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Abstract

The legal framework for account based and dematerialised securities in Belgian law has undergone numerous modifications over the last years. The purpose of this short paper is to highlight the main features of the legal regime for all subcategories of dematerialised and account based securities. The analysis illustrates that promoting legal certainty as concerns the rights attached to the securities, transfers and security interest on securities is critical for maintaining confidence in the system and, hence, attracting custody and settlement business.

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Competing for Legal Certainty:

The Regime of Dematerialised Securities in Belgian Law

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I. Introductory overview

The Belgian legal regime concerning dematerialised securities is illustrative of the importance of legal certainty for creating a sound framework to attract business in the field of securities custody and settlement. The presence of the Euroclear system in Belgium has been critical in drawing the attention of lawmakers to continuously improving the legal framework of dematerialised securities, in order to maximise the protection of investors and the sound functioning of the securities settlement systems.

For the sake of this report, the notion of "dematerialised" securities is understood in a broad sense: it not only includes those securities that do only exist as account-based rights, but also the traditional nominal or bearer securities that have been brought into an account-based system ('immobilised securities'). From a legal point of view, four legal regimes of dematerialised securities can be identified in Belgian law:

- Regime of *immobilised securities*: The Royal Decree No. 62 of 10 November 1967[1] introduced the possibility to create securities accounts following the deposit of securities with a central securities depository (CSD)[2] or an affiliated depository.[3] The deposit is of a perculiar nature, as it is made on a "fungible" basis. This essentially entails that the investor cannot claim to have identical securities restituted, but only the same amount of securities of the same nature.[4] This has made it possible to create an efficient system of transfer of securities through simple movements in securities accounts, without any physical transfer of securities. On the other hand, the system is not compulsory for investors, nor is it irrevocable: it allows investors at any time to "re-materialize" their securities by stepping out of the system, and having their securities — or, more exactly, securities of the same kind and amount — restituted.

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1 *Moniteur*, 14 November 1967, as repeatedly amended. The text has been coordinated by Royal Decree of 27 January 2004, *Moniteur* 23 February 2004.

2 Until 2002, the CIK (*Caisse Interprofessionnelle de Dépôt et de Virement de Titres – Interprofessionele Effectendeposito- en -girokas*) acted as the sole central securities depository under Royal Decree No. 62. In the aftermath of the financial market reform of 2002 (Law of 2 August 2002) Euroclear Bank has also been recognized as a central securities depository: See Royal Decree of 22 August 2002, *Moniteur* 4 September 2002.

3 The latter referred mainly to the Euroclear system, operated by the Belgian branch of Morgan Guaranty Trust Company of New York.

4 In practice, the securities will often from the outset be introduced in the accounts-based system by the issuer by way of deposit of a global certificate with the CSD, without creation of individual bearer securities or nominal certificates.

- The law of 2 January 1991 relating to public debt securities and the instruments of monetary policy[5] introduced the possibility to issue public debt securities in dematerialised form, as a proper category of securities which do only exist under the form of accounts. The National Bank of Belgium acts as central securities depository (CSD) for these public debt securities. Contrary to the regime of RD No. 62, dematerialisation is compulsory for investors: investors cannot claim to have their dematerialised securities transformed into underlying (bearer or nominal) securities.[6]

- Similar to the regime of dematerialised public debt securities, the Law of 22 July 1991[7] created a first category of dematerialised securities for private issuers, targeted mainly to short term debt financing programmes with less burdensome requirements as regards the disclosure of financial information.[8] The law enabled to issue treasury certificates under a dematerialised form. Similarly, credit institutions could issue deposit certificates in a dematerialised form.[9] The regime of (dematerialised) treasury and deposit certificates was subsequently broadened, so as to allow the State, regional and municipal public entities to issue or to guarantee treasury or deposit certificates. As for the organization of the accounts system of dematerialised treasury or deposit certificates, the law distinguishes between the public or private nature of the issue: dematerialised treasury or deposit certificates issued or guaranteed by a public authority will follow the regime of public debt securities, with the National Bank of Belgium acting as central securities depository. The treasury or deposit certificates issued by private issuers will be governed by the regime applicable to dematerialised company securities introduced by Law of 7 April 1995.

- The Law of 7 April 1995 amended the Belgian Companies Code in order to allow Belgian companies to issue securities (shares, bonds, beneficial shares or warrants) in a dematerialised form. However, lacking regulations as regards the recognition of account holder, the law has not yet entered into force.[10] Similarly to the regime of public debt securities, the dematerialised company securities are devised as a separate category of securities, contrary to the "fungible securities" under Royal Decree No. 62.

The different regimes on dematerialised securities are likely to undergo significant modifications in the near future. First, a bill is currently being drafted that would give effect to the regime of dematerialised company securities under the Law of 7 April 1995. Credit institutions and investment firms would be allowed to hold the accounts for dematerialised company securities, under the supervision of the Commission for Banking, Finance and Insurance. There would be two CSD's, depending on the kind of securities: for company bonds, the National Bank of Belgium would act as settlement entity, while the *Caisse Interprofessionnelle*[11] would be the CSD for all other dematerialised company securities.

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5 Law of 2 January 1991, *Moniteur*, 25 January 1991.

6 Unless stated otherwide in the terms of the loan or issue: See Art. 5 and 22 of Royal Decree of 23 January 1991 concerning public debt securities, *Moniteur*, 26 January 1991.

7 Law of 22 July 1991, *Moniteur*, 21 September 1991. see also Royal Decree of 14 October 1991 on treasury certificates and certificates of deposit, *Moniteur*, 19 October 1991.

8 Alhough the issuer should draw up and distribute a prospectus, there is no prospectus vetting by the Banking, Finance and Insurance Commission, as is the case for a regular public offer prospectus.

9 See Articles 1, § 1, 3rd paragraph (treasury certificates) and 1, § 2 (deposit certificates) Law 22 July 1991 on treasury and deposit certificates, *Moniteur*, 21 September 1991.

10 It should be noted that the possibility to issue dematerialised securities is at present commonly included as standard provision in most company bylaws, but yet ineffective.

11 See *supra*, footnote 2.

A second evolution that may have an impact on the legal regime of dematerialised securities, is the envisaged gradual abolition of bearer securities as from 1st January 2008, leaving only two categories of company securities: nominal or dematerialised. However, it is still discussed whether dematerialised securities would eventually be maintained as a separate legal category, as is currently the case in Belgium, or whether the French approach could be introduced, leading to consider dematerialised securities as a sub-category of nominal securities.

III. Main features of the dematerialisation regimes under Belgian law

Although the Belgian regulatory framework may at first sight seem fragmented and dispersed over different laws, the regimes are in substance strongly harmonised, being altogether inspired by the general philosophy of Royal Decree no 62. Annex I provides a comparative overview of the main features of the four regimes of dematerialised securities.

A. Scope of the regime for dematerialised securities under Belgian law

The four dematerialisation regimes existing under Belgian law are clearly distinct as to their scope, although the underlying regime may be largely similar. Regulatory overlaps and ensuing legal uncertainty are thereby avoided.

The dematerialised securities regimes (in the narrow sense) apply to specific securities created under Belgian law by issuers governed by Belgian law. This is also consistent with the private international law regime as concerns the question which kinds of securities can be created by a legal person: this question relates to the internal organisation of the legal person, and therefore is governed by the *lex societatis*.[12] It is therefore important to delimit the personal scope of application of each of the regimes:

(1) the Law of 2 January 1991 which allows for the issuance of dematerialised government debt instruments applies to debt instruments issued by Belgian public authorities, as specified in Article 1 of the Law.[13] The place of issue, or the law applicable to the loan incorporated into the securities are both irrelevant in this respect: the regime contained in the Law of 2 January 1991 will determine the nature of the rights attached to the securities and how to transfer them, also for dematerialised securities issued outside Belgium under foreign law.[14] Conversely, the Law of 2 January 1991 will not apply to issues in Belgium of debt securities by a foreign public body. These securities could, however, be brought under the ambit of the "fungibility" regime of RD No. 62.

(2) The law of 22 July 1991 on treasury certificates and certificates of deposit basically covers three categories of securities:

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[12] See Article 110-111 Law of 16 July 2004 on the Private International Law Code, *Moniteur*, 27 July 2004.

[13] More specifically, the State, Communities, Regions, provinces, municipalities, other public bodies, public institutions, institutes of public utility and the National Bank of Belgium. Morever, the list of eligible issuers may be extended by Royal Decree.

[14] As the securities are ultimately held with the National Bank of Belgium, Belgian law will govern these issues according to the so-called PRIMA rule: See Art. 7 Law of 28 April 1999 implementing Directive 98/26/EC of 19 May 1998 on the finality of payments and securities transactions in payment and securities settlement systems, *Moniteur*, 1 June 1999.

a. Debt securities, called "treasury certificates", issued by Belgian legal persons, excluding credit institutions; In order to qualify for the issuance of treasury certificates, the issuer should have at least 25 Mio EUR of own funds, and have a liquidity ratio of at least 1.[15], [16]
b. Debt instruments, called "certificates of deposit", issued by credit institutions established in Belgium (including Belgian branches of foreign credit institutions), and EU based credit institutions who make use of their European passport in Belgium and are authorized to issue deposit certificates in their home country. The application of the Belgian law to foreign credit institutions active under free provision of services or with a Belgian branch, should be seen in conjunction with the private international law regime: the Belgian law will not apply to the question if and under which form certificates of deposit can be issued by the foreign credit institution (directly or through its Belgian branch). It will only allow these institutions to issue such certificates if enabled to under their *lex societatis*, but taking advantage in Belgium of the flexible regime on financial information disclosure (*inter alia* no vetting of prospectus).
c. Treasury certificates of certificates of deposit issued by a public body under Belgian law.

(3) The regime of dematerialised company securities applies to Belgian companies, excluding Belgian branches of foreign companies[17], if they opt for the dematerialised form when issuing shares, beneficial shares, warrants, bonds or convertible bonds. From the perspective of the issuer, dematerialised securities are similar to bearer securities, in the sense that the issuer does not know the identity of the owners of the securities at all times.[18] Therefore, the regime of dematerialised company securities only exists for those company forms which allow the creation of bearer securities, i.e. public limited companies (*société anonyme*) and partnerships limited by shares (*société en commandite par actions*)

(4) Finally, the regime of immobilised securities will enable to bring other securities, either in bearer or in nominal form, or even dematerialised securities not governed by one of the aforementioned specific regimes (e.g. by a foreign issuer) under a securities accounts regime as governed by Royal Decree No. 62. Unlike the genuine dematerialised securities, the system of immobilised securities is based on a voluntary submission of a securities account to the "fungibility" regime. Hence, the applicability of the fungibility regime will primarily depend on the terms of the contract underpinning the deposit of securities. The fact that the securities have not been re-deposited by the financial institution with the CSD, is not in itself sufficient to exclude the application of the "fungibility" regime: RD No. 62 may also apply to the securities account held by an investor with his financial intermediary, if the "fungibility" regime

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[15] Calculated as follows: ((claims on 1 year and less) + (cash means) + (monetary investments)) / (liabilities on 1 year and less). See Article 13, para 1 RD 14 October 1991.

[16] An alternative is to have the issue irrevocably guaranteed by a third person that satisfies the financial criteria as concerns own funds and liquidity, or by a public body (Article 13, para 2 RD 14 October 1991).

[17] Unless it would appear that the actual seat of the foreign company is located in Belgium, in which case the Belgian law would apply as well to the dematerialised securities which have possibly been issued by that company.

[18] This obviously differs from the situation under French law, where the dematerialisation of nominal securities implies the possibility for the issuer to obtain from the account holder the identity of the actual securities owners.

has been declared applicable by contract, even though the financial intermediary holds itself the deposited securities.[19]

B. The nature of the investors' rights in relation to securities

The nature of the investors' rights as regards the dematerialised or immobilised securities held in an account with an intermediary, is similar across the different legal regimes. In all systems, the law expressly stipulates that the account represents a right *in rem* as regards the securities, albeit of an intangible nature. This is in particular important for the "fungibility" regime, as the deposit of securities in an account will not lead to a transformation of the rights of ownership (or other right *in rem*) into a mere claim for the securities.[20]
The right *in rem* cannot be individualised, though, to the extent that a multiplicity of securities owners detain accounts in similar securities with the same intermediary. It is therefore specified that the account position represents an *undivided* right *in rem*, which is to be exercised against the intermediary who keeps the account.[21]

As a rule, the exercise of the property rights on the securities (or other rights *in rem*) will only be possible against the intermediary with whom the account is held. Consequently, no rights can be exercised on the aggregate "omnibus" account held by the intermediary with the CSD[22], nor directly against the issuer of the securities. However, exceptions to this rule are provided for in the situation of insolvency or other situations of default (*concursus creditorum*) affecting one of the actors in the system (see *infra*):

C. Transfer of dematerialised securities

The dematerialisation regimes under Belgian law expressly contain a provision according to which the transfer of securities is realised by crediting the account of the beneficiary of a transfer.[23] However, contrary to the situation under French law, it is generally accepted that this provision does not modify the principle of transfer *solo consensu* as between the transferor and the transferee.[24] In other words, the specification of the object and the price of a sale will lead to transfer of property between parties. The delivery of the securities will take place in a scriptural way in the account system, and will make the transfer effective *erga omnes*. The disparity between the internal and external regime as regards the transfer of rights on the securities will bear specific relevance in the event of insolvency of the transferor: if the transaction has not yet been initiated such as to become irrevocable for the transferor upon the

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[19] See Art. 17 RD No. 62, which applies most of the provisions of the RD No. 62

[20] As is the case for a deposit of money in an account.

[21] See, in particular for immobilised securities: Art. 13 RD No. 62; for government debt securities: Art. 11 Law 2 January 1991; for dematerialised company securities: Art. 471Companies Code

[22] If the intermediary holds an awn securities account with the CSD, the former will of course be able to exercise his propert rights towards the CSD.

[23] Art. 6 Law 2 January 1991 (public debt securities); Art. 468, para 2 Companies Code. No similar provision has been enacted under the reime of RD No. 62, but the possibility to exercise the right of co-ownership based on the book-entry indicates that the existence of the right *in rem* after a transfer is related to the book-entry.

[24] M. TISON, "De uitgifte van gedematerialiseerde vennootschapseffecten- bemerkingen bij de Wet van 7 april 1995", in: H. BRAECKMANS, E. WYMEERSCH (eds.), *Het gewijzigd Vennootschapsrecht 1995,* Antwerpen, Maklu, 1996, p. 239 foll. Ch. SUNT, "Dematerialisatie van aandelen", in: K. BYTTEBIER (ed.), *De gewijzigde Vennootschapswetten 1995*, Antwerp, Kluwer, 1996, p. 455 et seq. Compare for the situation in Luxembourg the contribution of A. PRÜM in this volume.

occurrence of the insolvency, the bankruptcy receiver will not recognize the initiated transfer for the sake of the liquidation.[25]
This situation does not preclude parties to the transfer to defer the transfer of property through a specific provision in contract, e.g. until the actual settlement of accounts in favour of the transferee has occurred. This would allow to align the internal and external dimension as regards the transfer of rights.

The above principles apply to the transfer of property rights or related rights *in rem* (such as a right of usufruct). Where the vesting of the right *in rem* requires the actual dispossession by the transferor in order to be effective amongst parties, the accounts will have to be settled in order both to produce their internal and external effects. This will be the case not only for a right of pledge on the securities, but also, under Belgian law, for securities lending.

Finally, it should be noted that all dematerialisation systems are "closed-ended" systems, in the sense that the aggregate sum of all account positions should at all times equal the number of securities issued in dematerialised form or immobilised through "fungible" deposit. Hence, no transfers may be initiated which would result in a debit position on a securities account.[26] Short selling of securities will only be permitted provided the short position is covered through securities lending.

D. The finality of book entry transfers

All dematerialised securities regimes ensure the finality of book entry transfers when the account of the beneficiary has been credited. Specific rules have been introduced to ensure that the transfer is not disrupted by a revocation of the transfer order, the insolvency or other situations of default during the clearing and settlement process. These rules give effect to the European Settlement Finality Directive, as implemented into Belgian law by the Law of 28 April 1999.[27] Finalty is realised mainly through two principles. First, in order to ensure the smooth operation of the settlement systems, the introduction of a transfer order in the system will as a rule be irrevocable from a certain point on, to be determined in the operating regulations of the system.[28] Second, the insolvency or other event of default affecting the transferor or one of the intermediaries in the settlement system in the course of the transfer will not affect the transfer to be completed.[29]

E. Treatment of upper-tier attachment

A critical element in investor protection as regards dematerialised securities, concerns the elimination of third party claims on the investors' securities as aggregated in the upper tier account held with the CSD or an affiliated intermediary. With this purpose, the intermediary must hold the clients' securities and the securities held for its own account on separate

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[25] By contrast, the insolvency of the transferee will not preclude the bankruptcy receiver from requiring that the securities be transferred by the transferor against payment. However, he may also opt for not executing the transfer in case this would be less advantageous for the bankruptcy liquidation (art. 46 Bankruptcy Act). In the latter situation, the transferor could claim damages in the bankruptcy procedure.

[26] See, with respect to the system of RD No. 62: Court of Appeal Antwerp, 21 November 2002, *Droit bancaire et financier*,. 2003/V, 313, note R. STEENNOT & M. TISON.

[27] See footnote 28.

[28] Compare Art. 4, § 2 Law of 28 April 1999, which gives effect to the irrevocable character of the transfer order when provided for in the contractual arrangements of the system.

[29] See Art. 4, § 1 Law of 28 April 1999.

accounts with the CSD or its affiliated intermediary.[30] Thus, the clients' assets, which are aggregated within a "omnibus" account opened by the intermediary in its own name, but on behalf of the joint securities owners[31], can be legally insulated from third party claims.
All dematerialisation regimes provide in this respect for a double set of rules: first, attachment by the intermediaries' creditors on the omnibus account is excluded by law, at least as concerns the account held with the CSD and, as the case may be, its subcustodian.[32] Attachment on the intermediary's accounts will be allowed on the own account of the intermediary only. Second, the omnibus client account will also enjoy protection against attachment emanating from the investors' individual creditors, in the interest of all other investors who enjoy a co-ownership right on the aggregated securities in the omnibus account. These creditors should execute their claims through "lower-tier" attachment on the individual securities account held by the investor with the intermediary.[33]

F. Protection against insolvency of the financial intermediary

The insolvency of one of the actors in the securities settlement system may not only disrupt the smooth operation of transactions which have been initiated prior to the insolvency (see *supra*, sub D). It may also affect the rights of the investors on the securities, as expressed through their accounts. Investor protection will therefore, again, mainly focus on keeping the pool of securities on which the investors can exercise their right of co-ownership, outside the realm of the intermediaries' bankruptcy. The legal situation under Belgian law can be summarised as follows:

(1) in the event of insolvency or other situation of default affecting the intermediary, the rights of the different securities owners of a same security will be executed collectively on the aggregate "customer" account ('omnibus' account) held by the intermediary with the CSD (or an affiliate member).[34] In

[30] The so-called "segregation rule" at present still is provided for in the various dematerialisation regimes, thus applying to all domestic and foreign participants in the system. Since the financial market reform of 2002, the segregation rule has been rephrased as a conduct of business requirement (Art. 26, 16° Law of 2 august 2002), thereby receiving a scope of application which is not linked to participation in one or another settlement system, but to the legal status of financial institutions as being established in Belgium. However, this provision has not yet entered into force.

[31] From a legal point of view, the financial intermediary can be considered to act in the capacity of *commissionaire* on behalf of the investors in maintaining the omnibus account with the upper tier actor (either the CSD or an entity affiliated to the CSD).

[32] See Art. 11, § 1 RD No. 62 (fungible securities); Art. 10 Law 2 January 1991 (public debt securities); Art. 472 Companies Code. Under the regime of RD No. 62, Art. 11 does not exclude attachment by the investors' creditors on the omnibus account held with an affiliate member. By contrast, the Law of 2 January 1991, which also allows indirect participation to the clearing system of the National Bank of Belgium through an affiliated intermediary, seems to protect both the direct and the indirect account from attachment.

[33] This is in effect similar to the situation of normal bank accounts: attachment will be effected and perfected on the individual bank account, obliging the financial intermediary to eventually pay out the creditor. However, no attachment is possible on the "upper tier" assets of the financial intermediary. It should be noted that the underlying legal situation is somehow different in the case of bank accounts, as the deposit of cash in an account results in transforming an ownership right into a financial claim. It is therefore unconceivable for the investor's creditors to seize the assets of the financial institution, as these do not represent any right *in rem* of the investors.

[34] This is not to say that the securities owners can disregard the procedural requirements as regards the administration of the insolvency. Hence, in case of bankruptcy, the securities owners will have to direct their restitution claim against the bankruptcy liquidator (*curateur*). Furthermore, the dematerialisation regimes only specifiy how the rights attached to property of the securities can be exercised in a situation of insolvency/default. It does not in itself preclude the application of limitations as to the exercise of these rights

view of the legal obligation for the intermediaries to segregate their own accounts from client accounts[35], the credit position on the "omnibus" account held with the CSD should normally correspond to the sum of the individual clients' account positions held with the intermediary. The account held with the CSD thus is protected against concurrent claims from other creditors of the intermediary. If the position on the account is not sufficient to satisfy the claims of the securities owners, the latter may exercise the remainder of their claims on the own account the intermediary may possibly hold with the CSD. This right will prioritize all concurrent claims from other creditors and the property right of the intermediary itself.[36]

(2) When the insolvency or other situation of default affects the CSD directly, the securities owners[37] will execute their rights collectively on the financial instruments held by the CSD itself or given into sub-custody.[38] The protection is similar to the event of insolvency of an intermediary: the financial instruments held by the CSD are protected against claims from other creditors, and the own securities of the CSD will be attributed to the securities owners if the latter have not managed to fully recover their securities.

(3) The bankruptcy or similar event of default of the issuer of the securities, enables the securities owner to exercise his (financial) claims directly against the issuer (e.g. claim for reimbursement of the capital of a bond).[39]

G. Bona fide third party protection

The dematerialisation regimes under Belgian law do not generally provide for rules as concerns the protection of *bona fide* third parties who have acquired dematerialised securities, either directly or indirectly, from a person who was not entitled on these securities. This appears at first sight to be a weakness of the regulatory system: third party protection could avoid possible disruptions of the smooth functioning of the accounts system, as it would avoid the unwinding of transactions following successful property disputes. By contrast, this situation will maximize the protection of the interests of the (righteous) owner who maintains a securities account, and is assured of the possibility to revindicate his securities notwithstanding the occurrence of fraud (e.g. fraudulent access by a third person to the account) or errors in the system (e.g. erroneous transfer, followed by subsequent transactions to person in good faith). Nevertheless, some elements of third party protection exist in the legal regimes. Due to the nature of the (underlying) securities, some differences appear between the regime of immobilised securities, and the genuinely dematerialised securities.

As a rule, dematerialised securities, as intangible goods, would not benefit the protection that is granted by Article 2279 Civil Code to the *bona fide* possessor of tangible movable goods, in the sense that the mere possession constitutes a refutable presumption of entitlement on the good (property or other right *in rem*). Under Article 2279 Civil Code, the righteous owner is only allowed to revindicate the good acquired by the *bona fide* possessor during three years.

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stemming from the insolvency procedures (e.g. the obligation to await the formal termination of the verification of claims in a bankruptcy procedure, before being allowed to claim restitution of the securities).

35 The segregation rule follows from Art. 26, 16° Law of 2 August 2002: See *infra* for more details.

36 The rules are identical for all regimes of dematerialised securities. See for immobilisedsecurities: Art. 13, para 1, 1° RD No. 62; for dematerialised public debt securities: Art. 11, para 1, first indent Law 2 Jan. 1991; for dematerialised company securities: Art. 471, 3rd indent Companies Code.

37 Including the intermediary who holds own securities on an account with the CSD.

38 See Art. 12, para 2 to 4 RD No. 62, referred to in Art. 13, para 1, 1° RD No. 62.

39 Art. 12, para 1, 3° RD No. 62.

The non-application of Article 2279 Civil Code to dematerialised securities thus in general deprives the *bona fide* acquirer of securities of any protection against revindications from an alleged owner of the securities.[40] On the contrary, as indicated the system will protect the righteous owner of the securities held in the account against all situations of fraud or incorrect transactions with these securities.

In the regime of immobilised securities, no protection is granted to the *bona fide* third acquirer after the securities have been introduced into the system, as concerns transactions between accounts. By contrast, Article 10 of RD No. 62 protects the *bona fide* acquirer against any revindication by an alleged owner of the securities as regards incidents which have occurred *prior* to entering the system: the *bona fide* acquirer will not be required to restitute the securities to the righteous owner if, upon the entry of these securities into the "fungibility" regime, no statement from the alleged owner as to its involuntary dispossession had been made public.[41] This third party protection even remains in place after the securities – or more correctly securities of the same kind and amount – have been retrieved from the "fungibility" regime by the *bona fide* acquirer.

With regard to dematerialised government debt securities, Article 5 of the Law of 2 January 1991 contains a limited third party protection as regards fraudulent transactions: it prohibits the intermediary who holds the investor's account to effect any transaction with the investor's securities on its own behalf. The non-observance of this prohibition may not be opposed against a *bona fide* third party. This provision therefore protects *bona fide* third parties against the possible revindication by the investor of the securities that have been fraudulently disposed of by the account holder. However, no similar protection seems to exist in other cases of fraud or errors in transfers. As a consequence, a different treatment is given in law to the situation where a *bona fide* third part acquires securities which originally have been fraudulently transferred from the account of the righteous owner, depending on the perpetrator of the fraud: if the fraud was committed by the account holder, the *bona fide* acquirer will be protected; if the fraud emanated from another party who gained access to the account, the *bona fide* third party will not enjoy protection against the righteous owner.[42]

H. Investors' rights vis-à-vis the issuer

The relationship between the issuer and the owner of dematerialised securities as regards their mutual rights and obligations rests on a the basic rule that the immobilisation or dematerialisation of the securities does not preclude the full exercise by the owner of the rights attached to the securities, whether pecuniary (dividends, interests, redemption of

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[40] See also J. TYTECA, "De dematerialisatie van aandelen en obligaties" in: *De nieuwe Vennootschappenwet van 7 en 13 april 1995*, Kalmthout, Biblo, 1995, p. 80-81. *Contra:* Ch. SUNT, "dematerialisatie van aandelen", cited *supra* note 24, no. 41, according to whom the undetermined character of the co-ownership right on the aggregate securities in the omnibus account prevents the righteous owner of claiming restitution of its securities against a *bona fide* third party, as the owner will never be able to demonstrate that the third party has acquired his specific securities.

[41] This provision therefore attempts to solve all disputes as to entitlement on the securities *before* they enter the system of RD No. 62, and still have a "materialised" existence. Upon deposit of the securities in an account, the financial intermediary must verify whether no opposition has been formulated against these securities (which can still be identified by number). If an opposition has been formulated, the intermediary will not be allowed to accept the deposit under the regime of RD No. 62: See Art. 9 RD No. 62.

[42] It could be argued that this difference in treatment cannot be objectively justified from the point of view of the third party, and therefore could run contrary to the constitutionally guaranteed principle of equality before the law (Articles 10-11 of the Constitution). If this is the case, the validity of the provision could be challenged before the *Cour d'Arbitrage*.

capital, …) of associative (voting right, preferential subscription right etc). However, specific arrangements are needed in order to organise the exercise of these rights, absent a direct connection between the issuer and the investor.
First, the investor will be able to demonstrate his entitlement on the securities through the delivery, by the account holder or the CSD, of a certificate which states the number of securities he owns.[43] For the sake of participation in the general meeting of shareholders, it will also be certified that these shares will not be transferred until the day of the general meeting. This must ensure that no person would exercise voting rights with shares that have been alienated between the moment of issue of the certificate and the moment of the meeting itself.[44] ownership of securities towards the issuer, in the absence of a register which identifies the latter.
Second, the chain of operators in the account-based system (CSD and account holders) can be used to effect the discharge of pecuniary obligations by the issuer towards the investor. With a view to increase legal certainty, the payment by the issuer to the CSD will discharge the former of its obligations towards the issuer. The same principle applies to all further payments down the system, from the CSD to the subsequent account holders, and, ultimately, to the investor. [45] During the transmission process, the amounts paid by the issuer will only be protected against attachment by creditors of the possessor in the regime of immobilised securities: no attachment is allowed on these amounts by the creditors of the CSD. Surprisingly, no similar protection exists in the system of government debt securities or dematerialised company securities.

Conclusion

This brief overview illustrates that a fairly complex legal framework is needed to maximize legal certainty of both issuers, investors and operators in settlement systems for dematerialised securities. The long-standing tradition with the regime of immobilised securities and the presence of a strong player in the domestic market has fostered the emergence and continuous finetuning of a system which presents a high degree of legal certainty.

Nevertheless, the piecemeal approach to creating new categories of dematerialised securities scattered over different legal regimes, creates a risk of inconsistency amongst the various rules. Notwithstanding the overall similarity, differences appear in some areas, such as *bona fide* third party protection in securities transactions or the protection against creditor attachment of payments made by the issuer in favour of the investor.

More fundamentally, it appears important, from a comparative point of view, to raise the question whether there is still need for a separate category of dematerialised securities beside nominal securities. In fact, genuinely dematerialised securities combine elements of (anonymous) bearer securities in the relationship between the issuer and the investor, while having the characteristics of nominal securities in relation to e.g. tax authorities. The distinction seems to essentially boil down to the question whether or not the issuer should be

[43] See, for immobilised securities: Art. 15 RD No. 62; for dematerialised company securities: Art. 474 Companies Code. For obvious reasons, no similar provision exists for government debt instruments. As concerns immobilised securities, the issuer cannot require from the CSD or the affiliate member to obtain the numbers of the securities under deposit.

[44] This is all the more important as, under Belgian law, the pseudo-owner of the shares would be liable of a criminal offence by voting at the general meeting of shareholders (see Art. 651, 1° Companies Code).

[45] See, for immobilised securities, art. 14 RD No. 62; for government debt securities: Art. 11, para 2 Law 2 January 1991; for company securities: Art. 473 Companies Code.

allowed, at all times, to identify all of its shareholders or bondholders. Within the Belgian context, doubts are also raised as to the possibility to actually immobilise nominal securities.[46] With the prospect of the elimination of bearer securities, the legislator should therefore consider either to eliminate the legal uncertainty as to the possible immobilisation of nominal securities, or maintain the possibility for the creation of dematerialised company securities as a distinct category.

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[46] Indeed, some doubts have been expressed as to the possibility to actually bring nominal company securities within the system of RD No. 62, given the requirement to register the shares in the owner's name with the issuer. This requirement would exclude the intermediary to register as a *nominee* in the company register. We submit, however, that there is no objection, as far as company law requirements are concerned, for a nominee to register the shares with the company, as the disclosure of the specific capacity under which the nominee acts makes it clear for the company that the financial intermediary is not the "beneficial" owner. However, problems may arise as concerns the exercise of voting powers attached to the shares, as only the actual owners of the shares are entitled to vote. Hence, neither the account holder nor the investors will be entitled to vote with the shares: the former because it is not the owner, the latter because the shares are not registered in its name.

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Regulation	Royal Decree No 62 (fungible securities)	Law 2 January 1991 (public debt securities)	Law 22 July 1991 (treasury certificates/Certificates of deposit)	Law 7 April 1995 (Dematerialised company securities)
Issuer	Not specified nor limited: • Belgian or foreign issuers • Public or private entities	State, Communities, Regions, Provinces, Municipalities, et al.	*Private issuers:* • Enterprises with legal personality • Securitization funds • Credit institutions *Public issuers :* • State, Communities, Regions, Provinces, Municipalities, et al.	• Public Limited Liability Company (*société anonyme*) under Belgian Law • Partnership limited by shares (*société en commandite par actions*) under Belgian law
Type of securities	• All financial instruments referred to in art. 2, 1° Law 2/8/2002, either in bearer or nominal form or other; • Exclusion of dematerialised securities governed by a specific regime	• Dematerialised public debt securities	Debt instruments with a • Minimum threshold of 250,000 Eur per instrument (art. 4) • Limited duration	• Shares (incl. non-voting) • Beneficiary shares • (convertible) bonds • Warrants
CSD	• CIK • Euroclear • National Bank of Belgium	• National Bank of Belgium	• National Bank of Belgium	Not yet effective
Nature of investor's rights in relation to securities held in account	• Book entry represents intangible co-ownership right towards intermediary, who acts as custodian (art. 3) • Right can be exercised solely against the intermediary, except in case of insolvency or similar event of default (art. 13)	• Book entry represents intangible right *in rem* (art. 11) • Right can be exercised solely against the intermediary, except in case of insolvency or similar event of default (art. 11)	*Public issuers:* Same regime as the Law of 2 January 1991 (art. 7, § 1) *Private issuers:* Same regime as company securities (art. 7, § 3)	Under the same regime as the Law of 2 January 1991
Treatment of upper-tier attachment	Attachment on omnibus account held by the intermediary on behalf of the investors with the CSD (or an affiliate) is excluded (art. 11)	Attachment on omnibus account held by the intermediary on behalf of the investors with the CSD (or an affiliate) is excluded (art. 10)	*Public issuers:* Same regime as the Law of 2 January 1991 (art. 7, § 1) *Private issuers:* Same regime as company securities (art. 7, § 3)	Art. 471 Companies Code: Identical to Art. 11 RD 62.
Protection of investor in case of insolvency of the intermediary	Right of revindication exercised on the aggregate securities of the same nature the intermediary held on an omnibus account with the CSD (or its affiliate) (art. 13,2nd par). In case of shortfall of omnibus account to satisfy the investors' claim: • investors' claims can be exercised on own account, if any, of intermediary in the	Right of revindication exercised on the aggregate securities of the same nature the intermediary held on an omnibus account with the CSD (or its affiliate) (art. 11) In case of shortfall of omnibus account to satisfy the investors' claim: • investors' claims can be exercised on own account, if any,	*Public issuers:* Same regime as the Law of 2 January 1991 (art. 7, § 1) *Private issuers:* Same regime as company securities (art. 7, § 3)	

	same securities • pro rata repartition of securities to investors	of intermediary in the same securities • pro rata repartition of securities to investors		
Corporate Actions?	• Owner executes corporate associative rights directly against the issuer • Issuer can discharge its monetary obligations through the CSD	• Owner executes corporate associative rights directly against the issuer: Art. 11 • Issuer can discharge its monetary obligations through the CSD (art. 11)	*Public issuers:* Same regime as the Law of 2 January 1991 (art. 7, § 1) *Private issuers:* Same regime as company securities (art. 7, § 3)	• Owner executes corporate associative rights directly against the issuer (art. 474 Comp. Code) • Issuer can discharge its monetary obligations through the CSD (art. 473 Comp. Code)
Protection of the depositor in case of bankruptcy of the issuer or any similar event	Direct claim against the issuer Art. 12/13	Direct claim against the issuer (art. 11)	*Public issuers:* Same regime as the Law of 2 January 1991 (art. 7, § 1) *Private issuers:* Same regime as company securities (art. 7, § 3)	Direct claim against the issuer (Art. 471 Comp. Code)
Acquisition of investor's rights in good faith by 3rd parties	• No application of art. 2279 Civil Code to the intangible joint property rights of the investor • A party who claims property rights over a financial instrument, which was/is put under the regime system of RD nr.62, is not entitled to claim this right against a participant, clearing institution or owner in good faith; if he did not make public a statement of dispossession prior to the deposit of the securities in the account system.	• No application of art. 2279 Civil Code to the intangible joint property rights of the account holder • The institution holding the accounts may not perform transactions on its own account. Breach of this rule may not be opposed against third parties in good faith (art. 5)	*Public issuers:* Same regime as the Law of 2 January 1991 (art. 7, § 1) *Private issuers:* Same regime as company securities (art. 7, § 3)	• Art. 2279 Civil Code not applicable to intangible dematerialised financial instruments.
Transfer of the rights of the depositor	• *Inter partes*: usually consensual (depending on the underlying contract) • *Erga omnes:* Book entry	• *Inter partes*: usually consensual (depending on the underlying contract) • *Erga omnes:* Book entry (art. 6)	*Public issuers:* Same regime as the Law of 2 January 1991 (art. 7, § 1) *Private issuers:* Same regime as company securities (art. 7, § 3)	• *Inter partes*: usually consensual (depending on the underlying contract) • *Erga omnes:* Book entry
Finality of the transfer	• Credit of transferee's account • Irrevocability of transfer order: determined by rules of the system • Clearing and settlement possible notwithstanding insolvency of	• Credit of transferee's account • Irrevocability of transfer order: determined by rules of the system • Clearing and settlement possible notwithstanding	*Public issuers:* Same regime as the Law of 2 January 1991 (art. 7, § 1) *Private issuers:* Same regime as company securities (art. 7, § 3)	• Credit of transferee's account

	transferor, intermediary or CSD	insolvency of transferor, intermediary or CSD		

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