

PART 6 SPECIAL PROVISIONS RELATING TO UNCERTIFICATED

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PART 6 SPECIAL PROVISIONS RELATING TO UNCERTIFICATED SECURITIES

Overview

PART 6 extends the charge to stamp duty to shares title to which is transferred electronically via the CREST system. The CREST system enables trades dealt on the Irish and UK stock exchanges to be settled electronically. In the absence of this charge transfers through the system would have escaped liability to stamp duty because no instruments (see *section 2*) are produced by the system.

Prior to the making of the Companies Act, 1990 (Uncertificated Securities) Regulations, 1996, the Registrar of a company could not register a transfer of title to securities unless an instrument of transfer (i.e. a stock transfer form) had been received. These Regulations enable title to securities to be transferred and evidenced electronically i.e. without a stock transfer form. However, shareholders still have the option of holding share certificates if they wish.

Under the Regulations, a Registrar may update the register on receipt of a valid electronic message (called an operator-instruction) from CRESTCo., the UK company which is the operator of the CREST system. The charge to stamp duty in *section 69* is based on deeming that operator-instruction to be an instrument of transfer. This method has the advantage that the provisions of the stamp duty code, including exemptions and reliefs, carry over automatically to the operator-instruction. However, as the stamp duty code requires that an instrument be “impressed” with a stamp, obviously certain parts of that code do not fit neatly into this new scenario. The appropriate adjustments are made in *section 71*.

In reading the provisions of this Part it is helpful to bear in mind that—

- the “relevant system” means CREST;
- the “operator-instruction” means the electronic message which is sent by the operator of CREST (i.e. CRESTCo.) advising the Registrar of a company to register a transfer of title to securities;
- the “system-member” means the CREST member or sponsored member. In order to have one’s name on the company register as the holder of securities in electronic form one must be a CREST member or sponsored member. A CREST member will have a computer-link with the CREST system. A sponsored member does not have such a link but is sponsored by a person who does.

Leaflet CREST 1 contains general information regarding stamp duties and CREST.

Section 68 Interpretation (Part 6)

This section contains definitions which are required for the purposes of **Part 6**. (1), (2) “certificated securities”, “securities” and “uncertificated securities” are self-explanatory. Certain definitions are taken from the Companies Act, 1990 (Uncertificated Securities) Regulations, 1996. These are the Regulations which enable title to securities to be transferred and evidenced electronically. The definitions (including the definitions set out in the associated footnotes) taken from these regulations are set out below:

- “generate”, in relation to an operator-instruction, means to initiate the procedures by which an operator-instruction comes to be sent;

- “instruction” includes any instruction, election, acceptance or any other message of any kind;
- “operator” means any person specified in regulation 28 [of the Companies Act, 1990 (Uncertificated Securities) Regulations, 1996,] or approved by the Minister [for Enterprise, Trade and Employment] under [those] regulations as operator of a relevant system;
- “operator-instruction” means a properly authenticated dematerialised instruction¹ attributable to an operator;
- “relevant system” means a computer based system and procedures which enable title to units of a security² to be evidenced and transferred without a written instrument, and which facilitate supplementary and incidental matters and “relevant system” includes an operator-system³;
- “system-member”, in relation to a relevant system, means a person permitted by an operator to transfer title to uncertificated units of a security⁴ by means of that system and includes, where relevant, 2 or more persons who are jointly so permitted.

This section also provides that references to title to securities in **Part 6** include any legal (3) or equitable interest in securities.

Section 69 Operator-instruction deemed to be an instrument of conveyance or transfer

Summary

This section charges stamp duty on securities title to which is transferred electronically through the relevant system i.e. CREST.

Details

The electronic message (i.e. the operator-instruction) sent by the operator of the system, CRESTCo., to the Registrar of a company instructing that Registrar to update the register is deemed to be an executed instrument of conveyance or transfer. This subsection also provides that that message is deemed to be executed on the date it is generated. (1)

¹ “dematerialised instruction” means an instruction sent or received by means of a relevant system.

² “unit of a security” means the smallest possible transferable unit of the security (for example a single share).

³ “operator-system” means those facilities and procedures which are part of the relevant system, which are maintained and operated by or for an operator, by which the operator generates operator-instructions and receives dematerialised instructions (see footnote 1) from system-participants and by which persons change the form in which units of a participating security are held. “system-participant” in relation to a relevant system, means a person who is permitted by an operator to send and receive properly authenticated dematerialised instructions. “participating security” means a security, title to units of which is permitted by an operator to be transferred by means of a relevant system. “securities” means shares, stock, debentures, debenture stock, loan stock, bonds, units in undertakings for collective investments in transferable securities within the meaning of the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations, 1989, and other securities of any description.

⁴ “uncertificated unit of a security” means a unit of a security title to which is recorded on the relevant register of securities as being held in uncertificated form, and title to which, by virtue of these [i.e. Companies Act, 1990 (Uncertificated Securities) Regulations, 1996] regulations, may be transferred by means of a relevant system and corresponding expressions shall be construed accordingly.

Where an operator-instruction is generated in relation to the transfer of an equitable interest in securities that instruction is also chargeable to duty as an instrument of conveyance or transfer. This is designed to cater for a situation where the same nominee is acting for both the vendor and purchaser of shares: in such situations only an equitable interest in the shares is being transferred. (2)

Where no operator-instruction is generated in connection with the transfer through a relevant system of an equitable interest in securities, that transfer is, for the purposes of this Part, deemed to have been effected by an operator-instruction generated on the date of the transfer. This provision is necessary to ensure that shares transferred within the pool nominee (CREPON)⁵ operated by CRESTCo. do not escape liability to stamp duty. (3)

Where there is a transfer of title to securities through a relevant system in respect of a single netted settlement of 2 or more contracts for the sale of securities, the operator-instruction giving effect to that transfer is deemed to be a separate operator-instruction (generated on the date of the operator-instruction for the single netted settlement) for each of the contracts involved so that each deemed conveyance or transfer is chargeable to stamp duty. Transfers of title to securities falling within this subsection are not chargeable under *subsection (1)* so a double charge is avoided. (4)

Where there is no operator-instruction generated because the effect of a single netted settlement of 2 or more contracts for the sale of securities is that an operator-instruction is not necessary, a separate operator-instruction is deemed to have been generated on the date of the single netted settlement in respect of each contract included in the single netted settlement. Each deemed operator-instruction is deemed to be an executed conveyance or transfer of the securities in the contracts concerned and the date of execution of each conveyance or transfer is the date of the single netted settlement. (5)

Section 70 Rate of duty

This section provides for a flat rate of duty of 1% of the consideration paid for shares title to which is transferred electronically. (1)

Where the transfer operates as a voluntary disposition inter vivos, the duty will be calculated by reference to the value of the securities transferred. (2)(a)

In the event that the calculation of duty results in an amount which is not a multiple of a cent the amount is to be rounded to the nearest cent, any half cent being rounded up to the next whole cent. (2)(b)

Section 71 Application and adaptation of other Parts of this Act

Summary

The stamp duty code requires that a document be impressed with a stamp. Since it is not possible to impress a stamp on an operator-instruction it is necessary to adjust certain parts of the code. These adjustments are made in this section. In the main they provide that—

- the duty becomes due and payable on the date the operator-instruction advising the Registrar of a company to update the register is generated,

⁵ CREPON was established in response to concerns expressed by market makers that it would be damaging to their ability to provide a market if they could be seen to be building up, or disposing of, large shareholdings. CREPON meets these concerns by keeping the individual market maker's name off the share register. Transfers to CREPON are liable to ad valorem duty if the beneficial interest passes.

- the penalties and interest for late payment of the duty apply to electronic transfers as they apply to written transfers,
- the Revenue Commissioners may assess the duty due on an operator-instruction and the appeal procedures will apply to such assessment, and

Details

This section adapts the stamp duty code to ensure that most of the existing provisions will apply notwithstanding the fact that there is no document which can be physically stamped.

The transferee is accountable for the payment of stamp duty on operator-instructions (a)

The operator-instruction does not have to be stamped. Stamp duty on an operator-instruction is due and payable on the date that the operator-instruction is generated. The operator-instruction is deemed to be duly stamped for the purposes of *section 2(4)* (and notwithstanding *section 30(3)* which provides for compulsory adjudication in the case of voluntary dispositions inter vivos) when the duty and any penalty and interest relating to such duty has been paid to the Revenue Commissioners. (b)

Where there is an agreement in place, under *section 72*, between the Revenue Commissioners and the operator of the system, any duty collected by the operator is deemed to have been paid to the Revenue Commissioners on the date on which it became due and payable even though it may actually be paid over on a different date. In the absence of such an agreement the duty would have had to be paid over to the Revenue Commissioners on the date the operator-instruction was generated (see *paragraph (b)*). (c)

Penalties and interest on late payment of stamp duty are to apply to electronic transfers as they apply to written transfers. (d)

Certain provisions of the stamp duty code do not apply to electronic transfers. The provisions which do not apply relate in the main to instruments and the physical impression of stamps on instruments (e)

The Revenue Commissioners may make an assessment (including correcting assessments) of any duty due on an electronic transfer (see also *section 159C* as regards the time limit for making certain assessments from 1 January 2005). The appeal procedures contained in *section 21* apply to such assessments. (f)

Reliefs or exemptions from stamp duty (see *Part 7*) which require the document to be adjudicated (see *section 20*) by the Revenue Commissioners also apply to an operator-instruction notwithstanding the fact that the operator-instruction cannot be stamped with an adjudged stamp. (g)

Section 72 Collection and payment of duty

This section enables the Revenue Commissioners to enter into an agreement with the company which operates the electronic transfer system, CRESTCo., whereby CRESTCo. will collect the stamp duty paid by the transferee and then pass on the duty so collected to the Revenue Commissioners. Such an agreement has been entered into.

Section 73 Exemptions

This section contains an exemption from stamp duty in respect of an operator-instruction effecting the transfer of rights to securities in a quoted company, on or after 1 March 2003, by way of a renunciation of those rights under a letter of allotment. In (1)

addition, all the exemptions which apply when shares are transferred using stock transfer forms (see **Part 7**) apply to shares transferred electronically.

The deposit of securities into the CREST system so that they can be converted from paper to electronic form (i.e. dematerialisation) does not attract a stamp duty charge if the legal ownership only is being transferred. This subsection applies to written transfers only. (2)

Section 74 Exemption for market makers

Section deleted in respect of instruments of transfer executed on or after 1 October 2007.

Section 75 Relief for intermediaries

Summary

This section replaces the “old” *section 75* containing “broker/dealer relief” and provides for a new relief for intermediaries for instruments of transfer executed on or after 1 October 2007. See Commencement Order entitled “Finance Act 2007 (Commencement of section 109) October 2007” (S.I. No. 649 of 2007).

Details

The core provision of the new *section 75* is in *subsection (3)*. This subsection grants an exemption from stamp duty on the transfer of securities to a person or a person’s nominee, where— (3)

- A. the person is a member firm of an exchange/market,
- B. the person is an intermediary and is approved by the Revenue Commissioners as a recognised intermediary in accordance with arrangements made by the Revenue Commissioners with the exchange or market,
- C. the transfer of securities is effected **either**—
 - on the exchange or market in respect of which the intermediary is a recognised intermediary, or
 - on any exchange or market operated by the Irish Stock Exchange Limited (e.g. the ISE Main Market and IEX) or the London Stock Exchange plc (e.g. LSE Main Market and AIM), or
 - on any other exchange or market designated by the Revenue Commissioners for this purpose in regulations, and
- D. the transfer is not effected in connection with an excluded business.

The concepts used, in each of these requirements, are defined/interpreted in *subsections (1) & (2)* of the new *section 75*. *Subsection (1)* also includes some consequential definitions. The requirements at **A**, **B**, **C** and **D** above, are explained as follows:

A. the person is a member firm of an exchange/market

“Member firm” means — (5)

⁶ Plus Markets PLC (and the markets operated by it), POSIT (operated by Investment Technology Group Limited), SWX Europe Limited (formerly known as virt-x Exchange Limited), Eurex

- a member of the Irish Stock Exchange Limited,
- a member of the London Stock Exchange plc, or
- a member of such other exchange/market⁶ that is designated for this purpose by the Revenue Commissioners in regulations, that they are empowered (under *subsection (5)*), to make.

B. the person is an intermediary and is approved by the Revenue Commissioners as a recognised intermediary in accordance with arrangements made by the Revenue Commissioners with the exchange or market

An “intermediary” means a person who carries on a bona fide business of dealing in securities. The entering into derivative agreements referenced directly or indirectly to securities is treated, for the purposes of the definition of “intermediary” as the carrying on of a business of dealing in securities. The purchase of securities to hedge these derivative agreements would be considered as part of the carrying on of that business.

C. the transfer of securities is effected either—

- on the exchange or market in respect of which the intermediary is a recognised intermediary, or
- on any exchange or market operated by the Irish Stock Exchange Limited (e.g. the ISE Main Market and IEX) or the London Stock Exchange plc (e.g. LSE Main Market and AIM), or
- on any other exchange or market designated by the Revenue Commissioners for this purpose in regulations

A transfer of securities is effected on an exchange/market if—

- it is subject to the rules of the exchange/market, and
- it is reported to the exchange/market, in accordance with the rules of that exchange/market.

Thus, *for example*, where a member firm of the ISE is an intermediary and is approved by the Revenue Commissioners as a recognised intermediary in accordance with arrangements made by the Revenue Commissioners with the ISE, that member firm can, where appropriate, claim an exemption from stamp duty on a transfer of Irish securities to it even if that transfer is effected on the LSE or on another exchange or market designated by the Revenue Commissioners for this purpose.

Transfers of shares executed on or after 1 November 2007 which are required by a competent authority (e.g. IFSRA), in accordance with the EU Markets in Financial Instruments Directive (MiFID) to be reported directly or indirectly to the competent authority are deemed to satisfy the “effected on exchange/market” condition of the exemption above, subject to all other conditions being satisfied.

D. the transfer is not effected in connection with an excluded business carried on by the intermediary

For an exemption from stamp duty to be available to an intermediary on any particular transfer of securities, it is necessary that the securities are not being acquired in connection with various business activities termed “excluded business”. That does not mean that the intermediary cannot engage in such business. However, any transfer in

Deutschland, Chi-X Europe Limited, Turquoise Services Limited, Nasdaq OMX Europe Limited, PLUS – Europe operated by Bayerische Borse AG, Bats Trading Limited, SmartPool Trading Limited, NYSE Arca Europe and Pipeline Financial Group Limited have been designated by the Revenue Commissioners as exchanges/markets for the purposes of the relief (See S.I. No. 651 and 677 of 2007, S.I. No. 156, 321 and 468 of 2008, S.I. No. 46, 99 and 184 of 2009.)

connection with such business is not exempt from stamp duty.

An excluded business means any business which—

- consists in the making or managing investments,
- consists in providing services for connected persons,
- consists in insurance business, or assurance business,
- consists in administering, managing or acting as trustee in relation to pension business,
- consists in operating or acting as trustee in relation to collective funds.

Section 75A Relief for clearing houses

This section contains an exemption from stamp duty for transfers of securities to and from a central counterparty commonly known as a “CCP”, in specified circumstances. A CCP is an entity which introduces post-trade anonymity on exchanges or markets where member firms submit orders for shares. The relief applies to instruments of transfer executed on or after 1 October 2007. See Commencement Order entitled “Finance Act 2007” (Commencement of Section 109) Order 2007 (S.I. No 649 of 2007).

Section 76 Obligations of system-members

Summary

A system-member must keep particulars of transfers on which no stamp duty is paid, for example, where an exemption from stamp duty is claimed. Provisions similar to those in *section 8* will apply if stamp duty is underpaid as a result of fraud or neglect.

Details

A system-member must retain evidence in legible written form, or readily convertible into such a form, of each instruction entered into the system on which no duty will be calculated by the system. The evidence must be retained for 6 years from the date of the instrument and must be made available to the Revenue Commissioners on request. (1)

A system-member which does not comply with the provisions of *subsection (1)* will be liable to a penalty of €1,265 for each default. (2)

For penalties incurred before 24 December 2008, provisions similar to those contained in *sections 8(3)* and *(4)* will apply to incorrect instructions entered fraudulently or negligently into the system. For penalties incurred on or after 24 December 2008 see *section 134A(2)(b)*. (3), (4)

An incorrect instruction to which *subsection (3)* or *section 134A(2)(b)* applies is deemed to be the production of an incorrect document for the purpose of section 1078(2)(d) of the Taxes Consolidation Act, 1997, and is, therefore, a revenue offence. (5)

Section 77 Overpayment of duty

Summary

This section enables the Revenue Commissioners to refund any duty overpaid. The refund claim must be made within a period of 6 years beginning on the date on which payment was made. While this section provides that a claim for refund must be made within 6 years, the 6 year time limit has been changed (see *section 159A*) to 4 years from the date the operator-instruction is made, for a valid claim for refund other than a

valid claim made on or before 31 December 2004 in respect of a refund claim arising on or before 25 March 2003 (i.e. the date of passing of the Finance Act 2003). Interest may arise on the refund – see *section 159B*.

Details

The Revenue Commissioners may refund any duty overpaid. (1)

The refund claim must— (2)

- be made (in writing) within 6 years (*but see summary*) beginning on the date on which payment was made,
- set out the grounds on which the refund is claimed,
- contain a computation of the amount claimed, and
- be supported by documentation, if so required by the Revenue Commissioners.

If the person claiming the refund is not resident in the State or has no branch or agency in the State the Revenue Commissioners may require that person to appoint and maintain a tax representative in the State. (3), (4)

Section 78 Regulations

This section enables the Revenue Commissioners to make regulations to provide for the administration, assessment, collection, recovery and repayment of duty paid or payable in respect of the electronic transfer of title to shares.