

THE LAND REGISTRAR AS A LEGAL PROFESSIONAL

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1.- Overall approach.

If someone visits the *E-Justice* Web Portal of the European Commission a section designated as “*Legal Professions and Judicial Networks*” can be easily surprised. If that person clicked on a subsection titled “*Legal Professions*” it reads as follows:²

“Within the different legal and judicial systems of the Member States of the European Union (EU), there is a wide range of legal professions such as lawyers, notaries, judges, prosecutors and judicial officers. Members of legal professions do not hold the same titles in all Member States, and their role and status can vary considerably from one Member State to another.”

Land Registrars, as we immediately notice, are not listed among the Legal Professions –or Legal Professionals- in the European Union.

Located a little lower on the same website there is another section titled “Registers”. If we click on that section three subsections show up: 1-Business Registers, 2-Land Registers and 3- Insolvency Registers.³

Focusing on the Land Registries⁴, as these are the specific area of interest of ELRA, we can notice that the activities carried out by those represent an important share of all the E-Justice projects, sponsored by the European Commission to further the development of Electronic Justice, like the work in progress currently in execution by

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2 https://e-justice.europa.eu/content_legal_professions-29-es.do.

3 It is surprising to see no reference whatsoever to the Civil Registers –essential to find out about the legal status of natural persons, and crucial to their acting capacity- or the Chattel or personal/movable property registers, a register with ever growing importance.

4 The reason I’m focusing this presentation on the Land Registry lies in this being an intervention at ELRA’s General Assembly. The points made here could be validly applied, in general, to Business Registers and, partially, to Insolvency Registers.

ELRA: Projects IMOLA and CROBECO- and the Multiannual European *E-Justice* Action Plan 2014-2018.

For all the above and considering the role played by the Land Registry and the Land Registrars – in spite of their institutional diversity within the EU- it is shocking to find that the Land Registrars have been omitted from the Legal Professions list of the *E-Justice* Portal.

2.-Consequences.

The consequences of this omission implies, in essence, the exclusion of Land Registrars from the diverse working groups dealing with Networked Justice or Online Justice, sponsored by the European Union, as it can be easily spotted looking at the Multiannual European *E-Justice* Action Plan 2014-2018, among other documents, where Land Registrars have been excluded, among others, from the following matters:

a.- Cooperation with Judiciary Authorities and Legal Professionals.⁵

No form of cooperation from Land Registrars is foreseen.

b.- Registries.

There is no reference to Land Registrars in the Multiannual Plan, to nobody's surprise, when dealing with National Registries in support of the Justice Administration, such as Land Registries, especially those configured as registries of rights.⁶

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26.

The Member States' judiciary and relevant legal practitioners (such as lawyers, notaries and judicial officers) should be involved in future discussions in the area of e-Justice to ensure that the solutions developed correspond to the actual needs of their possible target groups.

27.

Such an arrangement would allow direct contact with these professional sectors, at which e-Justice is basically targeted, to discuss issues of common interest and to raise awareness of the latest developments in the area of e-Justice.

28.

The Strategy on European e-Justice provides for the establishment of a cooperation mechanism with the judiciary and legal practitioners. In this context, an annual meeting with representatives of the judiciary and legal practitioners (such as lawyers, notaries and judicial officers) will be organised to allow a regular exchange of views with these target groups of professionals (6). These meetings will be organised in the form of specific items on the agenda for the regular meetings of the Working Party on e-Law (e-Justice).

29.

Representatives of the judiciary and legal practitioners should be associated as much as possible with the work of the informal groups and the expert groups at the Commission as regards those projects which are of direct interest to them.

30.

The European Judicial Networks in civil and commercial as well as in criminal matters play an important role in the development of e-Justice and the close collaboration with both networks should be continued.

6 #20 Of the multiannual plan: The European e-Justice Portal should also provide a single access point via interconnections to the information in national registers with relevance in the area of justice managed

c- Semantic Web.

The same happens, ultimately, when dealing with the cross-border exchange of legal information, despite being a matter that directly involves the Registries, and not only the Land Registries- also business and civil registries-.⁷

Information from the Land Registry is – no doubt about it- legal information, and finding an interoperable legal semantic is, as we'll see, an important element to facilitate the cooperation in the field of Land Registries and to achieve a useful and meaningful Interconnection of Registries.⁸

All these consequences are in connection with legal matters in the online medium, but the same attitude can be found in the offline world in different legal projects and drafts from the European Union which affect, either directly or indirectly the Land Registries.

Fortunately, these consequences are mitigated thanks to the existence and activity of ELRA, playing the role of interlocutor before the EU Authorities. So, even Land Registrars are not acknowledged as part of the legal professions roster of the E-Justice Portal, ELRA is carrying out two projects financed by the EU, which are essential in the field of Registry Interconnection, such as IMOLA and CROBECO and, within the former, an important effort in the field of semantic interoperability in order to facilitate the cross border exchange of information from the land Registry, which always entails legal information.

3.- What's the reason behind this exclusion?

By “exclusion” I am talking, not only, about the absence from the list of Legal Professions of the E-Justice Portal, but, in general, about the lack of participation in working groups which contribute to the drafting of legislative projects which directly

by national public or professional bodies facilitating the administration of and access to justice, provided that the necessary technical and legal preconditions for such interconnections exist in the Member States.

7 # 22 and 23 of the multiannual plan:

The development of effective means for the exchange of legal information across borders, and in particular data relating to European or national legislation, case law and legal glossaries (such as Legivoc) should be continued.

Different projects can address this issue and increase the exchange and semantic interoperability of legal data throughout Europe and beyond. Unique identification, common metadata of legal information are the basic building blocks of the European legal semantic web.

8 In fact, the French/German “Non paper” of september 7th 2015, on “Interconnection of land registries”, drafted for the e-Justice Working party, points out at the fact that a Land Registry Interconnection could be harmful for this reason, as it may contribute to generate confusion and legal uncertainty, as I will later elaborate on.

affect the Registries and, also, substantial legislation affecting acts and legal contracts on Real Estate that, to bigger or lesser extent and/or legal reach, decisively determine the content of the Land Registry entries.

In a first approach –and this communication aims at being just that: a first approach– we can attribute this exclusion to two reasons:

- (1) The European Union lacks competence over the Land Registry, according to art. 345 of the 2007 Treaty on the functioning of the EU.
- (2) Land Registrars do not carry out a legal function, and therefore they're not considered legal professionals.

Let's examine, even briefly, each of these points:

3.1.- The European Union lacks competence over the Land Registry.

Article 345 of the 2007 Treaty on the functioning of the EU states that: *“The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.”*

This article implies that legislation governing the ownership of real estate is the exclusive competence of Member States. However, it is not as clear as it may appear at first glance, as pointed out by current president of ELRA Mr. Lewis:⁹

Regarding the Land Registry, art. 345 severely limits the Competence of the EU. If we deem anything relating to the definition of property rights, its configuration as a fundamental right, or not, the determination of its content, of its legal protection and the system, or systems, of conveyance as part of the Statute of Property Rights – then the choice of a certain Registration System over other systems, the different value of the Registry entries and the different Registry information instruments, including the legal statute of Land Registries- is the exclusive competence of Member States.

This seems to be the interpretation followed by the European Legislation itself.¹⁰ From this perspective, it's logical that the *E-Justice* Portal does not list Land Registrars among the Legal Professions of the EU.

⁹ See Lewis A. Buying and owning a property in Europe at <http://www.elra.eu/2015/01/buying-and-owning-property-in-europe/>

¹⁰ In this regard, REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession art. 1, section 2-1 “any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.”

However, it doesn't appear like all aspects related to the Land Registry can be excluded from the sphere of competence of the European Union. For instance, the requirements to access Land Registry Information remain, at least in part, the competence of the EU, as it deals with privacy and data protection legislation¹¹ of the Union, without prejudice of the particular requirements established by national legislation.

On the other hand, it can be seen that one of goals of the Multiannual Action Plan 2014-2018, is to “*provide a unique access point, by means of Interconnection, to the information of the national Registries... to facilitate the Administration of Justice*” and among such registries are, of course, the Land Registries.

This Goal must put into context, as we'll explain, with the provisions in the field of International Judicial Cooperation set forth by the Treaty on the functioning of the EU (art 67).

As we'll see, legal cooperation among the different Member States, as far as Land Registries are concerned, is not limited to a mere exchange of Registry Information, but also to possibility of both Judiciary and Non Judiciary documents originated in another Member State to enter the Land Registry, as long as they pass the corresponding test of legality.

Considering all the above, the assumption that the EU lacks competence over the Land Registry, in accordance to art. 345 of the Treaty on functioning of the European Union, it does not exclude its –although limited- competence in, at least, two of the examined cases.

3.2.- The idea that the profession of Land Registrar is not a legal profession because it does not imply a legal function.

This second point could explain the absence of the Land Registrars in the Legal Professions List of the E-Justice Portal.

If the previous point was true from a material standpoint, acknowledging certain competence of the European Union with regard to the Land Registry, this second point lacks –in my opinion- the slightest justification. However, the depiction of the Land Registry provided in the *E-Justice* Portal¹² may be misleading, as it states:

“Land Registries constitute a very important source of information due to their official nature.

Land registers help to facilitate land-related administrative tasks of citizens, legal professionals, state authorities, private companies and other interested parties. The

¹¹ In this regard Lewis A, Ibidem.

¹² https://e-justice.europa.eu/content_land_registers-107-es.do

official register information is open (in a majority of EU countries) to banks, creditors, business partners and consumers in order to enhance transparency and legal certainty in European Union markets.”

Whoever reads the description found on this website, will hardly understand what is a Land Registry and –especially- what is its goal or what it does, that is: what is its function, or why it helps to facilitate administrative tasks, as cited above between quotation marks.

From reading the previous website one would get the impression that the Land Registry serves a consultant, rather than a function with legal effects and, therefore, a legal function.

For further information at an European scale, the website refers to a link containing information about EULIS and ELRA, two organisations with very diverse size, constituency, nature and areas of work which are not Land Registries, even though they're closely related to the Land Registries, especially ELRA¹³- in spite of what the spotlight is focused on EULIS.

For further information at national scale it provides a series of links with a very succinct information about each country, which not always clarifies the value and effects of the Registered entries, and rarely provides any information on whether the Registry conducts any kind of legal supervision, to a bigger or lesser degree, of the documents- with regard to the Registries of documents-, or real rights –when dealing with Registries of rights- susceptible of registration.

If the *E-Justice* Portal does not clarify neither the goals and function of the Land Registry, nor the value and effects of the Registry Entries, nor whether a certain degree of legal supervision is required to obtain registration –of documents or rights, depending on the system- and on top of that, it states that the Land Registry helps to facilitate consultant tasks, it can hardly be inferred from such wording that the Land Registry serves a legal function, to some extent and also that the function of the Land Registry is a legal function –to a bigger or lesser degree- depending on the registration system and the Civil System of Conveyance of property and other real rights over real estate in force in each country. It can also be difficult to infer from the depiction of the *E-Justice* Portal, that Land Registries are in fact, essential instruments to the efficacy of

¹³ ELRA - <http://www.elra.eu/european-land-registry-association/> “About us”, “Mission and Primary purpose-, si que aparece una referencia clara al papel legal de los registros:

“The mission and primary purpose of the European Land Registry Association may be described as “the development and understanding of the role of land registration in real property and capital markets”.

ELRA wants to promote mutual understanding and the knowledge of land registers, to help creating an open and secure Europe, serving and protecting citizens.

We believe that Land Registries are a fundamental pillar of legal certainty and ELRA’s commitment is to ensure the transfer of this principal into Community Law.”

Court Rulings and Decisions, especially in civil matters, and thus, in International Judicial Cooperation.

4.- Function of the Land Registry and Land Registrars.

4.1.- Factors behind the current misconception about the role of the Land Registry.

Probably, two of the factors which contribute more heavily to the current misconception of the Land Registries are:

4.1.1.- Considering Real Estate Registration Law as Land Law, instead of being the legal branch that regulates the Land Registry and, more precisely, the value and effects of the entries recorded at the Land Registry, which belong to the System for the transmission of ownership and other real rights over Real Estate, with varying degrees of protection depending on each country's system.

Real Estate Registration Law, indeed, is not interested in Land itself but in Real Estate, that is: Registered Properties, or what it is the same: property Rights over Real Estate. The identification of the plots of land is considered useful as long as it helps the delimitation of property rights, where a detailed description is not required beyond a clear abuttal of adjacent properties, since from the perspective of the Land Registry, properties are not defined by geographical or architectural configurations but by the physical projection of the right of ownership which ends where the adjacent proprietor's right starts. That is why the so called "*physical delimitation*" is nothing but a "*legal delimitation*" of the physical space.

The law governing registration, in its substantial aspect, which establishes the value and effect of Registry entries, is part of Patrimonial Civil Law, in particular of the System for transmitting and acquiring property and other real rights over real estate, and its protection. This is the reason why Land Registries, according to art. 345 of the TFEU remain out of the sphere of competence of the European Union.

This is the essential nature of all registration systems, regardless of the Conveyance System –v.gr. causal or abstract-, the determination system for real rights – *numerus apertus vs numerus clausus*-, or the type of registration system- Registry of Rights, Documents, or some intermediate approach- with a higher degree of protection of real rights on the Registry of Rights, over the Registries of Documents.

The implementation of the Real Estate Registration Law demands the establishment of an Institution: The Land Registry, which may be organised according to several models. The fact that the origin and different historical evolution in each country has caused this institution to play other roles –in taxation for instance-, or the technical advances allow for the use of georeferencing and physical description of the properties, or the access to multiple information related to the territory should not distract us from what it is its main goal: being part of the property conveyance system and protecting rights on real estate with varying degrees of intensity. The notion of a

conveyance system is essentially legal, as is the notion of property and other real rights on real estate.

The organisation of the Registration System –to achieve the described goal- allows the production of certain by-products, some of them certainly relevant, especially if we are dealing with a Registry of Rights.

However possible and desirable the obtention of such by-products may be, it is necessary to underline that the Land Registry Organisation –and, within that, the requirements for registration- must be designed to pursue its specific goal in the most effective and efficient manner, an objective which in no way should be altered or compromised in the pursuit of by-products, which may be useful for other goals of administrative nature, related, for instance, with Land Administration, but at the cost of introducing inefficiency in the Registration Procedures or, what's the same, in the System for the Transmission of Real Rights on Real Estate and, therefore, in the Real Estate and Mortgage Markets.

In other words, nothing should distract the Land Registries from pursuing its specific goals. Subordinating such goals to other alien motivations equals to subordinating the principal to the accessory, to blur and denaturalize the nature of the Land Registry and to hinder its ability to serve the goal it was created for.

Probably, the trend of putting at the same level the goal of the Land Registry with that of other institutions which deal with the territory, something the concept of Land Administration is accountable of, has largely contributed to the consideration of Real Estate Registration Law as Land Law, making it difficult to identify its true nature: Being an Instrument to make transactions, simultaneously, secure and agile in a context of impersonal exchange, as we find in modern free market economies, thus enabling the efficient development of Real Estate and Mortgage Markets.

4.1.2.- Land Registries, although they all pursue the same goals, do not serve the same functions.

Indeed, not all Land Registries serve the same functions, that is: do the same things. This functional diversity accounts for, to some extent, the existing misconception about the role of the Land Registries.

4.2.- Goals and functions of the Land Registry.

Historically, modern Land Registries appeared subsequently to the demise of the Old Regime and the “liberalisation of the land” from its feudal ties, to allow for the development of the mortgage market. But, to that end, it was necessary that ownership and other real rights on real estate became, simultaneously, secure and easily transmitted. It is very difficult, especially in a context of impersonal transactions.

This instrumental goal is not easy to obtain in an impersonal society, as modern societies are, and as the European societies were by the end of the XVIIIth Century. The main reason lied in the subsistence of the roman principles of “*iustus titulus*” and the “*reivindicatoria action*” . With those elements being prevalent in an society with impersonal exchange, an unavoidable trade off between secure rights and ease for transmission exists. To try to resolve or mitigate this problem, States adopted various solutions, following the patterns that defined the Institutional evolution:

1.- Some States (France) kept the roman principles, although in order to mitigate the trade off, introduced the “Conservateurs des Hypothèques”, granting priority to the entry –the relevant date of the document containing the act or contract transmitting a real right on real estate is that of the entry at the office, and not that of the document itself- and also the effect of opposability –only published documents are opposable, and those that haven’t been published cannot be opposed to those which have¹⁴. That way, the purchaser has to worry only about rights deriving from published documents, which reduces uncertainty. It does not eliminate, however, the need for retrospective research of titles, always doubtful. The introduction of the so-called “*effet relatif*” later helped to diminish uncertainty and, this way, also mitigating the trade-off.

In this kind of Registration Systems the check of compliance with applicable legislation conducted by the “Conservateur” usually focuses on the observance of formal requirements set in the legislation for that act or contract, without assessing the substantial legal compliance of the act or contract, as well as the compliance in its case of the “*effet relatif*”. It also covers the interpretation of the contents of the Registry in case a certification is applied for¹⁵.

2.- Other States (Spain, Austria, Germany...) opted for a more direct intervention in the conveyance system by implementing a Registry of Rights, with Public Faith or Indefeasibility of the entries. In the case of Germany a system of abstract transmission, followed by registration was put in place. In Spain instead a causal transmission system followed by tradition, was chosen, with registration as requirement to achieve an indefeasible right *in rem*, which effectively isolates the acquisition from any potential harmful circumstances which were not registered –pretty much like the german *Vomerkung*- This meant introducing in the real estate sphere the same rules of protection devised during the middle ages to foster the commerce of chattel and movable goods: the “*Lex Mercatoria*”, by removing the “*reivindicatoria*

¹⁴ As long as they referred to previous transfers located within the same transmissive chain. On the other hand, “conservateurs” play an important role in taxation, provided before a document can be published, payment of applicable taxes needs to be proved. The management of the tax is usually done at the conservateur’s office.

¹⁵ Piedelièvre S. *Traité de Droit Civil. La publicité foncière*. L.G.D.J. 1999. Théry Ph. *La transmisión de la propiedad en el Derecho francés. Principios y cláusulas contractuales*, en *Los sistemas de transmisión de la propiedad inmobiliaria en el Derecho Europeo*, Orduña Moreno F. J. y De la Puente Alfaro F. (Coed) y Martínez Velencoso L.M., Ed.: Thomson-Reuters, Cizur Menor, Navarra, España, 2009

action” against any person who acquired from the registered owner following the procedures of the Land Registry.

In these systems the legality check by the registry varies. In Germany they check the compliance with the formalities of the documents, the formal consent, the obstacles which may exist according to what is recorded at the registry, and also the suitability of the real right to gain access to the registry, as the system of *numerus clausus* applies¹⁶. The registrar is not obliged to assess the substantive legal compliance of the act or contract, although it is no clear whether or not he could place an objection if a serious non-compliance was detected¹⁷. The registrar is not obliged to conduct this material assessment as the contract is not considered to be part of the conveyance, which requires the mere formal consent. In any event, at least *inter partes*, a *conditio* could exist.¹⁸

In Spain, the Land Registrar, in addition to applicable formalities to be observed, must check the material compliance with the law of the act or contract, before registration, as the system is of causal nature and Registry entries enjoy the effects of legitimacy and indefeasibility. That includes the assessment of the legal suitability for registration of the real right, as the system of *numerus apertus* operates in Spain, although subject to strict conditions. This function is relevant also in the sphere of cross-border transactions, as it is up to the registrar to adapt into Spanish law equivalents, any real rights contained in foreign documents¹⁹.

Between both kinds of Registration Systems –Rights of Documents- there are several mixed or intermediate systems, where the function of the registrar to check the

¹⁶ Martínez Velencoso L.M., La función registral en los principales países europeos en *Los sistemas de transmisión de la propiedad inmobiliaria en el Derecho Europeo*, Orduña Moreno F. J. y De la Puente Alfaro F. (Coed) y Martínez Velencoso L.M., Ed.: Thomson-Reuters, Cizur Menor. Drobnig U. *El sistema alemán de transmisión de la propiedad* (rasgos básicos y análisis comparado) en *Ibidem*. Asimismo *Real property Law and Procedure in the European Union*, informe definitivo fechado en 31 de mayo de 2005, coordinated by Christoph U. Schmidt

¹⁷ Pau Pedron A., *Panorama del sistema inmobiliario alemán*, en *La Publicidad registral*, Ed.: Fundación Beneficentia et Peritia Iuris, 2001

¹⁸ As in Roman Law, it is a recuperatory *conditio* of what was delivered, but without real effect, so if the thing has been transmitted to a third party all what's left is a possible indemnification, unless the transmission has been made in fraud or the third party was involved in such fraud. If these circumstances for the *conditio* to have real effect are not present, a “*vormerkung*” it is necessary at the registry before the acquisition is registered on behalf of a good faith third party.

¹⁹ Méndez González F. P.: *La función calificadora: una aproximación desde el análisis económico del Derecho*, en *La Calificación Registral*, T.I Gómez Gállego F.J. (Ed), Ed.: Civitas, España, 1996.

legality highly varies²⁰, although almost exclusively being an *ex ante* control, as it can be seen at the European Land Registry Network of ELRA's website. In all instances, but one²¹, registrars are legal professionals, usually highly qualified and highly ranked within their administrations, with a significative prevalence of adscription to the judiciary – <http://network.elra.eu/?cat=107>, see “process of registration”-. In all cases a legality check is performed.

Such legality check is limited to formal requirements of the documents, in some cases, but most go further and include the assessment of legal compliance of the contract according to the material legal requirements of national law.²²

The function of the registrar varies depending on the kind of registry, on the legal transmission system is causal or abstract and on the system of property rights is *clausus* or *apertus*. In a deeds system, the registry does not shows any entitlement. It only shows documents. However, a registration in a registry of rights shows the entitled person because is part of the process of the generation of the entitlements *in rem* of property rights on immovables.

In a causal system, the contract or juridical act is part of the transmission –*justus titulus*– but they are not part of it in an abstract system. This is why in a causal system with a registry of rights the legality check of the registrar usually reaches the *justus titulus*, but this legality check does not reach it in an abstract transmission system, even with a registry of rights system, nor in a causal transmission system with a registry of deeds.

4.3.- Land Registries are, therefore, Legal Institutions and Land Registrars are in charge of a legal duty.

Land Registries are then Legal Institutions, the function of the Registry is legal and the Registrar, considered as the person in charge of overseeing the legal compliance of the application for registration, is who authorizes the entries and certifies the contents of the registry, thus carrying out a legal function, while being a legal professional, particularly close to that of a Judge when dealing with Registries of Rights.

²⁰ Visit ELRN ELRA -<http://network.elra.eu/?cat=107>-, click “Land Registry Proceedings” then “Preventive Control of Legality”. In all cases a formal check exists, and in most cases En todos los casos hay un control de aspectos formales y en la mayoría también sustantivos del acto o negocio jurídico.

²¹ Estonia, where the Land Registry has a month, after registration, to perform the legal compliance check.

²² See Martínez Velencoso M.L., La función registral en los principales países europeos, en *Los sistemas de transmisión de la propiedad inmobiliaria en el Derecho Europeo*, Orduña Moreno F. J. y De la Puente Alfaro F. (Coed) y Martínez Velencoso L.M., Ed.: Thomson-Reuters, Cizur Menor

For these reasons, Land Registrars should be included among the Legal Professions listed on the *E-Justice* portal, along with the other professions currently included (judges, prosecutors, lawyers, notaries and court officials) and take part of the various workgroups dealing with projects related, not only with the organisation of the Land Registry, but also of connected institutions and regarding the material law in accordance to which the legality checks are performed by the registrars, according to their national legislation.

5. Land Registry Interconnection within the European Union: Semantic Interoperability as a key factor.

5.1- A preliminary issue: the extent of legislative competence of the European Union regarding the Land Registry. The Cooperation of the Land Registry as a manifestation of the Judicial Cooperation foreseen in the TFUE

On the other hand, being the Land Registry a part of the property rights system of each country, its regulations corresponds to the State, not to the Union, according to art. 345 TFUE, which does not prevent them, however, from serving as legal cooperation instruments within the European Union, in the framework foreseen by art. 67 TFUE.

We have abundantly mentioned art 345, so we will focus on art. 67 TFUE, especially in paragraph n°4 which states:

“4. The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.”

All of it “with respect for fundamental rights and the different legal systems and traditions of the Member States” as paragraph n.1 of the same article states.

his norm must be completed with the provisions of art. 81-1 of TFEU, which states:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial case.

It is worth noting that these provisions were not newly introduced with the TFEU, as they were also present in the previous treaties. Indeed, art.67 matches the former art.61 of the Constitutional Treaty of the European Union (TCE) and former art. 29 TUE and art 81 correspond to former art.65 TCE.

These provisions determine the extent of the legislative competence of the European Union in Registry related matters: within the boundaries established by art.

345 of TFEU cooperation in Land Registry related matters, is another aspect of the legislative competence in Judicial Cooperation, especially, although not exclusively, in civil matters, as set forth in articles 61 and 65 TCE.²³

In other words, cooperation in Land Registry matters is but a manifestation of the judicial cooperation foreseen in the different European Treaties, set out by different Regulations, and an instrument to make it effective in the sphere of property rights over Real Estate.²⁴

5.2- The Land Registry Interconnection foreseen within the E-Justice Initiative.

The Multiannual European E-Justice Action Plan 2014-2018, when dealing with the Registries, focuses exclusively on “*National Registers included in the Justice Sphere... to facilitate the access to and the administration of justice, establishing to that end a single access point by means of interconnection of such Registries*”. Among the Registries foreseen in the Action Plan are, no doubt, the Land Registries, and the interconnection among them can only aim at fulfilling the provisions of the Regulations drafted to develop the existing Treaties on Judicial Cooperation.

Number 20 of the aforementioned plan, makes the interconnection dependant on the compliance with legal and technical requirements at national scale, which can be interpreted in accordance with the view that such conditions are the competence of each State.

²³ Land Registry cooperation also operates in the sphere of judicial cooperation in criminal matters. Program of measures aiming at implementing the principle of mutual recognition of court resolutions in criminal matters (2001/C12/02) (DOC12 of 15.1.2001) and several Framework decisions passed by the Council on mutual recognition in criminal matters (the first is framework decision 23/2014 of November 20th of mutual recognition of resolutions in criminal matters in the European Union (Official Spanish Bulletin 21-11) affecting the sphere of the Land Registry as long as the orders or measures adopted by the criminal courts resulting in preemptive annotations of attachment, embargo or prohibition to transmit, which will of course require a previous phase of information on the properties of the person affected by such measures.

²⁴ Among these regulations it is worth pointing out 1 .-(COUNCIL REGULATION (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. 2.- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters , 3.- Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 and its successor Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters . 4.- REGULATION (EU) No 650/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession and 5.- REGULATION (EU) No 606/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 June 2013 on mutual recognition of protection measures in civil matters

This also would explain why the Working Party on Land Administration (WPLA) of E-Justice, has opted for a scheme where participation in the Land Registry Interconnection is strictly voluntary, not carrying any negative consequences over the States which decline to participate.

In any case, whatever technical approach is used for Land Registry Cooperation, including in its case the voluntary interconnection, such cooperation will always require the understanding and knowledge of the meaning of the Registry Entries- which we usually designate as “Land Registry Information”²⁵

5.3.- Land Registry Cooperation as a matter of legal semantic interoperability. The prevalence of National Legal Systems in the sphere of Real Estate Property Rights.

Challenging as the technical complexities of this cooperation may appear, they pale in comparison with the legal intricacies involved. A proper understanding of the Land Registry entries require that not only the procedural aspects of each national registry are understood, but also its patrimonial civil law, its taxation law, the rules of civil and administrative procedure and a long etcetera.

The legal system on each country bases itself on the principle of completeness as a method for self-integration. Additionally, in relation to certain matters – property on real estate- the legal systems do not usually allow for the application of any legislation but its own, and in this field legal systems not only are diverse, but repel one another in essential features, as certain figures admitted in one country are rejected in others and, at best, regulated in a different manner.

None of that is whimsical, but the sediment of a long and painstaking historical process. The different ways in which property is conveyed, the configuration of property rights, especially on real estate, that we know today, are the result of a Roman/Germanic Matrix, the disputes of Noblemen with their Sovereign, of the Noblemen amongst themselves, and of the commoners against the Noblemen, the King or even the Church, also of the rise of the bourgeoisie, de liberal revolution that brought the old regime to an end and the process of liberalization of the land that occurred throughout Europe since the end of the XVIIIth Century and all the XIXth Century, with varying results in each country, depending on the correlation of forces of the different stakeholders, as well as the emergence of the so called “social function of property” which spread across the European legal systems since the beginning of the XXth Century.²⁶

²⁵ The multiannual plan: The European e-Justice 2014-2018 foresees the creation of a semantic web (#22&23 note7) in the general legal sphere, without any particular reference to the Land Registry.

²⁶ Méndez González, F.P. *De la publicidad contractual a la titulación registral. El largo proceso hacia el Registro de la Propiedad*. Ed.: Thomson-Civitas, Cizur Menor, Navarra, España, 2008.

In fact, the legal configuration of contracts, succession and, above all, property rights, displays the real DNA of each country. On top of that we have to bear in mind that the Land, comprised within certain boundaries, is the physical substratum where the sovereignty of country rests. These are the real challenges involved in the Cooperation in the field of Private Patrimonial Law -especially relating to Real Estate- and therefore in the field of Land Registration, way more than the development of Technological platforms or, in its case, the physical description of the registered properties.

5.4.- Cooperation in the sphere of the Land Registry. The example found for instance in Regulation (EU) No 650/2012 OF THE European Parliament and of The Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession

This reality is constantly apparent in the field of Private Patrimonial Law, especially in relation to Real Estate. For instance, Regulation (EU) No 650/2012 of the European Parliament and of The Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, establishes that:

Art. 30 establishes the prevalence in real estate law of the “*lex rei sitae*” principle:

“Where the law of the State in which certain immovable property, certain enterprises or other special categories of assets are located contains special rules which, for economic, family or social considerations, impose restrictions concerning or affecting the succession in respect of those assets, those special rules shall apply to the succession in so far as, under the law of that State, they are applicable irrespective of the law applicable to the succession.”

Art. 31 establishes the principle of “Adaptation of Real Rights”

“Where a person invokes a right in rem to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right in rem under the law of that State, taking into account the aims and the interests pursued by the specific right in rem and the effects attached to it.”

This operation, always tricky, will vary in its difficulty depending on, among other concerns, whether the different legal systems have adopted a *numerus clausus* system to rule the configuration of Real Rights, or requiring a high degree of *tipicity* in such configuration, as usually turns out to be inevitable when dealing with *iura in rem*, however allowing for the possible creation of new types of real rights as long as certain

requirements are met. In Spain, the Legislation assigns the task of conducting the adaptation to the Land Registrar.

Article 1.2.1 places the competence over the Land Registry on each Member State and, therefore, any related provisions will fall outside the scope of the Regulation:

“any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register.”

As a consequence if, for example, a conflict exists between the presumption of public ownership, established in art. 69.2 of the Regulation, and the registered ownership backed by the public faith of the Registry of a Member State, the latter will prevail.

Article 69.5, by the way, creates a document, the *European Certificate of Succession*, that is suitable to be registered, notwithstanding with the provisions of art 1.2k & l, that is and for this purpose, the requirements of each national legislation in relation to the Land Registry which will prevail under all circumstances.

Also, art. 66.5 states that *“For the purposes of this Article, the competent authority of a Member State shall, upon request, provide the issuing authority of another Member State with information held, in particular, in the land registers, the civil status registers and registers recording documents and facts of relevance for the succession or for the matrimonial property regime or an equivalent property regime of the deceased, where that competent authority would be authorised, under national law, to provide another national authority with such information”*,

Usually, such national authorities will be the Land Registrars.

These provisions reveal that:

1- Cooperation in the field of the Land Registry is an instrument of the Judicial Cooperation aiming at making the latter effective.

2.-Judicial Cooperation –and, therefore, Land Registry Cooperation- in relation to Private Patrimonial Law of a Member State, especially in the field of property rights on real estate, can only operate within the permitted extent of each State’s legal system, inside its own framework of real estate patrimonial public order.

3.- Cooperation in the field of the Land Registry can allow for the creation of European-Wide formal registrable titles, always subordinate to the requirements of each State’s legislation on Land Registry.

4.- The access to Land Registry Information is the competence of each Member State.²⁷

5.- When a Real Right, admitted in one country, but relying on a property located in another State Member, is presented at the Land Registry for registration, it will need to adapt itself to the most similar real right admitted in the jurisdiction where the property is located.

6.- Cooperation in the field of Land Registries will always rely on the knowledge and understanding of the contents of the Registry entries.

This last demand, entails a profound knowledge of Patrimonial Law, especially relating to Real Estate, of the countries involved, as to the make them legally interoperable to some extent. And this is, as a consequence, undoubtedly the most challenging obstacle for Land Registry Cooperation.

5.5.- Cooperation and Interconnection. Land Registry interconnection depends of legal interoperability.

Ultimately, Cooperation in the field of the Land Registry depends, essentially, on the legal interoperability, not just between diverse registration systems, a relevant although secondary detail- but among different, and frequently incompatible, legal systems in the field of Patrimonial –especially in Real Estate-law. This means that without legal interoperability it is not possible to attain an effective cooperating among the Land Registries of different Member States, without prejudice of the auxiliary role that the technical interconnection may play in order to manage the legal interoperability, which is the real challenge and does not depend at all on whether a technical interconnection among Registration systems exists, or not.

The French-German “non-paper” of September 7th 2015, presented during at the Working Party Meeting warns, precisely, of the risks of uncertainty and legal confusion to be expected from a technical interconnection of Land Registries, as is:

²⁷ It appears to be the case according to art. 65 of Regulation 650/2012, and #20 of the Multiannual Action Plan 2014-2018. Also from the French/German Non-Paper document of September 7th 2015 presented at the e-justice Working Party:” In fact, as the location of land property is effortless discernible and can always and easily be related to the territory of a member state, it is all times evident, according to which national law access to registry information can be obtained”. The same can be said regarding the Business Registers according to what reads on the fact #11 of the DIRECTIVE 2012/17/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 June 2012 amending Council Directive 89/666/EEC and Directives 2005/56/EC and 2009/101/EC of the European Parliament and of the Council as regards the interconnection of central, commercial and companies registers : Since the objective of this Directive is not to harmonise national systems of central, commercial and companies registers, there is no obligation on the Member States to change their internal systems of registers, in particular as regards the management and storage of data, fees, and the use and disclosure of information for national purposes

“The information entered in a national land register is undoubtedly closely related to that national legal system. Accordingly, the information represented in one register is not necessarily comparable to information in a register of a different member state. The envisaged cross-border access to national registers could thus create the false impression that the information contained in the registers would be comparable. For citizens, providing different types of information without including legal details that can only be provided by Experts from the national legislations would be a source of legal uncertainty and confusion.”

The non-paper points out, quite rightly, that the Feasibility Study ²⁸relies on a misconception with regards to the importance and difficulty of the legal interoperability in the field of Land Registry Cooperation.

The study appears to be influenced by the misconception that the linguistic gap could easily be overcome by machine translation (p.53) or by a supplementary multilingual glossary (p.53). Both mechanisms add to the impression of a seemingly transnational usability of the portal. However, both would be either materially misleading or (at best) rather useless. For many legal terms, there simply are no equivalents in all member states. A correct understanding of legal terms and Concepts necessarily requires in-depth knowledge of a member states legal system rather than mechanistic or standard translations. Concerns about the project’s consequences in terms of liability are increased by the issue of the reliability of translations”

5.6.- Project IMOLA- Interoperability Model of Land Administration, as a means to facilitate Land Registry Cooperation by supporting Semantic Interoperability.

Land Registrars have been aware, all along, that the key issue in the field of Land Registry Cooperation, lies in the semantic interoperability in the legal field, and of the difficulty of such interoperability. For this reason ELRA, Colegio de Registradores de la Propiedad, Mercantiles y Bienes Muebles de España and the Dutch Kadaster devised the IMOLA Project:²⁹ *–Interoperativity Model of Land Administration-*.

On the website of ELRA devoted to the IMOLA project, this perspective is clearly set out:

²⁸ Usually referred to: European e-Justice Portal Land Registers Interconnection –Feasibility and Implementation analysis”, drafted in 2014 by the iLICONN Consortium, commissioned by the DG Justice, Unit B2

²⁹ <http://www.elra.eu/imola/>.

“There is a need for a standard means of accessing basic land registry information within the EU. Yet, the cross-border exchange of information between European land registries is complicated. Differences in national legislation and divergences inherent to the practice of land registration are the main causes of this complexity. Therefore, a need for a standard means of accessing basic land registry information within the EU, paired with the availability of explanatory material and the training of practitioners to improve the understanding of foreign legal systems, is evident.

Common points do exist and offer the possibility of defining a structure of key information shared by the majority of land registry systems. IMOLA project, subsidized by the EC Civil Justice Programme, will perform in-depth research on these common key points, develop interoperability solutions that will make the differences understandable to the professionals participating in real estate transactions, and facilitate cooperation with other networks in order to contribute to the development of a European real estate and mortgage market.”

The Feasibility Study, however, is not aware of the importance of the Legal or Semantic Interoperability, relegating it to a point that makes it trivial³⁰, by focusing on the technical interconnection as the key element of Land Registry Cooperation, which constitutes, in my opinion, a grave mistake.

This is due, among other factors, to the fact that the Feasibility Study has been conducted without the participation not only of Land Registrars, but without the engagement of any of the Legal Professions listed in the E-Justice Portal, in spite of this project, foreseen in the Multiannual European E-Justice Action Plan 2014-2018, stems directly from art. 67 TFEU. And what’s more, in spite of what is claimed in the Feasibility Study, ELRA was never approached for consultation, which casts legitimate doubt on the seriousness of the Study.

The fact that no jurists or legal professionals have taken part in the project for the Interconnection of the Land Registries, also explains the fact that such interconnection is conceived not only among such Registries, but also encompasses the National Cadastres on an equal footing with the Registries (r.1 list), which allows the study to overflow the field of what many countries understand for their “registration

³⁰ The Feasibility study proposes two means to solve this problem: an automatic translator available at the portal, and a Glossary, where it has placed high expectations: “The glossary must play the role of ontology that helps to understand the difference between the legal systems... The multilingual LR glossary must work as taxonomy (thesaurus of equivalent legal concepts, providing detailed information). The Portal will be of great support for providing a technical platform to host such a glossary.” This proposals cause great concern as they prove to be largely oblivious to legal reality, on one hand, and that the legal interoperability is essential to Land Registry Cooperation, on the other hand. The French/German Non Paper of Sept 7th 2015 stresses these two concerns.

system” without any academic base or any other backing for that matter, to reach a conception of the Land Registry in its “broadest meaning”.³¹

In some countries Registries and Cadastres are separate institutions with varying degrees of coordination, in other they are “merged organizations”³². The Feasibility Study, in fact, does not respect the different national solutions, over which the UE has no competence at all, but by including not only ownership and lien information from the Land Registry, but any type of relevant information from a geographical or territorial perspective³³ on equal footing with that of the Registry without providing any justification, it is assuming as its own model a reality only actual in the Netherlands, Denmark, Sweden and Finland, which no doubt are important States, but in the context of the European Union mean a small population with lower Real Estate transaction rates, when compared with other larger and more active real estate markets.

The attitude of ELRA is, very differently, respectful and prudent, according to the article 345 of TFEU . In its web site we can read:

³¹ For this purpose it must be reminded that the list maintained at the ELRN portal of ELRA with descriptions of the different registration systems, identifies the registries in each of the countries which take part in the association: Cfr: <http://network.elra.eu>. Also the Real Property Law and Procedure in the European Union report dated on may 31st 2055, coordinated by C. U. Schmid.

³² As the Land Registries Statement of ELRA, published on 2015 :”Most states have, in addition to a land registry, a mapping agency and a cadastre. The functions of the land registry, mapping agency and cadastre are complementary but different. Mapping agencies exist to record topography whilst the cadastre’s primary purpose is fiscal. Some countries have found it administratively convenient to combine the functions in a single organization”. The most significant countries of the European Union either lack a cadastre (UK) or Cadastre and Land Registry are separate organisations although coordinated between them : Spain, France, Germany and Austria, with the sole exception of Italy.

³³ The French/German Non Paper of Sept 7th 2015 states: “To include geoinformation in a searchable form will probably be impossible in a number of member states because of the dichotomy of land registers and cadastres (, which the interconnection shall allegedly respect, p.29). Certain information-urban planning- for instance- is not usually the competence of Cadastres and Land Registries. Besides, several types of information cannot be simply provided due to data protection provisions. AS the Non Paper further elaborates: he purchase price is an example of information simply not provided by many land registers (e.g. Germany); at the same time, provision of this sensible data might infringe privacy rights in some member states. The study, however, does not even indicate this piece of information as possibly sensitive data with regard to data protection (p.54 f.). All these points justify that the most relevant countries in the EU: Germany and France, have opted to not participate in the Interconnection project, despite having two radically different registration systems. It is to be expected that this position might be followed by other countries as well”.

“Land registries determine property rights and, to be effective, their decisions need to be recognised by the courts. This means that, like the courts, although land registries act on behalf of the state, they must be independent of it. The issues that land registries need to consider typically have a high legal content and, for land registries to be effective, their staff must be suitably trained and qualified.

Most states have, in addition to a land registry, a mapping agency and a cadastre. The functions of the land registry, mapping agency and cadastre are complementary but different. Mapping agencies exist to record topography whilst the cadastre’s primary purpose is fiscal. Some countries have found it administratively convenient to combine the functions in a single organisation.”

IMOLA, on the other hand, is a project set in motion by ELRA with financial support from the European Commission and, more specifically its template, which is in a very advanced state of development, is very useful instrument to facilitate the Cooperation in the Field of the Land Registries, regardless of the actual presence of a technical interconnection and, in its case, to avoid that interconnection from becoming a fiasco. Ultimately, as important as the physical technology may be, the key of a successful cooperation is always Institutional and, therefore, legal.