement system or the central account holder.

Registered securities are converted into dematerialised form once credited to the securities account of the relevant holder with an intermediary (“teneur de compte”).

**Mandatory conversion - sanctions**

In case of mandatory conversation at the expiry of the mandatory conversion period, if not presented for dematerialisation, voting rights are suspended and distributions are differed until effective dematerialisation of the relevant securities. These securities are not taken into consideration for the calculation of the quorum/majority at the shareholders’ general meetings. If not presented for conversion within a period of two years from the extraordinary general meeting of the issuer resolving to convert the securities, the issuer has the possibility (not the obligation) to convert the securities into dematerialised securities which are then recorded in a securities account in the name of the issuer (however the latter is not able to exercise the shareholders’ rights in relation to these instruments). If the securities are not presented for conversion within a period of minimum eight years from the extraordinary general meeting of the issuer resolving to convert the securities, the issuer, to the extent provided for in its articles of incorporation, may sell the relevant securities in compliance with the Law and with a 3 months prior notice. Proceeds of the sale will be deposited with the *Caisse de Consignation*.

Pre-emptive right and transfer limitation clauses remain applicable.

**Continuity of pledges**

Pledges over securities in bearer or registered form converted into dematerialised securities are not affected by the conversion and remain valid without any further formalities. When the pledged assets are recorded upon dematerialisation in an account opened in the name of the security provider (pledgor), the third party holder must however be informed of the existence of the pledge.

**Banking secrecy**

The Law expressly authorises the issuer to request the securities settlement system or the central account holder to provide information on the ultimate holders of securities. The same information may be obtained from the intermediaries (“teneurs de compte”) or any other Luxembourg or foreign person holding a securities account (“compte-titres”) with the securities settlement system or the central account holder. Until complete identification, voting rights are suspended. Neither the securities settlement system nor the central account holder can invoke the banking secrecy.
Part II - Amending provisions of existing laws

I. Law of 5 April 1993 on the financial sector, as amended
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> The Law creates a new category of professionals of the financial sector, the “central account holder” whose activity (i) is open only to Luxembourg credit institutions and investment firms, Luxembourg branches of EU credit institutions or EU investment firms and (ii) is subject to a licence requirement.

II. Law of 10 August 1915 on commercial companies, as amended
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> The Law adds dematerialised securities as a new form of securities co-existing in parallel with the traditional bearer and registered securities.
>
> Owners of bearer shares or debt securities may, at any time, request the conversion of the bearer shares or debt securities into registered shares or debt securities, or if provided for in the articles of incorporation, into dematerialised shares or debt securities.

If provided for in the articles of incorporation, owners of registered shares or debt securities may request the conversion of their securities into dematerialised form.

Holders of dematerialised shares or debt securities may request the conversion into bearer or registered shares or debt securities, save if dematerialisation is mandatory in the articles of incorporation.

> Mandatory information which had to be contained in bearer share certificates issued in global form is no longer required.
>
> Bearer debt securities issued in global form do not need any longer to be executed by two directors but may be executed by any person(s) duly empowered in this respect by the issuer.
>
> In order for the holders of dematerialised shares or securities to attend the shareholders’ meeting and to exercise their rights at the meeting, the securities must, at midnight (Luxembourg time) on the 14th day preceding the scheduled shareholders’ meeting, be registered in the relevant holder’s securities account opened with an intermediary.

III. Law of 1 August 2001 on the circulation of securities and other financial instruments, as amended

The below applies to securities which are deposited or kept in a securities account with an intermediary and are or are declared fungible. They can be in bearer, registered or dematerialised form.

> Ownership of securities is effective once the securities are recorded in a holder’s securities account (save in case of liquidation proceedings affecting the intermediary).
>
> Restitution of securities is effected by transfer to another securities account.
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To exercise shareholders’ rights or for any other reasons, holders of securities may request an intermediary to issue a certificate with the number and type of securities held at a given date. This certificate will merely evidence the book entry and is not a “title”. The presentation of this certificate will be sufficient for the holder to directly or indirectly exercise its shareholder’s rights. The issuer may however in its articles of incorporation request evidence of ownership through the whole holding chain.

The Law implements general principles provided for in the Unidroit Convention such as (i) the prohibition of upper tier attachment (no attachment of intermediated securities accounts of any person other than the account holder with the specific consequence that attachments made in breach of the Law are void), (ii) the protection of an acquirer acting in good faith and the protection of an acquirer against an earlier defective book entry and (iii) the obligation for an intermediary to hold sufficient securities equal to the aggregate number of securities credited to the securities accounts maintained by it for its account holders and for itself.

The Law also contains certain provisions strengthening the position of the intermediary, like where it transfers securities or pays the price for securities and where its account holder defaults, the intermediary acquires the ownership for security purposes to the consideration or securities received from the counterparty.

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