FACULTY OF LAW AND CRIMINOLOGY

Instituut FINANCIEEL RECHT
FINANCIAL LAW Institute

THE BELGIAN SUBSTANTIVE LAW REGIME FOR (THE CROSS-BORDER HOLDING OF) INTERMEDIATED SECURITIES

WP 2023-09

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Financial Law Institute
Working Paper Series

UNIVERSITEIT GENT

WP 2023-09

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Abstract

This contribution comments on the present state of Belgian securities law and will be included as a comparative law supplement to the second edition of the German Depotgesetz Kommentar (forthcoming, 2023) (first edition: Munich, Verlag C.H. Beck, 2012).

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The final version of this paper will be published in *second edition of the German Depotgesetz Kommentar (forthcoming, 2023)*

The entire working paper series can be consulted at www.fli.ugent.be

Auflage

The Belgian substantive law regime for (the cross-border holding of) intermediated securities

Louise Van Marcke[1]

Forthcoming in Depotgesetz Kommentar, Munich, Verlag C.H. Beck, 2023

1. Introduction: the Euroclear system

1. Belgium's national central securities depository ("CSD") is Euroclear Belgium, a *société anonyme/naamloze vennootschap* (SA/NV) incorporated in Belgium having its registered office in Brussels. Euroclear Belgium is the successor of the *Caisse Interprofessionnelle de Dépôts et de Virements de Titres SA/Interprofessionnelle Effectendepositen Girokas NV* ("CIK"), established in 1967 and integrated into the Euroclear system on 1 January 2006. Euroclear Belgium forms part of the Euroclear Group, which consists of six national CSD's of European member states (Euroclear Belgium, Euroclear Finland, Euroclear France, Euroclear Nederland, Euroclear Sweden, Euroclear UK & Ireland) and one International central securities depository ("ICSD"), Euroclear Bank. Together with Euroclear France and Euroclear Netherlands, Euroclear Belgium forms the 'ESES' group.[2]

Belgium is also home to Euroclear Bank SA/NV, Euroclear group's ICSD.[3] Since 27 July 2000, Euroclear Bank has been authorized as a credit institution governed by Belgian law, making it the group's only CSD with a banking license.[4] Euroclear Bank's

[1] Doctoral researcher, Financial Law Institute, Ghent University. This research was made possible by the support of the Research Foundation Flanders (FWO.OPR.2020.0064.01).

[2] From a legal perspective, the ESES CSD's (short for Euroclear Settlement of Euronext-zone Securities) are separate CSD's, though a number of their activities (such as new issuances, custody servicing, asset servicing (related to i.a. voting, information transfers between issuers and investors, payments) and settlement) are handled together for reasons of organizational efficiency. By joining TARGET2-Securities in 2016, TARGET2-Securities has taken over part of the functionality of the ESES platform that unified settlement for the three CSDs but has not touched upon the other integrated ESES-services. See EUROCLEAR, "Rights of Clients to Securities Deposited in the ESES CSDs", October 2018, 24p.

[3] As a consequence of the separately developed life cycles of Euroclear and Clearstream, at present a duopoly of ICSD's exists in the EU between the Brussels-based Euroclear Bank and the Luxembourg-based Clearstream Banking Luxembourg ("CBL").

[4] Subject to the Law of 25 April 2014 on the statute and supervision of credit institutions. This limited license allows Euroclear Bank to provide its clients additional banking services (e.g. intraday credit facilities) to ensure liquidity and smooth settlement.

historical function and to this day, its primary activity, is to act as issuer-CSD for international bonds ("Eurobonds").[5] As its second main activity, it functions as a one-stop-shop for securities held cross-border by operating a multitude of CSD-links with foreign settlement systems.[6]

2. With the entry into force of the Central Securities Depositories Regulation[7] ("CSDR"), Euroclear Belgium (on 24 April 2019) and Euroclear Bank (on 4 December 2019) were licensed as 'central securities depositories' (*centrale effectenbewaarinstellingen*)[8] under art 16. j. art 54 CSDR, with a corresponding cancellation as 'settlement institutions under Belgian law' (*vereffeningsinstellingen*).[9] The National Bank of Belgium ("NBB") acts as their competent authority.[10]

Today, Belgian CSDs are governed by the directly applicable CSDR, the Financial Supervision Act (*Wet Financieel Toezicht*, 2 August 2002[11]), in particular articles 2, 22 and 23, 33 to 37 and 41 to 43 and the Royal Decree of 11 June 2015.[12]

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[5] Eurobonds are internationally traded debt instruments issued (and denominated) in a currency other than that of their country of issue (for example, a Belgian company issuing US dollar bonds). An ICSD such as Euroclear Bank will generally not serve as an issuer-CSD for equities, since shares are always issued in an 'ordinary', national CSD. An exception to this rule is that Euroclear Bank acts as issuer-CSD for Irish securities since March 2021, as a consequence of Brexit. See EUROCLEAR, 'Successful migration of Issuer CSD Services for Irish Securities from Euroclear UK & Ireland to Euroclear Bank', 18 March 2021, https://www.euroclear.com/newsandinsights/en/press/2021/2021-mr-07-irish-securities-migration.html .

[6] Art. 48 CSDR. It is notable that, compared to Euroclear France and Clearstream Banking Frankfurt, Euroclear Belgium has set up relatively few CSD-links. This can historically be explained by the existence in Belgium of the ICSD: whereas CIK was once a separate entity with its own CSD links, once it joined the Euroclear group under its new name 'Euroclear Belgium' the idea grew to phase out these links since Euroclear Bank, which was part of the same group, already operated many of these links (insights gained from conversations with Euroclear Bank, July 2021). For an overview of existing CSD-links, see ESMA, "CSD Register", https://www.esma.europa.eu/sites/default/files/library/esma70-155-11635_csds_register_-_art_21.pdf , 60-125.

[7] Regulation (Eu) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories, and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012, pub. 28 August 2014.

[8] ESMA CSD register; NBB, "Centrale effectenbewaarinstellingen vergund in België", https://www.nbb.be/nl/financieel-toezicht/prudentieel-toezicht/toezichtsdomeinen/vereffening-en-verrekeningsinstellingen-0#bm_Header_0 . For the purpose of CSDR, Euroclear Bank has CSD regulatory statute, since there is no separate regulated status for ICSDs. The term 'I'CSD simply distinguishes it from national CSDs.

[9] Prior to the entry into force of CSDR, both Euroclear Belgium (CIK) and Euroclear Bank were recognized under Belgian law as 'settlement institutions' (*vereffeningsinstellingen*), see royal decree of 26 September 2005 on the status of settlement institutions and institutions assimilated to settlement institutions, pub. 11 October 2005. The now abolished definition of a 'settlement institution' (Art. 2, 17° Law of 2 August 2002 on the supervision of the financial sector and financial services, pub. 4 September 2002) only referred to the settlement function of the CSD, not to its other functions (e.g. custody). Note that the Belgian Companies Code (*BCC*) incorrectly still refers to 'settlement institutions' in its provisions on dematerialised securities, which is merely one of the many examples of technical inconsistencies with financial law regulations.

[10] Art. 134 of the Law of 25 April 2014 on the statute and supervision of credit institutions. Under Belgian law, the Financial Services and Markets Authority ("FSMA") also has a supervisory role, more specifically in relation to compliance with the rules on the loyal, fair and professional treatment of CSD participants and their clients, which is specifically manifested in the supervision of CSDs' compliance with articles 26(3), 29, 32 to 35, 38, 49 and 53 CSDR. For those aspects that fall within the competences of the FSMA, the NBB is obliged to obtain the advice of the FSMA, see art. 1, §2-3 Royal decree of 11 June 2015 designating the competent authority responsible for the authorisation and supervision of central securities depositories, pub. 19 July 2015.

[11] Law of 2 August 2002 on the supervision of the financial sector and financial services, pub. 4 September 2002.

[12] *Ibid*.

3. The Euroclear system is a recognised 'settlement system'[13] within the meaning of art. 2 of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems ("Settlement Finality Directive" or "SFD"), as implemented by a Belgian law of 28 April 1999[14].[15] Euroclear Belgium's settlement of securities transactions, as part of the ESES group, takes place through the integrated European TARGET2-securities platform.[16]

4. In what follows, the Belgian substantive law regime for intermediated securities[17], as held in the Euroclear system, is addressed. The neutral and umbrella term 'CSD' will be used to refer to Euroclear Belgium and Euroclear Bank. Some securities law topics are not addressed in this chapter, including the pledging of securities[18] and securities lending transactions[19].

2. The immobilisation vs. the dematerialisation regime

5. In Belgium, as of 2008, securities can only be issued in registered or dematerialized form (the bearer form having been abolished[20]).

According to the Belgian Companies Code ("BCC")[21] a registered security is represented by an entry in a company's securities register. Alternatively, the existence of registered shares can be evidenced by the issuer's deed of incorporation, where the

[13] Another Belgian settlement system is "NBB-SSS", operated by the National Bank of Belgium, which settles transactions of government debt securities. NBB-SSS represents a rare European case in which a settlement service is operated by a national central bank, acting as a CSD.
[14] Law of 28 April 1999 transposing Directive 98/26/EC of 19 May 1998 on settlement finality in payment and securities settlement systems, pub. 1 June 1999.
[15] For a discussion of the finality of book entry transfers, see M. TISON, "Competing for Legal Certainty: The Regime of Challenging the Prudential Supervisor: Dematerialised Securities in Belgian Law", *20 ans de dématérialisation des titres en France: Bilan et perspectives nationales et internationales*. Paris, Revue Banque, 2005, 251-270.
[16] See EUROCLEAR, "Euroclear Bank joining the European Central Bank's TARGET2-Securities platform", 21 December 2021, https://www.euroclear.com/newsandinsights/en/press/2021/2021-mr-31-euroclear-bank-joining-european-central-bank-targettwo.html .
[17] Referring to securities that are held in book-entry form on securities accounts, held by at least one intermediary that interposes itself between the investor and the issuer.
[18] For high quality Belgian law reviews on this subject, see H. DE WULF, "Aspecten van Verrekening En Vereffening van Beursorders (K.B. Nr. 62)" *De NV in de Praktijk*, vol. 2004, Kluwer, 2004, p. 62/2-62/36; L. VAN DEN STEEN, *De effectenrekening*, Antwerpen, Intersentia, 2009, 624-642; PARREIN, F., "Pand op nominatieve effecten" in *Voorrechten en hypotheken. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer*, Mechelen, Kluwer, 2017, 1-30; N. ROGGE, "Verpanding van financiële instrumenten", *Financieel recht. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* , Mechelen, Wolters Kluwer Belgium, 2021, losbl. 9-145.
[19] Securities lending practices, including the role of Euroclear Bank's securities lending programme, have extensively been covered by the same author elsewhere, see L. VAN MARCKE, "Securities Lending as a Barrier to (or an Instrument for) Shareholder Activism and the Role of Intermediaries as Lending Agents", (forthcoming in) A. VAN HOE and T. VOS (eds.), *Shareholder Activism in Belgium: Boon or curse for sustainable value creation?*, Brussel, Larcier Intersentia, 2023, 38 p. (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4232198).
[20] As of 31 December 2013, all Belgian securities had to be converted into registered or dematerialized securities, art. 3, §1 Law of 14 December 2005 abolishing bearer securities, pub. 12 December 2005. As a transitional measure, the bearer form was preserved for existing shares until the end of 2013, though their trading on a regulated market had to be executed by book entry, art. 28bis Law of 2 August 2002 on the supervision of the financial sector and financial services, pub. 4 September 2002.
[21] Law of 23 MARCH 2019 introducing the Code of Companies and Associations, pub. 4 April 2019.

subscribers are designated as the owners.[22] Transfers of securities made after incorporation are subsequently recorded in the company's securities register and are represented by an entry therein.[23] The entry in the securities register is presumed to prove the holder's ownership in respect of the securities for which it is registered.[24]

6. The Belgian legal framework for securities makes a strict distinction between the immobilisation and the dematerialisation regime.

Like Germany, Belgium has had a long-standing tradition of immobilizing share certificates, in practice mainly those of bearer shares (when they still existed). The legislative framework that allowed for the immobilisation of paper-based shares was installed by Royal Decree n°62 ("RD n°62")[25], as early as 1967[26]. Under the immobilisation regime of Royal Decree n° 62, paper-based securities – whether bearer, order or registered and issued under Belgian or foreign law – can be deposited with a CSD or its affiliated members (art. 2) and this gives rise to a proprietary interest under RD n°62 (this is discussed *infra*, nrs. 8-13). As a consequence of their entry into a securities account, securities are automatically made fungible (art. 6 RD n°62) so they can be traded smoothly on financial markets.[27] The nature or inherent characteristics of the deposited securities must not conflict with this principle of fungibility. For registered shares in particular, this fungibility requirement would in practice only be adhered to if the registered shares are issued by an NV, or by a BV whose articles of association explicitly provide for the shares' free transferability (art. 5:63 BCC).[28] The immobilisation regime no longer has relevance for Belgian bearer shares since their

[22] Art. 5:23 BCC, art. 6:23 BCC and art. 7:27 BCC. With respect to registered shares, the rule that proof of the existence can alternatively be evidenced by the deed of issue is necessary since in practice many companies only register their shares in a share register on the occasion of the first transfer of shares, see *Parl. St.* Kamer, 2017-2018, Doc. 54 3119/001 (explanatory memorandum), 136.

[23] At the company's registered office, a register is kept for each category of registered securities issued by the company (possibly kept in electronic form, opening the door to registries based on distributed ledger technology). For the specifics of the share register, see art. 5:25 BCC, art. 6:25 and art. 7:29 BCC; for the register of profit-sharing certificates in the NV see art. 7:31 BCC, and for the register of registered bonds in the NV see art. 7:32 BCC.

[24] Art. 5:29 BCC, art. 6:28 BCC, art 7:34 BCC. With respect to shares, the importance of this registration should not be overestimated: while it concerns a rebuttable presumption of being a shareholder (and thus being able to exercise the rights attached to the shares); the registration in principle says nothing about who owns the shares from an economical perspective.

[25] Coordinated Royal Decree n° 62 of 27 January 2004 on the deposit of fungible financial instruments and the settlement of transactions of these instruments, pub. 23 February 2004.

[26] The original royal decree dates back to 10 November 1967 and has been amended several times over the years.

[27] Fungibility or 'exchangeability' refers to the fact that it becomes impossible to determine which particular securities belong to which particular investor. See art. 6 RD n°62 and see art. 4 of the Euroclear Terms & Conditions ("You have no right to any specific securities certificates for securities held in the Euroclear System, but are, instead, entitled, subject to the Terms and Conditions, to transfer (by book entry), to deliver or to repossess from us an amount of securities of the issue equivalent to the amount credited to your Securities Clearance Account, without regard to the certificate numbers of the securities certificates.")

[28] The free transferability that results from depositing shares with the CSD is incompatible with the personal nature of certain other types of Belgian companies '*in personae*' and shares of Belgian cooperative companies cannot be deposited either, since they are not freely transferable (art. 6:54 BCC), see D. VAN GERVEN, *Handboek vennootschappen. Algemeen deel*, Brussel, Larcier, 2020, 1236.

issuance has been outlawed in Belgium, but theoretically – though debated[29] – remains admissible for Belgian registered shares.[30] Today, RD n°62's main importance relates to the protection of proprietary interests of clients of Euroclear Belgium and Euroclear Bank (ICSD) that hold foreign securities in their securities accounts. In practice, the regime is mainly relevant for the safekeeping of foreign securities on securities accounts held with Euroclear Bank (ICSD)[31] due to its large number of CSD links (and therefore wider access to foreign securities) compared to Euroclear Belgium. The importance of the system lies in the fact that the principles of RD n°62 can be applied to foreign securities, regardless of the form in which these securities are issued under the applicable law.[32] This means that clients of the (I)CSD in Belgium always retain rights under the Royal Decree vis-à-vis the (I)CSD, regardless of what kind of asset, right, interest or entitlement the (I)CSD itself holds under the foreign law applicable to these securities. Problems of applicable law are in this way 'absorbed' by the central holding institution located at the top of the chain (the conflicts of laws position is addressed *infra*, nrs. 21-22). The system ensures that cross-border shareholdings held via foreign (I)CSD-links enjoy the same protection as Belgian shareholdings.[33]

7. As opposed to immobilisation, dematerialisation exclusively refers to the form in which securities are issued. Dematerialized securities are not represented by any physical document but are merely evidenced and represented by the credit balance of

[29] Belgian doctrine has long disputed the possibility of depositing registered shares in the system of fungible financial instruments of RD n°62. The debate mainly evolved around the shares' free transferability on the one hand, and the shares' fungibility on the other hand, but is not further addressed here. See C. BODDAERT, "Gecöordineerd Koninklijk Besluit nr. 62 van 10 november 1967 betreffende de bewaargeving van vervangbare financiële instrumenten en de vereffening van transacties op deze instrumenten. Artikel 1-2 van het Koninklijk Besluit nr. 62 van 10 november 1967", in Comm. Fin. recht, Kluwer, 2007, 8; L. VAN DEN STEEN, *De effectenrekening*, Antwerpen, Intersentia, 2009, 169-172; D. VAN GERVEN, *Handboek vennootschappen. Algemeen deel*, Brussel, Larcier, 2020, 1237.

[30] In practice, the shares of Belgian company Solvac (a holding company with a 30.81% share in the listed group Solvay) and the preferential shares of Cofinimmo, exist only as registered shares but are continuously listed on Euronext Brussels. Euroclear currently enables post-trade processes for registered shares, and updates the share register itself (for technical operational details, see L. VAN DEN STEEN, *De effectenrekening*, Antwerpen, Intersentia, 2009, 171). Unfortunately, the Belgian legislator has not yet accommodated current practice of immobilization of registered shares with a suitable legislative framework. Although RD no. 62 does not exclude registered shares from its scope of application, there is currently no legislative framework governing the consequences of immobilization of registered shares, especially pertaining to the question who is responsible for updating the company's register of registered shares. To increase legal certainty, it does seem advisable to provide for such a legislative framework.

[31] M. TISON and L. VAN DEN STEEN, "Intermediated Securities under Belgian law: Assessing the Impact of the Geneva Securities Convention on the Regulatory Environment" in P.H. CONAC, U. SEGNA and L. THÉVENOZ (eds.), *Intermediated securities: the impact of the Geneva securities convention and the future of European legislation*, Cambridge, Cambridge University Press, 2013, 220.

[32] Art. 2, par. 1 RD n°62.

[33] Insights gained from conversations with Euroclear Bank, July 2021. This is also stressed in EUROCLEAR, "Rights of Clients to Securities Deposited in the ESES CSDs", October 2018, 4-10 (with respect to Euroclear Belgium).

a securities account.[34] By comparison, the immobilisation regime, as described in this chapter, refers to a method of preserving securities, regardless of their form.[35]

Belgian law currently regulates the issuance of dematerialised financial instruments through three separate regimes. These regimes apply to[36]:

- Dematerialised public debt securities (see art. 3, 7 and 11 Law 2 January 1991[37]);
- Commercial papers and certificates of deposit issued in dematerialised form (see art. 7 Law 22 July 1991[38]);
- Dematerialised securities issued by Belgian companies as regulated by art. 5:30, 6:29 and 7:35 et seq. BCC (former art. 468 et seq. of the old Companies Code).

Dematerialized securities cannot be deposited in the system of RD n° 62.[39]

In this chapter, only the systems of the RD n° 62 and the BCC are discussed (the latter for the purpose of discussing some particularities with respect to intermediated shares), though any conclusions can be extended to the other two systems of dematerialized financial instruments since these are essentially similar.

It should be noted that since 1995, Belgium has fundamentally treated dematerialized securities as a separate category of securities, distinct from registered and bearer securities.[40] In Belgium, dematerialized securities are securities that only exist (and have been issued solely) in book-entry form; i.e. that are booked on a securities account with an intermediary bank or broker (i.e., a recognized accountholder, *erkende rekeninghouder*). This is a typical feature of the Belgian system which distinguishes it from other legal systems: an investor, wishing to have its registered securities booked on a securities account (the securities thus being represented by a credit to that securities account), cannot 'dematerialise' them (as would be the case in France and the UK, for example[41]). Belgian registered securities can be converted into purely

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[34] D. VAN GERVEN, "Gedematerialiseerde effecten", *RW* 2007-08, 1698-1710; E. DIRIX, R. STEENNOT and H. VANHEES, *Ondernemingsrecht in Hoofdlijnen*, Mortsel, Intersentia, 2019, 91-93; H. BRAECKMANS and R. HOUBEN, *Handboek vennootschapsrecht*, Antwerpen, Intersentia, 2020, 444-446.

[35] The rights to immobilised and dematerialised securities are certified by book-entries in securities accounts, and transfers of these rights are executed solely by book-entry (credit-debit operations).

[36] See also art. 4(b) Terms & Conditions Euroclear.

[37] Law of 2 January 1991 on the market of public debt securities and monetary policy instruments, pub. 25 January 1991.

[38] Law of 22 July 1991 on treasury bills and certificates of deposit, pub. 21 September 1991.

[39] Art 2, par. 2, 1-3° RD n° 62 declares the Royal Decree inapplicable to the three regimes of dematerialized securities.

[40] Even with the introduction of the new BCC in 2019, this legislative choice was preserved. For a discussion, see M. Tison, "De uitgifte van gedematerialiseerde vennootschapseffecten – bemerkingen bij de wet van 7 april 1995", in H. Braeckmans en E. Wymeersch (ed.), *Het gewijzigd vennootschapsrecht 1995*, Antwerpen, Maklu, 1996, 230. In practice, it was only by 2006 that the Royal Decree necessary to implement this law was published, so that limited liability companies (both listed and unlisted) could only start issuing dematerialized securities instead of registered securities by 2006 (see Royal Decree of 12 January 2006 on dematerialised corporate securities, pub. 3 February 2006). This legislative development should not come as a surprise in Belgium in view of the timing of the abolition of bearer shares one year earlier (in 2005).

[41] France treats dematerialisation as a mode (method) of holding registered or bearer securities, namely on a securities account. The dematerialized form is compulsory, but both the bearer and registered form are preserved,

dematerialized shares, but in that case, they will lose their qualification as 'registered' shares.[42] Alternatively, registered securities could arguably be immobilized under the separate regime of RD n°62 (see *supra*, fn. 29).

3. Property law aspects: the entitlement of an accountholder to the securities held in its securities account

8. Belgian law distinguishes the securities owner's right to the credit balance of his securities account from the right it has to the underlying financial instruments. For both, the securities owner is entitled to a different right. According to Belgian civil law, the accountholder has a claim (right *in personam*) against its direct intermediary in respect of the credit balance of the securities account, as is the case for cash accounts. This right *in personam* is relevant for a number of claims that are related to the investor's property right, for example, the right to require from the direct intermediary the onward payment of dividends or other revenue related to shares (e.g., income from a share repurchase or a capital reduction).[43] This right *in personam* is an *accessorium* to the investor's property right. With respect to the underlying securities that serve as the basis for that credit entry, the investor is granted a right *in rem*, more precisely a co-ownership right, since the applicable legislation expressly provides for it.[44]

9. The securities owner (under the immobilisation regime) and the securities "owner or holder" (under the dematerialisation regime, art. 7:35, par. 1 BCC) of book-entry securities is entitled to an intangible co-ownership right (*mede-eigendomsrecht*). This co-ownership right principally relates to the universality of deposited securities of the same nature under the immobilisation regime (art. 2, par. 3 RD n°62), and respectively to the generality of securities of the same category registered in the name of the CSD

see art. L228-1, par. 6 Code de Comm.: "These securities, whatever their form, must be registered in an account or in a shared electronic recording device in the name of their owner (…)". A similar reasoning applies to the UK, where uncertificated (i.e., dematerialized) registered securities are being held through CREST (as regulated by The Uncertificated Securities Regulations 2001 No.3755, 23 November 2001). Consequently, in the UK dematerialization is a way of holding registered shares through CREST (which eliminates the existence of an immobilization system).

[42] L. VAN DEN STEEN, *De effectenrekening*, Antwerpen, Intersentia, 2009, 178.

[43] As far as financial revenue (dividends, interest, capital and other payments made by the issuer) is concerned, the issuer is discharged from payment once he has transferred the sums of money to be paid to the CSD (art. 14 RD n°62, art. 5:35 and art 7:40 BCC). The CSD subsequently forwards the funds to the first-tier intermediaries in accordance with the amounts of dematerialized securities booked in their names on accounts with the CSD at the expiration date. The CSD is then, in turn, discharged from payment. The law does not regulate the consecutive transfer of payments downwards in the chain (towards the securities owner). See also D. VAN GERVEN, *Handboek vennootschappen. Algemeen Deel*, Brussel, Larcier, 2020, 1238.

[44] G. SCHRANS, R. STEENNOT, *Algemeen deel van het financieel recht*, Antwerpen, Intersentia, 2003, 272; H. DE WULF, "Aspecten van Verrekening En Vereffening van Beursorders (K.B. Nr. 62)" *De NV in de Praktijk*, vol. 2004, Kluwer, 2004, p. 62/2-62/36. Euroclear alerts its clients that "were it not for RD n° 62, the fungibility of the securities held in the Euroclear System would have resulted in you only having contractual rights against us. These contractual rights would be similar to the right of a person who deposits cash with a credit institution, i.e. an unsecured right for the return of an equivalent amount of cash and/or securities", see EUROCLEAR, "Rights of Participants to Securities deposited in the Euroclear System", July 2020, 6.

in the issuer's register of registered securities under the dematerialisation regime (art. 7:35, par. 6 BCC).

The (consequences of the) co-ownership right that owners of dematerialized securities are entitled to are in general – and above all, from a practical perspective – largely aligned with the regime of immobilized securities under RD n°62[45], so that both regimes (and in particular, the investor's co-ownership right) are discussed together hereafter.

10. When securities are deposited on a fungible basis with a CSD or its affiliated members (who then deposit them with the CSD) which is externalized by a credit entry in a securities account (cf. the immobilisation regime), or when dematerialized shares are booked on an account with a recognized account holder (cf. the dematerialisation regime), a co-ownership right is "vested" (*gevestigd*) on the part of the investor.[46] The Dutch word *vestigen* implies that a new right is granted to the depositor as a consequence of the deposition, respectively the booking on the securities account, so that the right it was previously entitled to is now changed (or rather: 'converted'[47]) from an individual ownership right (in)to a co-ownership right. The justification for this legal conversion is the fungible nature of their book-entry existence: when securities become fungible, and thus interchangeable, it is no longer possible to exercise an individual right over one or a few of them.[48]

11. The co-ownership right relates to the entire pool or 'universality' of securities of the same nature.[49] The securities owner, as a co-owner, is entitled to an abstract part of any security of the same nature, or in other words: each of the co-owners is entitled to a *pro rata* share of the universality (pool) of securities. The nature of this right is intangible[50] since it does not have a tangible asset as its object-matter but rather a 'pool' or universality of assets (namely, securities). The individual securities are not individually identifiable and assignable as such, but the 'pool' or 'mass' of securities is – it is this totality that is therefore the subject-matter of the co-ownership right.[51]

The universality consists of securities of the same nature. This means the securities are each other's 'equal' from an economic and financial perspective: they have been issued

[45] Minor differences between the two regimes, that are in the author's opinion purely theoretical, are discussed by L. VAN DEN STEEN, *De effectenrekening*, Antwerpen, Intersentia, 2009, 215-220.
[46] Art. 2, par. 3 RD n°62; art. 7:35, par. 6 BCC.
[47] G. SCHRANS, R. STEENNOT, *Algemeen deel van het financieel recht*, Antwerpen, Intersentia, 2003, 272.
[48] Since the securities are not individualized, it would be impossible to determine to which securities exactly the security holder is entitled, see also *supra* fn. 27 (fungibility).
[49] M. TISON and L. VAN DEN STEEN, "Intermediated Securities under Belgian law: Assessing the Impact of the Geneva Securities Convention on the Regulatory Environment" in P.H. CONAC, U. SEGNA and L. THÉVENOZ (eds.), *Intermediated securities: the impact of the Geneva securities convention and the future of European legislation*, Cambridge, Cambridge University Press, 2013, 220.
[50] Explicitly confirmed by art. 2, par. 3 RD n°62.
[51] This reasoning resolves the 'problem' that under general Belgian law, property rights can only relate to specific, individually identifiable assets (*ut singuli*), which is a principle referred to as the 'speciality principle', see more extensively L. VAN DEN STEEN, *De effectenrekening*, Antwerpen, Intersentia, 2009, 147-151.

by the same issuer and incorporate the same bundle of rights (e.g., with respect to equities, equal dividend and voting rights).[52] With respect to equities, when the issuer has created different classes of shares (*soorten van aandelen*) to which different rights are attached (art. 7:60 BCC), the universality or pool is limited to the shares of the same class (*soort*).

12. As a principle, both for immobilized and dematerialized securities, co-ownership rights can only be exercised vis-à-vis the direct intermediary with whom the securities owner holds its security account.[53] As an exception, however, securities owners can:

(1) exercise a right of recovery (*terugvorderingsrecht*)[54] in the case of bankruptcy, winding-up or other events triggering a situation of *concursus creditorum*[55] of the affiliated member/recognized accountholder[56];
(2) exercise their associative rights (rights as a shareholder) directly against the issuer;
(3) in the event of *concursus creditorum* on the part of the issuer; exercise their right of recovery directly against the latter.

In addition, the securities owner can also exercise a right of recovery in the case of bankruptcy or *concursus* of the CSD.[57]

13. A few words must be said about the right of recovery the securities owner, as a co-owner, is entitled to in a case of *concursus*, since it forms the essence of the Belgian securities system.[58] It is useful to distinguish its two cases of application: (i) the investor enjoys a right of recovery in the case of bankruptcy or *concursus* of the affiliated member (in the immobilisation regime, see art. 13 RD n°62) or the recognized accountholder (in the dematerialisation regime, see art. 7:38, par. 2 BCC); and (ii) the investor enjoys a right of recovery in the case of bankruptcy or *concursus* of the CSD (under the immobilisation regime, see art. 13, par. 1, 1° RD n°62 referring to art. 12, par 2-4 RD n°62; and under the dematerialisation regime, see art. 7:38, par. 1, 1° BCC referring to[59] art. 12, par 2-4 RD n°62).

From a theoretical perspective (based on the relevant provisions), an investor's co-ownership right relates to the universality of deposited securities of the same nature

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[52] G. SCHRANS, R. STEENNOT, *Algemeen deel van het financieel recht*, Antwerpen, Intersentia, 2003, 269.
[53] Art. 13, par. 1 RD n°62; art. 5:33 and art. 7:38 BCC. In principle, therefore, there is no legal relationship between the end-investor and other parties than its direct intermediary, like the issuer and the CSD. In this sense, the system is similar to that of common law jurisdictions, were it not for an important exception: there are a number of specific rights the end-investor can exercise against the issuer or the CSD. This is very characteristic of the Belgian system.
[54] Alternative translations are a 'right of return' or 'revocation'.
[55] This situation is hereafter referred to as *concursus*.
[56] As discussed *infra*…
[57] See art. 12, par. 2 RD n°62, which is also applicable to the owners of dematerialized securities according to art. 7:38, par. 1, 1° BCC.
[58] Together with the direct right to exercise shareholder rights against the issuer (in case of intermediated shares), which is also very characteristic for the Belgian system.
[59] By mistake, the BCC still refers to art. 9bis of the initial KB nr. 62, which should be updated to art. 12 of the coordinated version.

under the immobilisation regime (art. 2, par. 3 Royal Decree n°62), and to the generality of securities of the same category registered in the name of the CSD in the issuer's register of registered securities under the dematerialisation regime (art. 7:35, par. 6 BCC). However, if the universality is considered as the object of the investor's right of recovery, it becomes clear that the scope of the universality is actually much wider than this. The undivided estate, against which the right of recovery can be exercised, in fact not only consists of the actual securities themselves (as held by the CSD), but by extension can also consist of any right (claim) of an account holder or CSD against a higher-tier account holder or CSD.

First, in a case of bankruptcy or *concursus* at the level of the recognized account holder, the owners of immobilized/dematerialized shares can exercise a right of recovery (in accordance with the modalities of par. 2-4 of art. 13 RD n°62, respectively art. 7:38 BCC) that manifests itself at the level just above the (bankrupt) recognized accountholder. The investor can then exercise the right of recovery against the universality of securities that the (bankrupt) recognized accountholder holds with another recognized accountholder or with the CSD (art. 13, par. 2 Royal Decree resp. art. 7:38, par. 2 BCC).

Second, a similar conclusion applies in the situation of bankruptcy or *concursus* of the CSD in the specific event that a CSD link exists with a foreign CSD (the case of so-called sub-custody of securities).[60] In that case, the shares to which the right of recovery relates will be located at (or; in the case of dematerialized securities, will have been initially issued at) a foreign CSD. The object of the universality is then the claim of the CSD against the foreign CSD with which the former has opened a securities account, (see art. 12, par. 2 RD n°62, which is also applicable to the owners of dematerialized securities according to art. 7:38, par. 1, 1° BCC). As a result, the 'mass of securities' will also include the CSD's right in a collective depository of another CSD. This 'right' can take different forms according to the applicable law: a co-ownership right (and therefore a right of recovery), a beneficial ownership by virtue of a trust, an individual ownership right, a securities entitlement etc. .

4. Equities: the exercise of shareholder rights vis-à-vis the issuer

14. With respect to intermediated equities (shares), Belgian company law does not explicitly determine which person in a holding chain must be considered as the "shareholder" for the purpose of exercising shareholder rights.[61] Nevertheless, a correct reading of the (somewhat complex) applicable legal provisions can only lead to the conclusion that under Belgian law, shareholder rights are principally granted to

[60] See *infra*, nr. 16.

[61] For a working paper on this topic by the same author, see L. VAN MARCKE, "Who is the shareholder? The (ir)relevance of introducing an EU-harmonised definition of 'shareholder' in the context of the SRD II review process", Financial Law Institute Working Paper, May 2023 (forthcoming).

the end-investor (i.e., the person holding the shares for its own account, ultimately bearing the risk of the investment).

The person, entitled to exercise company membership rights (*associatieve rechten* under the Royal Decree, or *lidmaatschapsrechten* according to the BCC)[62] directly with the issuing company, is the 'owner' of shares deposited under the immobilisation regime or of dematerialized shares.[63] This starting point is especially noteworthy for dematerialized shares, since art. 7:35, par. 1 BCC states that the dematerialized security is represented by an entry in the securities account opened with the CSD or a recognized account holder "in the name of the owner or holder". Arguably, a correct interpretation is that art. 7:35 BCC merely seeks to reflect the reality from a securities law perspective that the person, registered in the securities account, may be a mere 'holder' thereof and may not be its economic owner, while in the relationship with the company only the owner is entitled to vote – since art. 7:38 and 7:41 BCC strictly refer to this owner (and not the holder) for the exercise of membership rights. Art. 7:41 BCC stipulates that membership rights can only be exercised by owners of dematerialized securities after a certificate (*attest*) has been delivered to them by the CSD or the recognized account holder proving the number of securities registered in their name or in the name of an intermediary-nominee, on the date required for the exercise of those membership rights. Crucially, the wording of this article reaffirms that even when the registration is taken in the name of an intermediary-nominee (the 'holder'), it is the owner for whose benefit the certificate is issued for voting purposes.[64]

15. Belgian company law therefore does not on a general basis introduce a nominee-system whereby the 'holder' of shares on behalf of another person is recognized as the legal shareholder in the relationship with the company[65], as is the case in many common law systems. On an international level too, it is widely accepted that both France and Belgium are amongst legal systems that recognize the *final* layer of an intermediated holding chain as a shareholder, entitled to exercise voting rights.[66] In

[62] Participation to the general meeting is one of those company membership rights.
[63] See art. 13, par. 1, 2° RD n°62 resp. art. 7:38, par. 1, 2° BCC.
[64] Curiously, the article that provides for the 14-day record date in listed companies (art. 7:134 BCC) states that the shares are registered "in the name of the shareholder" in the share register or (when dematerialised) in the accounts of an authorised account holder or of the CSD. In this provision, the possibility of registering the shares in the name of a nominee is suddenly abandoned. However, deciding that nominees enjoy voting rights under Belgian law on the basis of this anomaly alone seems a bridge too far. It is recommended that the Belgian legislator aligns this article with articles 7:35 - 7:44 of the BCC.
[65] By comparison, VAN DEN STEEN is of the opinion that the titular (*titularis*) of the securities account (being either the holder or the owner) should be considered as 'shareholder' and can exercise the membership rights on behalf of the true owner. Such a view, however, seems less consistent with the wording of the legal provisions in question; see L. VAN DEN STEEN, *De Effectenrekening*, Antwerpen, Intersentia, 2009, 253-257.
[66] See the answers from France and Belgium to the ESMA questionnaire on shareholder identification, ESMA, "Report on shareholder identification and communication systems", 5 April 2017, https://www.esma.europa.eu/sites/default/files/library/esma31-54-435_report_on_shareholder_identification_and_communication.pdf , annex I, 18 (par. 47-50). The Association of Global Custodians too qualifies 'end-investors' as "shareholders" in Belgium and France (and Germany), see ASSOCIATION OF GLOBAL CUSTODIANS, "Shareholder Rights Directive II Position Paper", European Focus

sum, while in Belgium, France and Germany there are still differences in the definition of who is the "shareholder", the legal frameworks ultimately lead to the lowest actor in the chain (e.g. in Germany too, the entitlement of the voting right ultimately lies with the end-investor who must explicitly authorize an instruct the *Legitimationsaktionär* (how) to vote[67]), which is preferable from the view of legal certainty for end-investors. This finding is important and stands in sharp contrast with the situation in the UK and US, where an actor higher in the chain will be recognized as the legal shareholder vis-à-vis the issuing company and end-investors only have entitlements against their direct intermediaries (i.e., the so-called no-look-through-approach). The EU has not yet harmonised the definition of a "shareholder" but there is growing pressure to do so (in line with the views of member states such as Belgium, France and Germany).[68]

5. Legal treatment of intermediaries

16. The system of securities accounts that enables the holding of intermediated securities operates pyramidally. The investor opens a securities account in its name with a recognised account holder (respectively, affiliated member under the terminology of RD n°62[69]), to which its securities are credited in book-entry form. The recognised account holder opens a securities account either with another recognised account holder, or with the CSD (as a CSD participant). The CSD acts as the 'top of the pyramid' and maintains the link with the issuer.[70] When securities of a *foreign* issuer are held (i.e., cross-border holding of securities), cross-border sub-custody structures will come into play at the level of the recognised account holders (e.g., by making use of a global custodian) or the CSD (e.g., by setting up a CSD-link).

With respect to sub-custody, the CSD is generally authorised to deposit financial instruments deposited with it with other depositaries in Belgium or abroad by means of a deposit on an account or otherwise.[71] Such sub-custody does not affect the

Committee , 4 August 2020, http://www.theagc.com/EFC%20SRD%20II%20Position%20Paper%2004-08-20%20FINAL.pdf , 19-23.

[67] See §135(6) AktienGesetz, thereby ensuring that the final decision on how to vote ultimately remains with the latter.

[68] Over the last years loud calls have been made by several interest groups to include a European definition of the "shareholder" in an amended version of the SRD II (under review in spring 2023) with the aim of eliminating any remaining inconsistencies and uncertainties in the EU with respect to the person who is entitled to exercise shareholder rights. In their proposals, the "shareholder" should equate the "end-investor", i.e. the person at the bottom of the holding chain holding shares for its own account. One of the reports referred to is that of BETTERFINANCE, "Barriers to Shareholder Engagement – SRDI II Revisited", January 2023, https://betterfinance.eu/publication/barriers-to-shareholder-engagement-srd-ii-revisited/ , 40. For a discussion of different proposed definitions, see L. VAN MARCKE, "Who is the shareholder? The (ir)relevance of introducing an EU-harmonised definition of 'shareholder' in the context of the SRD II review process", Financial Law Institute Working Paper, May 2023 (forthcoming).

[69] See *infra*, nr. 18.

[70] Though not in all cases, see *infra*, nr. 20.

[71] Art. 4 RD n°62.

application of the Royal Decree (including the legal rights of the investors).[72] Recognized account holders are entitled to the same right of sub-custody.[73] Legal doctrine assumes that the principle of freedom of sub-custody (including the legal protection granted to investors) by analogy also applies with respect to dematerialised securities.[74] Art. 4(c)(z) of Euroclear's Terms & Conditions reaffirms Euroclear's principal freedom to hold securities held in the Euroclear system with any depositary. Its Terms & Conditions also allow any other CSD with which those securities are held, to redeposit or hold the securities with one or more sub-custodians or depositories used by it without the requirement of Euroclear's approval (art. 4(c)(ii) Terms & Conditions).

17. The general position under Belgian law is that only end-investors enjoy property rights over the securities they hold, while intermediaries (including the CSD) do not. RD n°62 qualifies the relationship between the intermediary and the investor as 'custody' (*bewaargeving*), which implies that the person depositing its securities, remains the owner of those securities.[75] The acknowledgement of the investor's undivided right of co-ownership on the universality of book-entry securities of the same category held by the CSD, irrespective of any sub-custody by it, furthermore implies that Euroclear Belgium (and Euroclear Bank) do(es) not have any proprietary right to those securities but merely act as a depository.[76] As a result, the securities held by intermediaries on behalf of their clients – or the securities deposited at Euroclear – will not form part of the intermediary's or CSD's insolvent estate, so that they become unavailable for distribution among their creditors.[77]

18. In Belgian legal parlance, first-tier intermediaries that hold their accounts directly with the CSD are referred to as 'recognized account holders' (*erkende rekeninghouders*) in the BCC in the context of dematerialized securities, and as 'affiliated members' of the CSD (*aangesloten leden*) in RD n°62 in the context of immobilized securities. From a functional perspective, both terms actually refer to the same type of institutions. According to art. 1 of Royal Decree of 12 January 2006[78], a number of institutions (such as credit institutions and investment firms incorporated under Belgian law, clearing and settlement providers incorporated in Belgium, branches incorporated in Belgium of credit institutions or investment firms governed by foreign

[72] *Ibid*. This is comparable to §5(4)(2) *Depotgesetz* in Germany, which assumes as a condition for sub-custody that the depositor is granted a legal status which is *equivalent* to that under the *Depotgesetz*.
[73] Art. 4 RD n°62.
[74] L. VAN DEN STEEN, *De Effectenrekening*, Antwerpen, Intersentia, 2009, 49.
[75] With respect to dematerialized securities, the BCC does not explicitly mention the qualification of the account agreement as a 'custodial' one (*bewaargeving*), but the proposition in the legal literature that this is implicitly the case, deserves support. See for a discussion, L. VAN DEN STEEN, *De Effectenrekening*, Antwerpen, Intersentia, 2009, 375-396.
[76] See art. 2-3 RD n°62.
[77] Moreover, in the EU, client assets (in 'client accounts', either segregated or omnibus) are separated from securities held by the intermediary for itself ('house account') for the same purpose.
[78] Royal Decree of 12 January 2006 on dematerialised corporate securities, pub. 3 February 2006.

law (authorized in their country of origin to hold securities for others), and the National Bank of Belgium) are authorised by law as 'recognised account holders'.[79]

19. A Belgian domestic holding chain is not necessarily characterized by the presence of one or more intermediaries. Belgian law (art. 7:35 BCC) provides that dematerialised securities can be held on a securities account in the name of the owner or holder with *(1)* a recognized account holder (who then in turn holds an account with the CSD), or *(2)* directly with the CSD itself. This implies that for dematerialized securities, some investors can make a direct connection with the Belgian CSD without having to use one or several layers of intermediaries.[80] Nevertheless, the ability to open a securities account *directly* with the CSD should be read in accordance with the participation requirements imposed by the CSD on its members.[81] Euroclear Belgium, for example, does not offer securities accounts to private individuals[82], so that not all types of end-investors will be eligible to hold securities with the CSD in such a non-intermediated way. In practice, only certain holders of securities accounts (e.g. credit institutions, when holding securities in their own name on their house account) can open a securities account directly with the CSD without making use of another recognized account holder.[83] Likewise, in case of immobilized securities, not all types of investors can open a securities account directly with the CSD, since art. 3 of RD n°62 prescribes the CSD acts *exclusively* on behalf of its 'affiliated members' (the recognized account holders).

20. Another noteworthy point is that under Belgian law, recognized accountholders can alternatively serve as the 'top' of the holding chain (instead of a CSD), though only for dematerialized securities that are *not* admitted to trading on a regulated market (art. 7:44 BCC). This is also the case for immobilized securities, which may be delivered to an affiliated member without the affiliated member having to deposit them with the

[79] For the current list of recognized accountholders, see the NBB's list at https://www.nbb.be/nl/financieel-toezicht/prudentieel-toezicht/toezichtsdomeinen/bewaring/lijsten/lijst-van-de-erkende. These institutions can become CSD participants, see the categories of admissible 'clients' summed up in 3.1.2 of the ESES general terms and conditions for ESES CSD's (which includes Euroclear Belgium). Of course, the categories of admissible 'clients' of Euroclear Belgium (ESES) are broader than 'recognized accountholders' (*erkende rekeninghouders*) under Belgian Law. 'Recognized accountholders' are only those institutions incorporated in Belgium, while clients of Euroclear Belgium (and by extension all ESES CSD's) can be institutions from different member states of the EU and sometimes even the wider European Economic Area. EUROCLEAR, "ESES Terms and Conditions (Book I)", March 2021, https://my.euroclear.com/dam/ESES/Shared/legalinformation/termsandconditions/ESES-Terms-and-conditions-Book-I.pdf , 9-10 (3.1.2).

[80] Art. 7:35 BCC; G. VAN GERVEN, *Handboek Vennootschappen – Algemeen Deel*, Gent, Uitgeverij Larcier, 2020, 1215.

[81] VAN GERVEN confirms "a security holder can only open an account with an affiliated member and not with a CSD, unless that security holder is itself an affiliated member", G. VAN GERVEN, *Handboek Vennootschappen – Algemeen Deel*, Gent, Uitgeverij Larcier, 2020, 1239.

[82] Thereby distinguishing itself from EUI and Euroclear Sweden, two CSDs of the Euroclear group where private individuals can hold securities accounts directly. See EUROCLEAR, "Becoming a Client", https://www.euroclear.com/about/en/business/Becomingaclient.html

[83] This nuance has not always been made in the relevant literature, where it seems like any end-investor could open a securities account directly with a CSD when dematerialized securities are concerned. See in that sense L. VAN DEN STEEN, *De Effectenrekening*, Antwerpen, Intersentia, 2009, 46-47.

CSD, on the condition the depository has explicitly agreed to the application of the fungibility regime imposed by RD n° 62 to deposited securities (art. 17 RD n° 62).[84]

6. Conflicts of laws aspects

21. Neither RD n°62 nor the BCC contain an express conflict of law rule. Art. 91 of the Belgian Code of Private International Law ("Code of PIL")[85] does contain such a rule: "the rights to a security for which the law provides for entry in a register shall be governed by the law of the State in whose territory the register in which the entry appears on the individual accounts of the rights holders is located. The register is presumed, subject to proof to the contrary, to be located at the place of principal establishment of the person maintaining the individual accounts" (§1). The Belgian position thus reflects the internationally recognised PRIMA rule for intermediated securities. In its application to securities, art. 91 Code of PIL constitutes an exception to the general *lex rei sitae* rule of art. 87, §1 Code of PIL.[86] The rule applies to securities registers and registrations in securities accounts, and to both immobilized and dematerialized securities.[87]

This rule ensures that securities held in the Euroclear system are deemed to be located in Belgium, as Euroclear's principal place of business, regardless of where the underlying securities are actually located (e.g. with a foreign CSD in a case of sub-custody). These securities will therefore be governed by Belgian law, and investors will enjoy the rights conferred to them under RD n°26 or the BCC (or under another regime, not addressed here).[88]

22. However, it is important to note that the law designated in application of art. 91 Code of PIL will not govern all questions of law relating to securities. For example, with respect to intermediated shares, the rule does not encompass the exercise of shareholder rights. The exercise of shareholder rights remains the prerogative of the *lex societatis* – a principle that is also adhered by international harmonisation initiatives.[89]

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[84] From a technical point of view, this situation is not quite reconciled with the investor's right of recovery in case of insolvency of the affiliated member serving as top of the holding chain, though. This is because art. 12 of the Decree is not made applicable to an art. 17 case, and the recovery in case of insolvency of an affiliated member under art. 13 assumes that the securities are held with another affiliated member or with a CSD, which, however, is not the case when the affiliated member is the top holder. See also in this regard the discussion by L. VAN DEN STEEN, *De Effectenrekening*, Antwerpen, Intersentia, 2009, 211-215.

[85] Law of 16 July 2004 on the Code of Private International Law, pub. 27 July 2004 (*Wetboek IPR*, "WbIPR" and hereafter "Code of PIL").

[86] Which assumes that the rights *in rem* relating to property (such as a co-ownership right) shall be governed by the law of the State in whose territory the property is situated at the time they are invoked.

[87] Explanatory memorandum to the legislative proposal of the code of international private law (WbIPR), *Parl. St.* Senaat 2003-04, 3-27/1, p. 116-117.

[88] Confirmed by EUROCLEAR, "Rights of Participants to Securities deposited in the Euroclear System", July 2020, 4. See also *supra*, nr. 6.

[89] Both the Hague Securities Convention (the Hague Convention of 5 July 2006 on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, "HSC") and the Geneva Securities Convention (UNIDROIT Convention on Substantive Rules for Intermediated Securities, 9 October 2009, "GSC") have

7. Insolvency and loss participation (shortfalls)

23. The entitlement of an accountholder to the securities held in its securities account is closely related to asset protection in insolvency regulations. *Supra* nr. 13, the end-investor's co-ownership right under Belgian securities laws was already explained in light of the right of recovery it enjoys in a case of *concursus creditorum* of an higher-tier intermediary, or of the CSD. Whereas creditors with a personal claim will come into concurrence with each other in an event of insolvency, investors enjoying this right *in rem* (co-ownership right) are treated as third parties to the insolvency proceedings and will be able to have their assets returned to them. The investor's proprietary interest vis-à-vis the securities that are booked in its security account therefore grants it a welcome protection in a case of intermediary insolvency.

24. This right of recovery, enjoyed by the end-investor, is not always absolute. Due to the co-ownership rights over the pool of book-entry securities of the same category granted to all end-investors, both Belgium and Germany from the outset assume a *pro rata* distribution of the securities in case these should be returned.[90] However, if there are enough securities present in the intermediary's estate to satisfy *all* ownership claims coming from the collectivity of investors (i.e., if no shortfall arises), the *pro rata* distribution will simply lead to a full return of the investors' assets to which their ownership right relates (everyone then receives an equivalent number of securities). It is only when a shortfall[91] occurs, that the *pro rata* distribution will result in all end-investors (co-owners of the securities) recovering fewer securities.[92] These loss-sharing principles are reiterated in art. 17 of Euroclear's Terms & Conditions.[93]

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deliberately excluded corporate law issues from their scope and indirectly refer to the issuer's *lex societatis* for those issues.
With respect to shares, the HSC does not relate to the exercise of shareholder rights against the issuer, since the relationship between the issuer and the account holder is excluded by art. 2(3)(c). Furthermore, the HSC lacks reach in the sense that it has only been ratified by three states (Mauritius, Switzerland and the US).
In comparison, the GSC has only been ratified by one state (Bangladesh), and has therefore not yet entered into force. The end-investor is not truly enfranchised by the GSC: according to art. 8(2) GSC, whom the issuer is required to recognize as the shareholder, entitled to receive and exercise the rights attached to shares (as provided by art. 9 GSC), remains a matter of national law. Even though the GSC determines that an ultimate account holder has certain rights attached to its securities (according to art. 9 GSC) and the issuer cannot oppose to this, whether the ultimate account holder can effectively exercise these rights against the issuer remains a matter of national corporate law, since the UAH must also qualify as a shareholder and the GSC does not comment on this.

[90] See art. 7:38, par. 2 and 3 BCC and art. 13, par. 2 and 3 RD n°62 in Belgium and art. 23(6) *Depotgesetz* in Germany.

[91] A situation where insufficient securities are available to satisfy all of the intermediary's clients. For example, a shortfall occurs when the number of securities for which an intermediary has a credit-booking with a higher-tier intermediary (e.g., a credit booking of 1000 securities) is *less* than the number of securities for which its own combined clients have credit-bookings in their securities accounts held with it (e.g., credit-bookings of 300, 500 and 400; or a total of 1200).

[92] For the deficit, the end-investors will have to file a claim as unsecured creditors.

[93] Note that in the case of any securities loss with respect to any issue of securities which arises under circumstances of sub-custody with a third party, Euroclear will take steps to recover the securities as it reasonably considers appropriate, although the expenses for such recovery will be charged to its participants (art. 17(c) Terms & Conditions). This principle is also more generally reiterated in art. 12(e), stating that Euroclear is not liable for the acts or omissions of (or the bankruptcy or insolvency of) any depository or sub-custodian it uses. These principles

Thus, the starting point in Belgium and Germany is that of a *pro rata* distribution, but this only truly takes effect in the event of a shortfall. With respect to France, some literature has contended that the investor's proprietary right to the securities in its account is *individual* in nature and is, to say the least, not a co-proprietary right.[94] However, it is difficult to see how the investor's right would be different in real terms, especially when comparing the investor's right of recovery. One would expect an individual property right to imply that, as opposed to the Belgian and German co-ownership right, the owners of securities would be able to assert an *exclusive* right to the particular securities registered in their account. However, the practical implementation of the insolvency provision of art. L.211-10 *French Code mon. et fin.* actually leads to a situation similar to that of Belgium and Germany: in first instance, the liquidator must verify whether the number of financial securities held in an account with a CSD or another intermediary in the name of the defaulting intermediary is sufficient to enable the intermediary to meet its obligations to its account holders.[95] If a shortfall occurs at this point, the total number of shares available will be distributed among account holders on a *pro rata* basis (i.e., in proportion to their credit entries in their accounts).[96]

25. Belgian insolvency rules furthermore provide that the securities of the same category, held by the failed intermediary for its own account (i.e., those which it owns itself and which are registered in a separate 'house account' with the higher-tier intermediary), will be used to cover a shortfall in the client account. Consequently, the recognized account holder / affiliated member will only be granted the securities that remain after the total amount of securities of the same category held by him on behalf of third parties has been returned to those third parties.[97]

26. It must be stressed that under Belgian law, the choice for individual client segregation of the securities account will not affect the level of client asset protection. When an intermediary holds client securities with a higher-tier intermediary, it can do so through individually segregated client accounts or one general *omnibus* account (according to art. 38 CSDR, this is at the client's discretion).[98] While this choice falls to

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are important to be aware of, now that Euroclear retains full discretion to place securities in sub-custody and participants, or end-investors, therefore in principle have no choice in the matter, but may suffer the consequences, for example in case of a shortfall (see *supra*, nr. 16). The German custody act seems to assume the opposite: §3(2) *Depotgesetz* provides that a depositary which holds securities in safe custody with another depositary can be held liable for any fault of the third-party depositary, as for its own fault. According to §5(4) *Depotgesetz*, this liability for any fault on the part of the foreign depositary (sub-custodian) may not be limited by agreement.

[94] HAENTJENS concludes that "although the precise classification of investors' interests in securities is unclear under French law, it is undisputed that investors do not have a co-ownership right in pools of securities", M. HAENTJENS, *Harmonisation of Securities Law: Custody and Transfer of Securities in European Private Law*, Alphen aan den Rijn, Kluwer Law International, 2007, 35.

[95] Art. L.211-10, par. 1 Code mon. et fin.

[96] Art. L.211-10, par. 2 Code mon. et fin.

[97] Art. 7:38, par. 5 BCC; art. 12, par. 4 RD n°62.

[98] Article 38 par. 3 resp. 4 CSDR requires CSD-participants to offer to their clients 'omnibus client segregation' (where the securities that belong to different clients of that participant are being held in one account) or 'individual

the investor, it is a fundamental observation that this kind of individual segregation will not, as a principle, result in additional protection for the end-investor in civil law jurisdictions such as France, Belgium and Germany.

On more than one occasion, it has been confirmed that "in countries such as Belgium, Germany, Austria, and The Netherlands that use a 'co-ownership of a pool of (fungible) securities' model, the use of individual client segregation does not actually affect the level of investor protection."[99] Even when an end-investor demands that its intermediary holds a segregated client account on its behalf with a higher-tier intermediary (as opposed to letting the intermediary commingle its securities with those of other investors in an omnibus account), its 'entitlement' will remain a co-ownership right, since Belgian and German law assume that book-entry securities become fungible (interchangeable) upon their deposit. Segregation does not change this in any way.

In its legal documentation, Euroclear confirms with respect to ESES-CSD's such as Belgium that "given the asset protection already granted to [investors] by Royal Decree No. 62 (…), additional segregation of the securities [the investor] deposits with us will not in principle result in a greater asset protection for [the investor] or [its] underlying clients. Indeed, [the investors] (and [its] underlying clients) are granted, by operation of the law, an intangible co-ownership right over the pool of book-entry securities in the same category we hold on behalf of all our Clients (and their own clients) that hold securities in that category, regardless of the fact that such securities are segregated or not."[100] The same holds true under German securities laws.[101] In sum, while individual client segregation generally implies higher costs, it is unlikely to lead to increased client asset protection in jurisdictions using a co-ownership model.

8. Conclusion with respect to Belgium

27. This chapter analysed the Belgian substantive law regime for (the cross-border holding of) intermediated securities. Belgium finds itself in a particularly interesting position: not only is it home to a national CSD, Euroclear Belgium, it also hosts one of

client segregation' (where the securities that belong to different clients of that participant are being held through individually separated accounts).

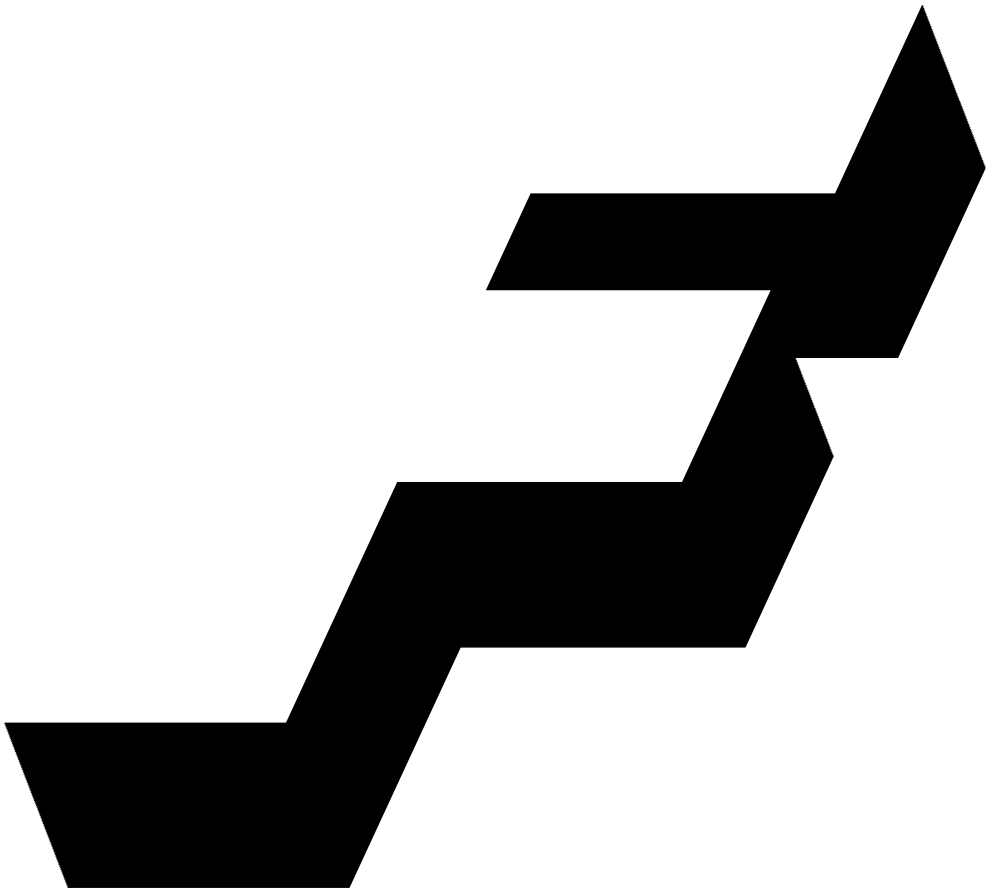
[99] R. PRIEM, "Asset Segregation at CSDs: Protecting Investors with a Level Playing Field", *European Business Law Review* 2020, Vol.31(5), 934.

[100] EUROCLEAR, "Rights of Clients to Securities Deposited in the ESES CSDs", October 2018, https://www.euroclear.com/content/dam/euroclear/operational-public/eses/Legal-documentation/LG0430.pdf , 9 (Principle 3.3.3).

[101] The German CSD, Clearstream Banking Frankfurt, notes that "the right of segregation would apply, irrespective of whether securities are booked in Individual Client Segregated (ICS) or Omnibus Client Segregated (OCS) [accounts], so that both segregation types provide a similar level of protection in case of insolvency of CBF", see CLEARSTREAM BANKING FRANKFURT, "CSD information disclosure with regards to Article 38 of CSDR" https://www.clearstream.com/resource/blob/1649338/812b60521ecbef69501d252df1610c59/cbf-article-38-disclosure-document-draft-data.pdf 12 (4.3). The loss sharing mechanisms furthermore pose "a potential risk to the participant and the balance of securities held via accounts opened on either an ICS or OCS basis", at 13 (4.5).

the two European ICSD's, Euroclear Bank. The latter acts as issuer-CSD for international bonds, operates an extensive network of CSD-links with foreign settlement systems and is also the Euroclear group's only CSD with a limited banking license, therefore allowing it to offer clients additional banking services. Notwithstanding Euroclear Bank's function as a one-stop-shop for holding securities across borders as an investor-CSD, Belgian investors enjoy a fairly far-reaching protection under Belgian securities laws. With respect to cross-border holdings (held through Euroclear Bank[102], and irrespective of any sub-custody), the investor rights comprised in RD n°62 apply to all types of securities, whatever the form in which they have been issued under their applicable (foreign) law. The two cornerstones of the Belgian system are the right of recovery (discussed *supra* nrs. 13 and 23-26), and (for shares) the direct exercise of shareholder rights against the issuer (discussed *supra*, nrs. 14-15). From the perspective of legal certainty for end-investors, including their asset protection, this undoubtedly places Belgium in a strong position in the market.

[102] And also through Euroclear Belgium, although Euroclear Belgium operates less CSD links therefore being somewhat less relevant in this respect.



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