

THE POSSIBILITY OF A COMMON EUROPEAN LAND REGISTRY WITHIN THE CURRENT LEGAL FRAMEWORK*

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Abstract: *The purpose of this paper is to explore the possibility of implementing a common European Land Registry from a legal point of view. Although the European Union has yet to succeed in implementing a sole land registry, it has made clear and certain steps in this direction. Through platforms like EULIS or common vision agreements signed with associations like ELRA, the European Union is working towards the standardization of the way in which its member states handle real estate registration. In order to fully understand the legal implications of, and how achievable a standard European Land Registry is, it was deemed necessary to make an analysis based upon the comparison between the different legal systems found in the European Union, with focus upon the concept of property transmission. This comparison was chosen because, on the aforementioned principles, all EU member countries have developed their own legal instruments and institutions with the sole aim of supervising real estate registration. By focusing on the points of the land registration process, which involve principles of law, like property transmission, good faith protection or, third party effects, and the differences between them in different EU countries, this research has concluded that, despite the steps in the right direction, the implementation of a common European Land Registry at least from a legal point of view, is not yet a viable option.*

Key words: *Private Law, European Union Law, Land Registry, European Regulatory Framework, Property rights, Property registration*

Introduction

As the process of globalisation continues to make its effects more and more obvious, the affected economies and legal systems need reliable instruments for the classification, clarification and application of legal concepts and provisions that ensure the security and transparency of the present and future legal relations. In order to fulfil this necessity, the use of registers has been implemented and encouraged, in order to provide a good overview of the different facets of a particular situation. Registers create rights and obligations, have third-party effects

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and organise the transfer of legal rights, which makes it particularly important in the economy market. This is confirmed by the tendency to update and modify the forms of registers with the evolution of the free economy market (like the European Union). Real estate is a very important part of the global economy since it allows not only for the personal development of the individual but also for the development of business, or state affairs (for example infrastructure). This is the main reason why the registry plays a central role in the real estate world. With the implementation through legal provisions, such registers offer a clear view over the legal situation of a certain piece of real estate.

Lawmakers in Europe have adopted and developed such registers under different forms, that were particular to their needs at the moment of implementation (examples: "*Cartea funciară*" in Romania, "*Grundbuch*" in Germany, Austria). They are designed to reflect the information needed to determine the property rights, the rights of disposal, limitations of ownership, the legal relations between multiple owners of a certain piece of real estate. The German Federal Court considers the Land registry as being "the mirror of all private material rights on real estate¹".

With the European Union specific principles of freedom of trade and movement of member states citizens, the increase in real estate transactions and the way they are handled demanded an updated registry, in order to have a clear image upon the legal attributes of the property, and thus eliminating the barriers which may appear against the aforementioned principles². This research focuses on the comparison of different Land registry systems (Romania, Germany, Austria) from a legal point of view while taking into consideration the different steps made by the analysed systems in order to harmonise the legal provisions, bringing the real estate property law to a common, European form. Although the solutions proposed by the European Union (like the EuroMortgage, Euro-Title System, or EULIS - *European Union Land Information Service*) may represent steps in the right direction for a unified European Land Registry System, the member states had yet been able to fully implement such measures, mainly because of the way in which they traditionally handle property law.

1. Section - Current European Framework

Private property is a central point for the European integration and the wellbeing of the European market economy. Thus, in order to ensure a standard practice, security and stability in this domain across the European Union member states, property law is subject to the efforts of standardisation. But, at this point,

¹ Kuntze , J., Ertl, R., Herrmann, H., & Eickmann, D. (1974). *Grundbuchrecht*. Berlin: Walter de Gruyter, p. 74.

² F. Baur & R. Stürner. *Sachenrecht*. München: C.H. Beck, 2009, p.151-154

due to the different systems of property registration found in the European Union, the standardisation process and its effects are still questionable. The Europeanisation of the land registers would bring great difficulties at the individual state level, especially because of the different levels of registration in different countries. For example, in Romania only 35,8% of the total estimated properties are registered in the Land Registry³. Such discrepancies may cause problems in a unified land registry system. Furthermore, in some cases, it would be more beneficial for member states to increase the quality and integrity of their own land registries instead of focusing on creating a favourable framework for a standard European land registry. Another relevant example in this case is that, since 2001, Austria is working on improving its Land registry system, more specifically, by increasing the information available in an electronic format⁴, while in Romania there are still more than half of the estimated properties that are not yet registered in the land registry⁵.

Although the European Union, as an entity, has refrained from ruling directly upon the subject of the European Land registry, it has instead acknowledged the necessity and efforts of organisations like ELRA (*The European Land Registry Association*). ELRA is constituted as a non-profit organisation with a mission and primary purpose that can be described as “*the development and understanding of the role of land registration in real property and capital markets.*”⁶ This association was recognised by the European Commission and the European Parliament as the association representing land registries in the European Union, being “*fully committed on working on behalf of Land Registries and in cooperating with the European Union Institutions*”⁷. Thus, ELRA is creating a favourable framework for the cooperation of different land registry systems in the European context by acknowledging the fact that Land registries are a fundamental instrument for the basic exercise of community freedoms, such as free movement of capital and people, even though the traditional laws governing the individual member states Land registration systems are usually intertwined with the real estate rights and property laws. ELRA has 33 organizations representing the Land Registries of 26 European countries and is still growing. Of the countries selected for this research only Romania and Austria are represented within ELRA.

³ ANCP. *Agenția Națională de Cadastru și Publicitate Imobiliară*, available on: <http://www.ancpi.ro>.

⁴ J. Ernst, R. Mansberger, G. Muggenhuber, C. Twaroch, & R. Weesely, *Osterreichische Beiträge zum Kataster im internationalen Umfeld. 200 Jahre Kataster Österreichisches Kulturgut 1817 - 2017*, Wien: Bundesamt für Eich- und Vermessungswesen, 2017, p. 283-294.

⁵ ANCP. *Agenția Națională de Cadastru și Publicitate Imobiliară*, available on <http://www.ancpi.ro>.

⁶ *Ibidem*.

⁷ *Ibidem*.

2. Section - Case Study

2.1. Subsection - Romania

In Romania the land registration process has become of utmost importance, creating the necessary security in ensuring the guarantee of property rights, while also maintaining the framework necessary for the transfer of these rights from the moment they are created, to their extinction⁸. The Land Registry serves the same purpose as in most other countries, mainly to respect the principles of the law regarding the publicity of real estate. From a historical perspective, Romania had five different Land registration Systems, each one specific to a certain region. In 2009, the new Romanian Civil Code regulated land registration through land registers⁹.

The new provisions regulate Land Registries as a part of land registration process through which a registration may translate or constitute real rights¹⁰. The new Civil Code introduces aspects which better define both the purpose and the object of the new land registries especially regarding: the definition of tabular rights, types of registration, the publicity of the land registry, operations with real rights regarding real estate, the conditions in which new registrations are made, the dates from which new registrations come into force and produce effects against third parties, conflicts between third parties regarding the same property, provisions regarding deeds and legal relations¹¹. It is important to note the fact that the provisions of the new Romanian Civil Code come produces effects only on deeds and registrations after the 1st of October 2011, when it came into force. Complementary to the provisions found in the new Romanian Civil Code are the provisions of Law 7/1996 (Republished in 2013) - *Regarding the cadastre and real estate publicity*, which regulates the general conditions of land registration, the land registration activity and procedures, and the organisation of the cadastre.

The Romanian Civil Code offers free access to the land registry, and therefore it presumes the knowledge of its contents¹². Interested parties may obtain any information regarding the rights over a certain property, including copies of documents that were the base of the registration.

The challenges that Romania faced in creating and enforcing a unitary Land Registry system are reflected in the statistics mentioned which reflects a poor performance in the process of registering all the properties in the Land Registry. Keeping this in mind, it is important to note that creating a Standard European

⁸ P. Petru, *Probleme de Drept Civil și Procesual din Practica Secției Civile și de Proprietate Intelectuală a Înaltei Curți de Casație și Justiție*. Dreptul 12/2005, p.261-262.

⁹ Law no. 287 from 17 July 2009 regarding the Civil Code, republished in the Official Journal of Romania, Part I, no. 505 from 15th of July 2011 - Title VII.

¹⁰ I. Sferidan, *Drept Civil. Drepturi Reale Principale*. București: Hamangiu, 2013, Pag.301.

¹¹ *Civil code*, art. 876 - 906.

¹² *Idem*, art. 883.

Land Registry would have to face the difficulties and down sides of bringing together more than five different land registration systems, and, although the technical problems could be considered resolved (most countries already base their systems on the cadastre), the legal provisions in effect, may create conflictual situations, especially regarding the their enforceability against third parties.

2.2. Subsection – Austria

Austria is a country with rich tradition regarding the Land Registry (Grundbuch) the bases of which can be traced back to the Habsburg Monarchy. The General Civil Code from 1812 (ABGB), was contained the first legal provisions that instituted generally applicable norms in the field of property rights, and the principle of land registering through which real rights were only deemed after the registration in the Land Registry, and also the principle of trust, through which interested third parties may trust the veridicity of the information contained in the Land Registry.¹³ Since then, it has suffered several small changes especially regarding its applicability, and the way in which the entries in the land registries are held. The first major change was made through the Law from 17.11.1980 which introduced the process of changing the way the Land Registries are held, introducing the “Automation assisted data processing for the Land Registry” or ADV-Grundbuch¹⁴. This was the technical base which led to today’s version of the Austrian Land Registry, which is not a registry in the common sense of the word, but a complex computer assisted information system. Despite this fact, it still retains the structure of the old registries¹⁵.

In Austria, the Land Registry is an instrument that creates, modifies, transfers or revokes property rights. This transfer is done using a valid document to produce the legal effects, but it does not come into effect until it is fully registered in the Land Registry. The principle of rank (*prior tempore potius iure*) is also taken into consideration. The Land registry also benefits of the publicity principle, through which any interested party can obtain information about a given property and the source of the rights that are in effect upon that property without having to prove the legitimacy of the interest. The Law that governs the Land registry also gives it the benefit trust, guaranteeing its accuracy in the eyes of the citizens. Although Austrian Land Registry is regulated through a dedicated law, the rights upon which it has effects are regulated by the Austrian Civil Code.

¹³ W. Brauner, *Österreichs Allgemeines Bürgerliches Gesetzbuch. Eine europäische Privatrechtкодifikation I*. Wien: Hofmeister, 2014, p.219-225.

¹⁴ Bundesgesetz von 27.11.1980 über die Umstellung des Grundbuchs auf automationsunterstützte Datenverarbeitung und die Änderung des Grundbuchgesetzes und des Gerichtskommissärsgesetzes, Official Journal of Austria nr.550/1980

¹⁵ W. Rechberger & L. Bittner, *Grundbuchsrecht - 2. überarbeitete Auflage*. Wien: Fakultas, 2007, p.471-484.

As mentioned in Section 1, Austria is currently working on increasing the information available in its electronic Land registry, more specifically by including 3D technical data in the cadaster. As a result of the fact that Austria is continuously looking to expand its data in the land registry, and considering the fact that it is already in an electronic format, it would be easier to face the challenges imposed by the implementation of a common European Land Registry.

2.3. Subsection - Germany

After the creation of the German Reich, and the new earned independence, the two Laws that govern the focus points of this research were created as follows: the German Civil Code (*Bürgerliches Gesetzbuch*)¹⁶ which regulated property rights, and the German Land Registry Law (*Grundbuchordnung*)¹⁷ which regulated upon the procedural aspects of the Land Registers and property rights. The aforementioned legislative acts came into force on the 1st of January 1900, and have since suffered heavy modifications, in order to keep them in accordance with the times. Till the year 1935 the German Land Registry Law contained general guidance upon the way the Land registry should be kept and how the operations should be registered, the rest being left for the federal states to decide. This was changed in 1935 when all federal states have been forced to use the same provisions upon the operations in the Land Registry¹⁸.

Through the reform the German Land Registry Law, decided upon implementing a similar system to the one (at the time) already in use in Austria. The principles that were in effect were almost the same: the rights of property could be created, modified, transferred or revoked, based upon the deed (or the appropriate document), but only came into effect after it has been registered in the Land Registry. The principle of rank applies similar to how it is applied in Austria. Notable differences can be found regarding the way the information is organized in the land registry, and the fact that it also contains more data regarding the sources of property rights upon that entry in the registry. Although since 1993 the German Land Registry is also in an electronic format, its publicity is somewhat limited by the fact that any third party interested in the information presented in the Land Registry must prove a legitimate interest in the solicited information in order to get access to it¹⁹. This limits the publicity of the Land registry to those that benefit from the property right, or any other part that has a legitimate financial

¹⁶ *Bürgerliches Gesetzbuch* in the form of publication from 2. Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), with article 7 which was modified on 31. January 2019 (BGBl. I S. 54).

¹⁷ *Grundbuchordnung* in the form of publication from 26. Mai 1994 (BGBl. I S. 1114), with Article 11, Paragraph 18 which was modified on 18. Juli 2017 (BGBl. I S. 2745).

¹⁸ M. Bengel, D. Richter, R. Bauer, & D. Weidlich, *Grundbuch, Grundstück, Grenze - Handbuch zur Grundbuchordnung unter Berücksichtigung katasterrechtlicher Fragen*. Berlin: Hermann Luchterhand Verlag, 2000, p.115-127

¹⁹ *Grundbuchordnung* (BGBl. I S. 1114) - § 12, Abs.1.

interest (potential buyers, banks that offer credits, etc.). The Land Registries are although accessible, without the need to prove the legitimacy of the request, by public servants that are in the exercise of their authority, public notaries and mandated lawyers, also benefiting from the presumption that they are in the rightful exercise of their profession.

Germany has a well developed Land Registry system that guarantees the applicability of the principles on which it is based. Furthermore, the high level of details included in the Land Registry and the fact that it is in a fully digital format, could make the integration in a common European Land Registry an easy task. But, in this particular case, despite the developments that Germany made to its Land Registry system, the limitations applied to the the principles that govern property law, would cause great compatibility issues in case of implementing the common European Land Registry. Also, it is worth noting that Germany, is not represented in the European Land Registry Association.

Conclusions

The analysed Land Registry Systems have more or less similar methods, to ultimately fulfill the same common function. The procedural principals that stay behind the given systems, when viewed from a perspective, complete each other, and only produce legal effects with one common condition: the registration of the operation regarding the property rights in the Land Registry. Although the presented forms are different up to a point, the common principles and the common normative base may already be there for the implementation of the Common European Land registry. But, this is a lengthy process, in which the national dogmatical differences need to be put aside, and solutions of compromise need to be made, in order to create the proper "legal atmosphere" necessary for the creation of the principles on which the Common European Land registry would be based.

The importance of the implementation of the pan-European Land registry is no doubt high, especially in reinforcing the freedoms on which the whole concept of the European Union is built. But, although there are positive movements in towards this direction, given the current legal framework, that is different from state to state and the current challenges that the Union faces, it can be concluded that the European Land Registry is not a viable option, at this moment, at least from a legal point of view.