

TRANSFER OF IMMOVEABLES IN A EUROPEAN PERSPECTIVE

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1. Transfer of Immoveable: the EU perspective

The issue of the transfer of immoveable is at the core of the process of harmonization of European law, despite the legal regime of property is formally excluded from the influence of European law¹.

When dealing with the transfer of property rights, legal systems aim at creating a legal framework for the market which is twofold: increasing its efficiency while preserving legal certainty. Considering that the European institutional goal is primarily directed to building a common market it is not surprising to see that, despite the formal exemption, the question of the transfer of property is central to the concerns of the European institutions².

The need for the harmonization of private law at the European level, and mainly of contract law, was indeed felt only for personal property, and in particular the corporeal (chattel), as the main candidate of this process³, leaving aside the immoveable one, on the grounds that it was

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¹ Article 345 of the Treaty on the Functioning of the European Union (TFEU), formerly Article 295 EC (before that Article 222 EEC), clearly stated that the Treaties "...shall in no way prejudice the rules in Member States governing the system of property ownership", suggesting that also the legal regime related to its transfer is included in that exemption. But this is a rather naïve conclusion.

² It clarifies the call for harmonization of legal rules related to property transfer see D. CARUSO, *Private Law and Public Stakes in European Integration: the Case of Property*, in *European Law Journal*, 2004, p. 751.

³ W. FABER, B. LURGER (eds.), *Rules for the Transfer of Movables, A Candidate for European Harmonisation or National Reforms?*, München, 2008.

less involved in cross-border transactions due to its “stationary” (not moveable) nature⁴.

However, this idea does not seem to be very convincing. Surely not in terms of economic values involved, if we think that the market of immovable (real estate market) in 2014 was estimated at almost 1.150 million euro’s, more or less the 10% of the GDP of the 28 EU Member States; nor because of the nature of immovable. “Rights on land move with their owner” it has been said⁵, pointing out that there is also a cross-border market for immovable. It was precisely the increase in mobility of Europe’s citizens within the borders of the Area of Freedom, Security and Justice, which means that European citizens acquire an increasingly great number of immovable properties in other States of the Union, a good reason for harmonizing the legal regime of the transfer of immovable.

The reduction of the uncertainty costs related to the knowledge of the foreign legal mechanisms can indeed booster the efficiency of the market of immovable property.

Around these needs a series of academic or professional projects directed to create a common legal framework for a European market of immovable have grown. Most of these projects are aimed at setting model rules in order to simplify the transfer system: the creation of standards (contractual or form of registration)⁶ or the reduction of the

⁴ *Lex rei sitae* is the rule governing the legal situation of immovable property transactions. As a consequence, there are fewer conflict of laws questions and jurisdictional questions.

⁵ D. CARUSO, cit., p. 757.

⁶ See for example the projects conducted by ELRA (European Land Registry Association) an international non lucrative association that wants to promote mutual understanding and the knowledge of land registers, to help creating an open and secure market for Europe, serving and protecting citizens. The projects are: CROBECO (Cross Border e-Conveyancing) which concerns cross border registration in foreign Land Registers and IMOLA (Interoperability model for Land Registers) which aim to increase the accessibility and transparency of land registry information and to facilitate the registration of cross-border documents.

costs of conveyancing services⁷, have been the tools to foster smoother market transaction. However, beyond the issues of efficiency, the impact of the economic and financial crisis, clearly linked to the immovable property⁸, has stressed the role of security in property transfers as a social and political priority that European institutions should have in their agenda.

Despite their difference in legal design, it may be easily observed that in order to secure market transactions European legal systems have surrounded transfer with legal institution functioning as a gatekeeper of legality and certainty such as contractual formalities, notarial body, land registers. These institutions have been developed over the time and they cannot be easily simplified or even eliminated. It is the role of a reliable comparative legal work to understand how the different legal systems have reached such an equilibrium over the years, how and why they have translated it into their legal rules, and how these principles and rules are working in practice⁹.

⁷ See ZERP et al. - COMP/2006/D3/003 – Conveyancing Services Market – Final Report, that compares and evaluates the different regulatory systems under which legal conveyancing services are provided.

⁸ It is well known that the 2008 crisis was triggered by a large decline in home prices after the collapse of a housing bubble, leading to mortgage delinquencies and foreclosures and the devaluation of housing-related securities. Declines in residential investment preceded the recession and were followed by reductions in household spending and then business investment. Spending reductions were more significant in areas with a combination of high household debt and larger housing price declines. See A. MIAN, A. SUFI, *House of Debt*, Chicago, 2014.

⁹ See the *Project, Real Property Law and Procedure in the EU* conducted by the EUI (European University Institute) coordinated by C. Schmidt and C. Hertel which aimed at studying the conveyancing process in different European countries: <http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf>.

And also the volume edited by L. MARTINEZ VELENCOSO, A. PRADI, *Transfer of Immoveable Property in Europe*, in *The Common Core of European Private Law series*, Cambridge, forthcoming.

2. *The Immoveable Transfer Mechanism as a balancing between two opposite: efficiency and certainty*

Transfer of ownership is a social transaction which structure can vary according to the nature of thing involved. Different institutional mechanisms are in charge to regulate the simple delivery of a book from those governing the transfer of immoveable. Despite that differences the problem of transfer is approached by legal institution by trying to find a balance between two important and often conflicting interests: on the one hand transfer mechanisms must be designed to be as simple and inexpensive as possible, in order to encourage market transactions; conversely there are strong reasons to regulate and monitor the transfer in order to secure transactions.

Just to describe the different mechanisms of the transfer of immoveable property comparative legal culture is used to divide them into two main categories: on the one hand there are systems based on the *titulus adquirendi*, basically a contract, as the main instrument for the transfer¹⁰; on the other those which elect as a principal moment the *modus adquirendi*, that today is expressed by registration¹¹. Despite the importance of this taxonomy, it is worth noting that these different legal solutions are stemming from the same political need: namely the desire to simplify a mechanism that clearly prevented market transaction such as the feudal system.

The feudal system has been seen as a system restrained by excessively fragmented rights over the land and by a complex mechanism of transfer. All that has justified the ban against feudal entitlements, in favor of a unitary concept of ownership and of a strong reduction of the number of property rights, which have been standardized into a limited list (*numerus clausus*)¹².

¹⁰ For a quick look see for example the essay on Belgium, Italy and Greece in this volume.

¹¹ See as an example the Austrian and the Finnish systems in this volume.

¹² The economic explanation has been the suggestion that the *numerus clausus* is a device for minimizing the effects of excessive fragmentation of interests, which prevents market transactions. See M.A. HELLER, *The Boundaries of Private Property*, 108 *YALE L.J.* 1163, 1176-78 (1999).

Moreover, for the sake of market transfers, legal systems have established only one moment when the ownership is transferred, thus simplifying the transfer mechanism developed in the medieval period that required both the *titulus* (a valid contract) and the *modus adquirendi* (the solemnity related to the delivery).

The coincidence of the boundaries of the rights with the physical boundaries of its object, associated with the fact that a single legal act together with the object also transfers all rights and obligations related to it, certainly promotes market transactions, but also requires a legal equipment which is capable of ensuring legal certainty.

While a simplified model based on physical possession could work well for simple transactions, such as those for corporeal movable property, for which physical control over the things can provide the legal presumption of ownership, the same can't be said for the immoveable property¹³. Unlike what happens for movable property, only in a limited set of cases the person who physically finds himself on a given piece of land turns out to be the owner¹⁴. In this circumstance physical possession couldn't work as a title evidence so that the law should find other legal tools in order to obtain certainty over property rights.

In the domain of immoveable, the cost of the uncertainty determined by mere recognition of possession is significantly greater than the cost of creating instruments for providing legal certainty of the title. The social signal resulting from the physical occupation does not reflect the underlying legal actuality, so, unlike what happens with movable property, the law will have to prepare assessment tools different from that of possession. The delimitation of the proprietary spheres assumes the nature of a public good and it is therefore better guaranteed by collective mechanisms.

As a mechanism arranged by the legal system in order to make easier and with a sufficient degree of certainty the knowledge of legal transfer, immoveable transfer publicity presides over both, the protec-

¹³ This is why legal systems are protecting possession as a mere fact situation, see U. MATTEI, J. GORDLEY, *Protecting Possession*, 44 *Am. J. Comp. L.* 293, (1996).

¹⁴ See report on question n. 1 of the volume edited by L. MARTINEZ VELENCOSO, A. PRADI, *Transfer of Immoveable Property in Europe*, in *The Common Core of European Private Law series*, Cambridge, forthcoming.

tion of public interests by delineating the boundaries of ownership (concerning both the content of the right as well as its title holder thereof) and the security of private interests by protecting the owner against unwanted disposals. Where, instead, these instruments have not been established, the burden of uncertainty is bearded by private parties, that only through costly instruments could minimize it¹⁵.

All European legal systems have developed institutions to provide legal certainty to the transfer of immoveable property other than possession. Contractual formalities, the notarial validation and the registration in land registers are all mechanisms that different legal systems have combined in order to give legal certainty to these types of transactions¹⁶.

Where the importance of the *modus acquirendi* (*roman traditio* or *german Auflassung*) has been maintained, the Land registers has become the institutions which provide a basis for the legal security of property transfers. Registration is actually the formal legal mechanism sufficient to produce legal consequences of the transfer¹⁷. On the other hand, all systems which find their reference in the Code Napoleon¹⁸ have adopted the contract (*titulus acquirendi*) as the crucial moment for the transfer. Notarial formalities are still the main institution to give to the contract legal certainty.

Even legal systems where the need to break with the past was less felt, such as the common law systems, have gone through legal reforms that reduced the number of legal estates over the land for the sake of simplification. However, despite they have maintained the importance of the *modus acquirendi* as the main instrument to transfer immoveable property, thus nearing the German tradition, only recently they ended

¹⁵ See for example in the most part of the United States where evidence of title is established through title reports written up by title insurance companies, which show the history of title (chain of title) as determined by the recorded deeds.

¹⁶ Most of the European system required written form as a term of validity for the contract. Some of them require notarization in order to submit to the immoveable register. See answer on question 2 and 3 of the volume edited by L. MARTINEZ VELENCOSO, A. PRADI, *Transfer of Immoveable Property in Europe*, cit.

¹⁷ See Austria and Finland in this volume.

¹⁸ As for example Belgium, Italy and Greece in this volume.

up to give the registration the role of security provider in the transfer mechanisms.

In common law systems the transfer mechanism historically rested upon conveyance, a formal procedure which has its core in a solemn act, the deed, whereby legal title passed. Since what is conveyed is always an estate in the land and not the land itself¹⁹, other contractual interest, most of them related to the trust, were not secured by the formalities required at law. These interests were protected by the equity jurisdiction (equitable interests). Given this duplication of legal positions and remedies, it can be well understood the difficulty of organizing a registration system that was really effective²⁰.

3. Registration of the Transfer

Rooted in to the legal discourse this institutional framework derived primarily from commercial needs and the economic theories has been fragmented by the various technical solutions legal traditions have adopted. Despite their different construction we can observe a huge convergence in assigning to the registration a fundamental role in the transfer mechanism. Even those legal systems that historically have not set the center of their transfer mechanisms around the registration sooner or later have adopted a system of public registers to provide some certainty to legal transaction. This happens either through explicit regulations or through courts decisions.

According to the Code Napoléon property is transferred upon consent without the need of creating a system of registration. It was a statute of 1855, based on a Belgian Law of 1851, which required the transcription of the transfers of immoveable property. In legal systems influenced by the Code Napoleon (like Italy, Belgium, or Greece), to the

¹⁹ Since it has been widely assumed that property of land, as such, is not a conception internal to English land law (W. BLACKSTONE in his *Commentaries* stated “This allodial property no subject in England has”). The 1925 land reform legislation in England largely did away with the system of legal estates by reducing their number.

²⁰ See England and Wales as well as Ireland essay on this Volume all that start their description with the estate in land doctrine.

transcription has been given declarative effects, which means that it declares a transfer already happened by virtue of a contract. The transcription has the sole effect of making the right enforceable against third parties and not to constitute the legal right upon the buyer²¹.

However, when taking into account the operational level, in the case of two subsequent sales (double sale) the first buyer, who transcribes as second his purchase, has only an action for damages (against the seller) and no real remedy for recovering the ownership from the second buyer. This means that, despite the declaratory effects, the transcription become practically an unavoidable moment in order to render the transfer perfect and effective towards third parties. As a result, in all the systems based on the consensualistic principle, the legal owner of an immoveable is not the first who buy it but the first who registers her acquisition. An analysis of operative rules confirms how legal systems based on the principle of consensus converge towards those that have made the land register the pivotal institution of their mechanism of transfer.

Other systems are converging to registration thorough legal reform such as Greece which is experiencing a migration from a French based model, centered on the contract, to a German based one centered on the land registration²².

In England and Wales as well as in Ireland a system of registration has been introduced recently by legal reform which first simplified the system of legal estate on land in order to adopt a Land Register provided with a significant strength. Despite the reduction of the number of legal interest in land these systems are still having a parallel chain of interests on land created by equity jurisdiction²³. One can thus understand the difficulty of introducing in the English law a land registration

²¹ See A. CHIANALE, voce *Pubblicità Immobiliare*, in *Dig. Disc. Priv.*, sez. Civ., Torino, 1997.

²² Note that Greece is now migrating towards a real base title registration system through a complex restructuring of the Cadastral Data as described by A. Moraitis in this book.

²³ The dual system on interest in land is the starting point of both essays on common law systems in this volume: see M. Conaglen for England and Wales and U. Woods for Ireland at the very beginning of their exposition.

mechanism. At the beginning of the eighteenth century in some parts of Yorkshire and Middlesex a recording system had been created, adopting a personal-based Register where the deeds were recorded, but it proved to be ineffective due to its voluntary basis and the highly fragmentation of interests in land. Its replacement with a land registration system was possible only after a drastic reduction in the number of possible estates to be registered. Indeed only the Land Registration Act of 1925 created a land register system on which to base the whole land transfer mechanism. As a consequence of this reform all the legal interest on land should be compulsorily registered at the first transfer and all the following registrations would have been based on it.

It should be immediately observed that, despite the high degree of reliance given to the registration, the subversion of property rights has itself a social cost: as we will see, all legal systems introduce some limits to the presumption that the registered owner is also legal owner in order to discourage opportunistic behaviors. Good faith is required to the non owner (non domino) purchaser. Even in the Austrian system in which to the Land Registers is given an almost absolute importance the third party purchaser by the registered owner is protected by law only if in good faith.

As we have seen registration is becoming more and more the core of the immoveable transfer system. Nevertheless the option of giving to the registration an essential role in the transfer process depends on its reliability. This reliability is highly determined by the presence of a suitable technology that can as precisely as possible identify the goods and their physical and legal changes without losing accuracy.

A technology that ensures such accuracy allows to build a Register that rests on a database whose focus is the immoveable or, better, the rights (title) that insist on it. A “title registration system” is based on a precise survey of all the immoveable in a given territory.

The paradigmatic case is represented by Austrian Cadaster created when all the territory of the Habsburg Empire (300.000 sqKm) was surveyed in the XIX sec. and the data, thus collected, entered in the database of the Cadaster. The cadastral surveys assumed a key role in structuring the basis of the Austrian Land Register (Land Book). Born for tax purposes, the Cadaster had indeed as a reference not the legal

owner but the subject using the land, who does not always correspond to the legal owner. These data were then transferred (implanted) in the Land Register (Land Book) under the supervision of a professional judge, thus giving legal certainty to the title therein registered. Today the Cadaster and the Land Book together form a joint information system, which show the legal situation as well as the material one over almost every single parcel of land of Austria²⁴.

Built in this way it was possible to give a particular reliability to the records contained in the register. The main feature of the Austrian land system is, indeed, the principle of public faith attributed to the Land Books: the person who is registered in the books is the legal owner. The third parties who acquire the right by inspecting the Land Book can trust the completeness and correctness of the information contained herein and are protected from claims based on defects of the contract, provided they are in good faith.

A real basis model such as the title system may not been adopted in countries without the organizational requirements needed for the creation of the Austrian Land Registry.

It is usually the lack of an appropriate technology and the lifelong incompleteness of the Cadastral data that pushes towards a personal basis system: in Italy, Belgium or Greece the Register is indeed organized on a personal basis for this reason. The object of the transcription is not the immovable (better, the right over it) but the legal instrument (e.g. the deed or the contract) from which the transfer has originated, plugged into directories organized by person and not by parcels of land. The result is a complex system whose consultation does not give either certainty about the consistency nor about ownership of the rights. In personal-based systems the certainty of the ownership is obtained only through a complicated research that reconstructs the chain of records and thus allows to go back up to a purchase by adverse possession²⁵.

²⁴ See N.J. SADJADI, *Land Registration and Cadastre in Austria*, in *Land Registration and Cadastre in selected European Countries*, Wien-Graz, 2009, pp. 27 and ff.

²⁵ See for example what is written about the Italian system in this volume.

4. Some Conclusion

The adoption of a land registration system is generally motivated by the need of certainty in legal transactions. The protection of the buyer and creditors of an immoveable property owner, obtained by means of a registration system gives greater efficiency to the immoveable market and allows the development of credit secured by real estate. Delimiting and securing property rights in the case of immoveable is a public good and service that can best be created by the State. Not all registration systems are equal and not all serve at best for the sake of economic efficiency.

If we look at the history of continental Europe we may observe that the development of Registers has followed the evolution of legal mechanisms related to the transfer of property. Where priority was given to the contract as the instrument around which to concentrate the immoveable transfer mechanism, contractual formalities (such as the English conveyancing system or the contractual notarization) acted as a security provider. Despite this, however, the need for instruments of a public nature has been felt. Registries were adopted but they were given a side effect in settling disputes between conflicting rights on the same parcel of land. Where, by contrast, the registration had constitutive effects it was the high technological precision of land surveys that lead to the same result. In other words, the real basis organization of the Registry is at the heart of the entire transfer mechanism.

With regard to the recent evolution it should be noticed that in all legal systems in which a legal reform on immoveable transfer system is taking place, the starting point has been a change in the structure of the registers: basically from a deed recording system to a land registration one.

The most evident example of this is the dichotomy which has been created in the common law world. The vast majority of states in the US employ systems of recording legal instruments transferring property that affect the title (not only deeds) as the exclusive means for publicly

documenting land titles and interests²⁶. This system does not determine who owns the title or the interest involved nor, for instance, that there may be unrecorded legal claims which might take precedence over the registered ones. This kind of system has obviously proven ineffective and has led to forms of private protection of the title: typically, evidence of title is established through title reports written by title insurance companies, which show the history of title (property abstract and chain of title)²⁷ as determined by the publically recorded deeds²⁸. Conversely in England and Wales, where a system of registration was introduced recently, the legal reform has led to adapt the rules of immoveable transfer to the needs of the new registration system²⁹. Through a significant reduction in the legal positions susceptible of registration these systems have been able to adopt a Land Register provided with a significant strength: who appears as the owner has an indefeasible title (provided in good faith) and third parties can rely on it. That means that even if deprived of the right and until any modification of the registers he or she can perform effective alienation.

Coming back to civil law countries, Greece is a good example of how legal rules are adapted to the need of a registration system. This legal system is experiencing a migration from a French based model, centered on the contract, to a German based one centered on the land registration by restructuring the cadastral database. It is more the cost of the update of the cadastral data than the inability of the Greek legis-

²⁶ In the US nearby deeds and mortgages there is generally added a catch-all category of “other instruments affecting the title to real estate” to be recorded.

²⁷ A property abstract is a collection of legal documents that chronicle transactions associated with a particular parcel of land. A chain of title is the sequence of historical transfers of title, that runs from the present owner back to the original owner of the property.

²⁸ B.C. DENT, *Land Title Registration: An English Solution to an American Problem*, 63 *Indiana Law Journal*: 55 (1987) available at: <http://www.repository.law.indiana.edu/ilj/vol63/iss1/2>.

²⁹ It is said that the new English registration system find roots in the German one via Torrens, see E. COKE, *The new of Land Registration*, Oxford, 2003, p. 11.

lation to slow this transition³⁰. In Italy the digitalization of the cadastral and register data has for sure simplified the legal transaction as it allowed to build a real basis searches. But still the inaccuracy of the Cadastral data prevents to rely on a system like the Austrian one, which is still in force in some Italian provinces and which, in a possible reform of the Italian Civil Code of 1942, would be the new reference model for the circulation of immoveable property.

Being a public services land registration systems address the issue of compatibility with the financial and technological resources available. The assessment of legal institution aimed at create certainty around the property rights over immoveable has a cost that grows proportionally with the increase in reliability of the verification system adopted but which decreases in relation to the available technology. The more a system is reliable the higher will be its cost. However these costs are inversely proportional to the available technology and the degree of precision with which this technology is able to reflect the characteristics of the good that is to be recorded. Certainly the digital revolution will help to improve the immoveable transfer system. An electronic transfer system associated with the digitalization of the Registers is a legal issue that all the European systems are addressing. The use of electronic signature to transfer and to register property rights over immoveable and the transition from paper to a digital platform of the data contained in the Register will permit to maintain registers, and maps associated to them, in an electronic form so as to reduce inefficiencies and complexities of the transfer, and the related search, mechanism. It could surely speed up the transfer mechanism and reduce the costs associated to it, but, as far as security is concerned, it rather depends on how accurate the data are and how broad is the spectrum of the interests that the Register could list.

³⁰ See P. CLEPP, *Reforming Greece easier said than done: The never-ending case of the land registry*, <http://openeurope.org.uk/today/blog/reforming-greece-easier-said-done-never-ending-case-land-registry/>.

