*Agostina Lodde

The interconnection of the European registries of real property: the comparison of the Italian and Spanish cases

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Abstract The need to ensure that the information kept by the Land Registers can circulate freely within the space of the European Union is a priority objective in the context of the strategy outlined by the EU Council in matters of European electronic justice 2014-2018, which plans to concentrate its action "on the interconnection of the registers that are of interest to citizens, private companies, legal professionals and the judiciary". Therefore, it is stated that "the necessary technical and legal preconditions should be ensured to make such interconnections possible".

The implementation of the "technical preconditions" of which it speaks, thanks to the extraordinary developments of information technologies, represents the easiest goal to reach, while it is much more complicated to solve the legal difficulties arising from the historic diversity of Registers, also taking into consideration the limit set by the art. 345 of the Treaty on Functioning of the European Union, according to which "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership."

In order to better understand the aforesaid diversity and following the overview of the various European systems of land registration, which appeared in no.1/2016 of this magazine, we have sought to provide a comparative framework of the Italian and Spanish registration systems, which are based on common legal traditions (those of Civil law) but which, due to different evolutionary paths, have brought about completely different regulations in their respective Registers.

* Agenzia delle Entrate – Direzione centrale Catasto, Cartografia e Pubblicità immobiliare

INTRODUCTION: RIGHTS OF FREE MOVEMENT AND INTERCONNECTION OF THE REGISTERS WITHIN THE EUROPEAN AREA OF FREEDOM, SECURITY AND JUSTICE

Article 3 paragraph 2 of the TEU (Treaty on European Union)[1] reads as follows: "The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime".[2]

Under articles 4 and 67 of the TFEU (Treaty on the Functioning of the European Union), the European Union (EU) and the Member States have a shared responsibility for the implementation of a common area of freedom, security and justice.[3]

Title V of the TFEU - articles 67 to 89 - is entirely dedicated to the AFSJ (Area of Freedom, Security and Justice). In addition to the general provisions, this title contains specific chapters focused respectively: on policies relating to border checks, asylum and immigration; on judicial cooperation in civil matters; on judicial cooperation in criminal matters; on police cooperation.

In this context, the right to the availability of decent housing, at an acceptable price and in a secure environment is both a fundamental need and a right for the European citizen, concomitantly, the satisfaction of this need, which can alleviate poverty and social exclusion, remains a major challenge in several European countries.

Buying or selling a house, exercising the rights deriving from a succession due to death, obtaining credit through paying a mortgage guarantee, are all activities that the European citizen should be able to carry out freely and safely within this common space. To give effect to the exercise of these fundamental rights is essential for guaranteeing the citizen (professional or otherwise) access to data and real estate information, in the other Member States as well as in their own State, in order to check, for example, if the property has been duly registered, to determine inheritance rights, to grant guarantees on properties located abroad or to execute the judicial decisions.

According to the most recent statistics published by the European Commission,[4] European citizens aged between 15 and 64 years residing for over ten years in a country other than the country of citizenship, numbered 11.3 million in 2014. Of these, 8.3 million were employed or seeking employment. In addition, also in 2014, more than one quarter (27.1%) of the population of the EU-28 lived in a dwelling of residential property for which he/she was paying a mortgage, while more than two fifths of the population (43.0%) lived in a dwelling of residential property without paying a mortgage. Therefore, seven out of ten people (70.1%) owned their dwelling of residential property

1 Gazzetta ufficiale no. C 326 of 26/10/2012 pp. 0001 – 0390.

2 This article of the Treaty of Lisbon, which aims at defining the main objectives pursued by the EU, seems to attribute greater importance to the creation of an area of freedom, security and justice (AFSJ) compared to the previous Treaty of Nice, because now this objective is mentioned even before the one related to the creation of an internal market.

3 The text of art. 4 is shown:
Article 4
1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 3 and 6.
2. Shared competence between the Union and the Member States applies in the following principal areas:
omissis
j) area of freedom, security and justice;

4 Source: EUROSTAT

in the EU-28, while 19.1% lived in rental housing leased at market rent and 10.8% in rental housing with a rent-subsidized or free housing.

Despite the above-described phenomena (mobility within the common European area and strong propensity of citizens to the purchase of their own home) being of such large proportions, still today, buying or selling property in a country other than the country of citizenship remains a complicated and potentially risky undertaking. Since the European legislation on the transfer of ownership is not easily harmonised, the potential buyer/seller is forced to confront an "alien" legal system. Not dealing with the problem by the European institutions could represent a serious obstacle to the development of the single market. Some problems derive from the great diversity of the legal systems and traditions which we find throughout the European Union.

We have systems based on Common Law and systems based on Civil Law; systems of registration of rights (Title systems) and systems of transcription of the deeds (Deed Systems); legal systems which ensure the ownership of the registered right and legal systems in which such a guarantee is not provided; Land registers where the information is freely accessible to all and Registers that can be viewed only partially or upon proof of a legitimate interest; States in which the Land Register and the Cadastre are separate organisations, States in which they are integrated and States that still lack a complete Cadastre.

Whenever we discuss the harmonisation of European legislation concerning property law, every possible solution must reckon with the principle stated by art. 345 of the Treaty on the Functioning of the European Union. This rule is extremely concise but at the same time unclear: "The Treaties shall in no way prejudice the system of property ownership existing in the Member States."

It should be noted that its purpose is more limited than one might imagine. In the first place, most of the differences between the various national systems are not applicable to the system of "property ownership" and therefore do not fall within art. 345 of the TFEU. We can mention, for example, the rules that govern access to real estate information in the various Member States: whether the information of the registry is "open" to anyone or if it is made available only to those who demonstrate having a legitimate interest, it is not a question of the right of property but of protection of data or protection of privacy. Likewise, the rules governing the keeping of a register in each individual jurisdiction, under which "real" systems are opposed to "personal" systems with various shades in between, are rules of organisation of information and not rules relating to the system of property ownership.

THE INTERCONNECTION OF EUROPEAN LAND REGISTERS: CURRENT STATUS

The various associations that operate in the sector, and among these mainly ELRA (European Land Registry Association) with its network of experts in the field of real estate registration (ELRN-European Land Registry Network), have for many years engaged in initiatives to laid the foundations for a harmonisation of the rules and instruments for cross-border access to real estate information.

All of the described initiatives and projects move in the framework of an expressed European desire to make cross-border access to information on real estate faster and more efficient, in implementation of the principle of free movement of persons and their assets and rights in the common space of freedom, justice and security.

Among the first initiatives in this context, noteworthy is the one undertaken by EULIS (European Land Information Service). EULIS is a European Economic Interest Group, founded in 2009, whose members play the role of leaders in real estate information in their own country or region; the service was therefore designed by experts able to understand the similarities and differences both in legal and in procedural and practical terms, among the different real estate registration systems in Europe. The portal[5] provides an online service for professionals and registered users, through which access to real estate records kept by the registers of the member countries is supported by a complex of information on the real estate registration system in force in the country concerned as well as a helpful glossary that brings understanding of the legal and technical terminology adopted in each Registry (Figure 1).

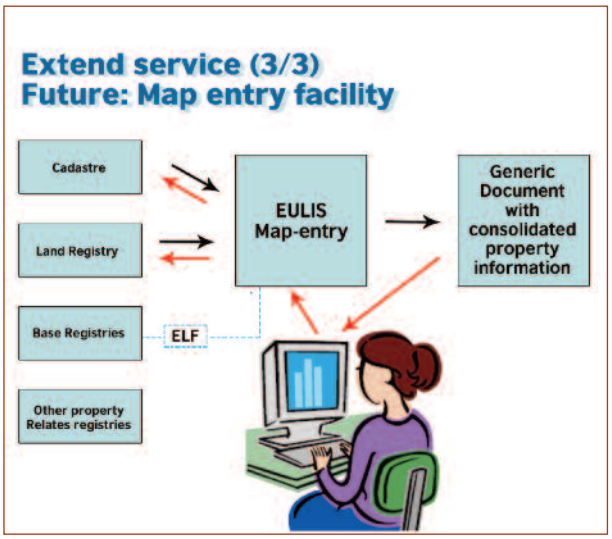

Figure 1 Information flow chart - *Source: www.eulis.eu*

With reference to the necessary formalities to obtain the registration of an act in countries other than in the one where the agreement has been concluded, the CROBECO (Cross Border Electronic Conveyancing) project has shown how it is possible for a notary of a given member country to execute an act in their own country and present it, with success, by an electronic method, to the Registry of another member country, without impacting the existing legal rules.

5 www.eulis.org;
http://eulis.eu/service/using-comparison/

Therefore, in implementation of a specific decision of the EU Council, as early as 2010, the European Commission has activated, and progressively implemented, a European Justice Portal (https://e-justice.europa.eu), "destined to become a electronic one-stop-shop in the area of justice. According to the declared intent of the Commission, the final objective is to make the lives of the citizen easier, providing information on justice systems and improving the access to justice throughout the EU, in 23 languages" (Figure 2).

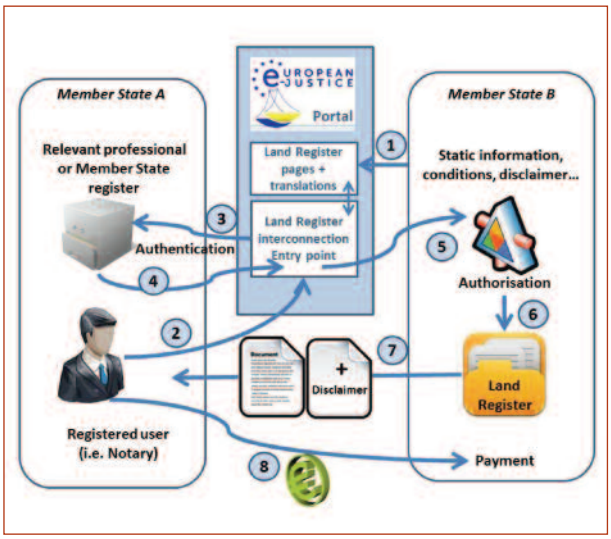

Figure 2 LRI- Land Registers Interconnection: Conceptual model based on the use case - *Source: eJustice.eu*

Among the various sectors of information present in the portal is the entry "Registers", aimed at facilitating the possibility of taking advantage of the opportunities offered by the opening of borders and the European internal market, through the access of sellers, creditors, commercial partners, and consumers to documents and reliable and official information. This item is divided into three different categories: business registers; land registers and insolvency registers.

With regard to the land registers, the portal currently presents only information sheets drawn up by individual Member States, containing a brief description of each national land register, with a link to the website of its institution.
The strategy outlined by the EU Council in matters of European electronic justice 2014-2018 then envisages, with regard to the theme of the registers, the need to focus the action "on the interconnection of the registers that are of interest to citizens, private companies, legal professionals and the judiciary". Therefore, "the necessary technical and legal preconditions should be ensured to make such interconnections possible".

Consequently, the 2014-2018 multi-annual action plan regarding European electronic justice has indicated a series of actions to be undertaken in the sector of the registers, among which it marks as a priority project (category A) that of carrying out a specific feasibility study on the interconnection of the land registers.

The study - which ended in August 2014 - was carried out by a consultancy firm through the administration of three different questionnaires to the competent national administrations, in order to analyse the existing situation within the Member States, by identifying the possible digital network for connection and proposing potential solutions for the management of payments.

The results were discussed with a favourable outcome from the Working Party on e-Law (e-Justice), and 8 Member States (to which Northern Ireland should be added) have so far confirmed their interest in participating in the pilot project from the outset. In the course of 2015 the business case and the project document have been prepared, including the definition of the scope, time frame, costs, organisation and deliverables. Following the approval of the project document, which took place in the month of January 2016, the implementation phase now opens, which includes the development of applications in an experimental context, with an estimated completion date by the end of 2017.

A key point of the project is the exclusion of regulatory amendments to the national laws: the objective consists in making it possible to have cross-border access to real estate data for users in other Member States under the same conditions as those laid down for domestic users, by expanding the existing national capabilities to a pan-European level. Thus, for example, the various provisions regarding access will be complied with (including the protection of privacy and the provision of differentiated access levels according to categories of users); the information and the documents provided may have a different legal value according to the national system in force; the payment of the required fees for the release of the information, where provided, will be maintained.

The analysis of user needs carried out by the Commission has highlighted the primary requirement of receiving information from the different Member States in a format that is unified to the greatest possible extent, regardless of differences that exist between national systems, including linguistic differences. To this end, the solution proposed provides a preliminary mapping of the information stored at the national level, so as to establish a correspondence between the data contained in the registers of the Member States and the predetermined fields in a common model, through which information would be provided in the user's preferred language, chosen from among those used by the e-Justice portal.

The system will also give the possibility of downloading in digital format the original documents present in the national registers in the language in which they are stored. Wherever this is not possible, a request can be made for delivery by mail.

The land registry systems protect the fundamental right to property of the citizens and provide legal certainty in the circulation of immovable property, setting the conditions for the development of an efficient and more transparent market. But what has been achieved in the last two decades at the national level must now be able to be achieved at a pan-European one as well, through a more widespread use of the electronic register and secure communication platforms.

In order to make a concrete contribution of expertise and experience in respect of interconnection of the registries, ELRA obtained financing for the development of its project, called IMOLA (Interoperability Model for Land Registers). The project, concluded in 2015, showed the possibility of creating a common model to use for the release of information of the property registries by any member state. Since the information is presented in a common model, which has considered the technical and legal meaning attributed to the same information from each national system, it has been found necessary to provide glossaries and descriptive forms.[6]

6 ELRN has produced numerous fact sheets on real property recording systems of each country belonging to the association. They may be consulted on the web at www.elra.eu

THE IMOLA PROJECT (Interoperabilty Model for Land Registers)

As mentioned in the introduction, in the European context, there is the need for standardised tools both for access to information held by the national registers, and for the release of same to the single European user. The IMOLA project fits into the context of the initiative of the European Commission to build an interconnection of the European land registers, and in particular it responds to the goal of obtaining a uniform response from all States involved. The legal and technical complexity of this project is determined by the numerous differences that can be found in the national legislation of the different countries in the field of real estate registration. This complexity therefore requires a conscious approach of high scientific value: the IMOLA project availed itself of the network of the contact points of the ELRN (European Land Registry Network) portal for processing the support material to an understanding of each information system and, through the conduction of seminars and workshops, which saw the participation of various experts, stakeholders and jurists, came to the elaboration of a "prototype" for an interoperable model called ELRD (Electronic Land Registry Document), working in close collaboration with other associations and networks operating in this area. As each standard model, the prototype developed by IMOLA had to take into account the fundamental differences in the various national organisations but has also attempted the concrete possibility of defining a structure of "key" information shared by the majority of the Registers involved.

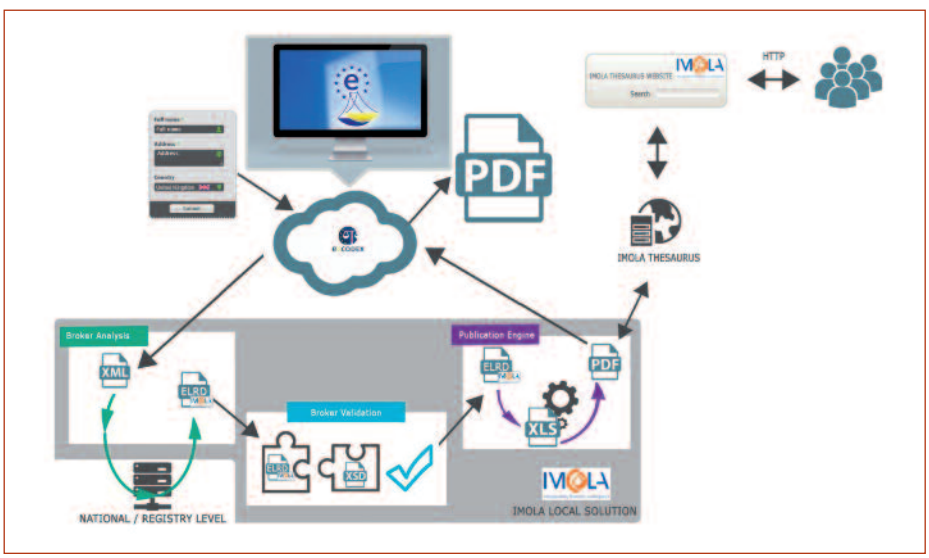

Figure 3 The IMOLA project: an important instrument for the implementation of interconnection - *Fonte: www.elra.eu*

In an initial stage of the project, different types of real rights and registration methods were compared: the analysis has led to the identification of descriptive labels that can be of help in identifying "equivalent rights". The research has also covered the conditions of access to information, with particular regard to the policies of privacy and data protection as well as to the use of electronic communication in each registration system.

7 ELRA has undertaken the project IMOLA with the EULIS association, the Colegio de Registradores de la Propiedad, MercantilesBienes y Muebles de España and the Dutch KADASTER.

The result achieved up to this moment was the release of a prototype of an interoperable model capable of transposing and processing the requests, using XML. The guidelines that inspired the project were the following:

1. The primary purpose of the European document information property (ELRD) is the pursuit and the realisation of that **judicial cooperation** that the same European legislation has in fact been requesting for a long time, together with the facilitation of real estate transactions (mortgages, transfers) through the more rapid, efficient and safe movement of information at the European level on the legal status of marketable properties.

2. The legal information provided, their structural organisation and even the labels and anything else that completes the "Document", are based on a **"bottom-up" approach**, thanks to which the Model that is the result is not fruit of the imposition of any existing model in Europe but is the product of the efforts of mutual understanding between the Contact Points and a complicated balancing of positions, given the extreme diversity that exists between the different systems of real estate registration in Europe. The following are therefore proposed:
   a. Structure of the information according to an ABC diagram;
   b. Exposure of the plurality of real estate properties (LandRegistryUnit);
   c. Ownership and its attributes;
   d. Organisation of existing burdens and rights on the properties, including the legal restrictions.

3. The ELRD "Document" must contain sufficient information to provide the applicant with an adequate idea on the "legal status" of the property or properties, since the information obtained from the national register would be insignificant or useless if deprived of a reference to the main legal and technical aspects of real estate registration in that country.

4. The model has been designed to be equipped with Flexibility in order to be able to include all the information deemed relevant for the majority of European Registers. Therefore, every real estate registration system should be able to place their own informative data in this scheme, safeguarding the technical-legal specificities of each legal system, since it shall be possible to enable or disable certain data fields. The project has expressed, in its conclusive phase, the awareness that "although ELRD is easier for the systems of registration of rights (Title systems), the systems for recording of deeds (Deed systems) could adapt the information contained in the personal folio to the requirements of the ELRD model" and for example connect to the same, to make more transparent and comprehensible the reference to the deed (the so-called "title" in the Italian mortgage terminology) from which they derive.

5. **Reference information and Glossaries** will support both the use of the model and the understanding its legal terms.
   a) **The Glossaries** define different labels. A general glossary of terms will send to a national glossary and vice versa.
   b) **Reference Information (RI)** explains the significance of the real estate information in greater detail, also with regard to the national context in which it is issued. In the IMOLA project, the ELRN network has introduced, to this end, **five fact sheets concerning the technical and legal discipline of the registration of real estate in the acceding countries** and, in particular: - in section A the files relating to the Real Estate Unit; in section B those relating to ownership; in section C files relating to burdens and limits imposed on the property; lastly were made available two fact sheets concerning the **legal value** and the **effects of the registration** in each country.

6. The **semantic form**. The ELRD document has required the adoption of a semantic model based on:
   a. Labels (in English) and the common characteristics of the real estate information at the European level (bottom-up approach); [8]
   b. A Thesaurus, which is becoming the real turning point of the future developments of IMOLA;
   c. The use of "building blocks" of e-Codex,[9] was also taken into consideration.

In 2015 the first phase of the IMOLA project came to its conclusion. It has reached, in two years of intense work, in addition to the primary objective of building a "prototype" model (ELRD) for the organisation of the information of the land registers in Europe, other important results such as

- the drafting of guidelines for standardised access to the information of the Registers;
- the definition of a "Broker" to unify the numerous national dictionaries, the existing models, the protocols and output formats;
- the definition of a semantic model for the European Model-ELRD;
- the design of tools for assistance that will help in the understanding and use of the information obtainable with access to the Registers through the e-Justice portal;
- the introduction of a notices search engine, capable of accepting requests and providing the results in a standard default format;
- the training activities for participants in seminars and in the various phases of the project, very useful also in order to achieve a mutual understanding of the different systems involved and the application of European legislation in the field of real estate registration.[10]

8 Each field in the document has been defined by means of a semantic concept, in such a manner that each Member State can correctly identify the information that it has to place. To obtain this result, work of comparative analysis has been undertaken on the type of information that each Member Country registers and broad and inclusive definitions have been identified, such that they can be accepted by the different legal systems. For example, the box containing the information on the ownership of the property has been defined as "ownership", in order to also allow the legal systems of Common law to incorporate the relevant information without creating confusion. The national registers are in fact very sensitive to the manner in which information is presented, since any inaccuracy can induce errors in the contracting and responsibility for the registrar.

9 E-CODEX is a European project for the development of information technology solutions to support cross-border operational processes in various fields of civil justice. The solutions developed by the project can be used as "Building Blocks" in different areas (such as, for example, the digital identity or the documentary standards) and used in other pilot projects at the European level. This will allow all groups of users to operate in a secure environment and have access to a wide range of legal services in a European context. http://www.e-codex.eu/about-the-project/building-blocks.html

10 One may merely consider the recent introduction of the European Certificate of Succession referred to in Regulation no. 650 of 4 July 2012, or Regulation (EU) no. 1215/2012 on the recognition of judicial decisions pursuant to art. 39 and their registration in the land registers of the Member States; to the discipline of the "European Enforcement Order" introduced by EC Regulation 805/2004.

COMPARISON OF REAL PROPERTY RECORDING SYSTEMS: ITALY-SPAIN[11]

Spain can be counted as belonging to the legal systems in which property is transferred with the combination of two elements: a valid legal title (purchase, donation, barter...) and a *modus*, namely the delivery of the object, the consent and the passage of possession. Its traditions of Civil law bring the scheme of the contract that transfers ownership closer to that of the Roman tradition, in which the contract is completed with the combination of two elements: the *titulus* (the agreement on the transfer) and the *modus* (the passage of the object); the first is confirmed in the second, even if only symbolically by the passage of the *escritura*.[12] The *traditio* or delivery can be real or symbolic. Since we are dealing with immovable property, the most frequent form of symbolic delivery, even if not the only one, is the signing of the notarial public deed, in accordance with the provisions of article 1462 of the Spanish Civil Code.[13]

In Italy, as in some other countries of under Napoleonic law (France, Belgium, Portugal), the principle developed differently, deviating from the *tituls/modus* dualism and eliminating the need for the passage, albeit symbolic, of possession on real estate (principle based on pure consensus).

However, both in Italy and in Spain[14] the completion of the contract for transfer of ownership does not require registration, the latter being provided for the sole purpose of enforceability of the agreement with regard to third parties: thus, the "Transcription" (in Italy) and the "Registration" in Spain have the same function of "declaring" to third parties the transfer, the establishment or the modification of the real rights, and solving any conflicts between multiple buyers of the same goods according to the criterion of priority of registration/transcription. The timely registration of the purchase secures the buyer regarding purchases or burdens imposed on the same property by third parties, even if carried out at an earlier date but not yet registered. Things change when considering Mortgages: both in Italy and in Spain the registration of the mortgage in the register has constitutive value. This means that the security right does not even exist without registration, neither between the parties nor with respect to third parties.[15]

11 Starting from the comparison between the different mechanisms for the transfer of ownership in the two countries, there will be a comparative analysis of the respective property recording systems, taking into account the usual comparison criteria, already used in my previous work, published in no.1/2016 of the magazine. Also in this contribution, it is preferred to put aside the issue of mortgage registration, to concentrate the analysis on the advertising of the Deed of Transfer, constitutive and amending acts of immovable property rights.

12 The principle is laid down in art. 609 of the Spanish Civil Code: "*Lapropiedad se adquierepor la ocupación. La propiedad y los demás derechos sobre los bienes se adquieren y transmiten por la ley, por donación, por sucesión testada e intestada, y por consecuencia de ciertos contratos mediante la tradición. Pueden también adquirirse por medio de la prescripción*"

13 The text of art. 1462 is shown:
"*Se entenderá entregada la cosa vendida cuando se ponga en poder y posesión del comprador. Cuando se haga la venta mediante escritura pública, el otorgamiento de ésta equivaldrá a la entrega de la cosa objeto del contrato, si de la misma escritura no resultare o se dedujere claramente lo contrario.*"

14 In the majority of the State, with the exception of the territories in which the "constitutive" tavolare (Land Book type) system is in force.

15 As regards the effects, as will be explained later, the Spanish system produces not only a "negative" effect of enforceability (art. 32 L.H.) belonging to the Deed systems but also determines the "positive" effect belonging to the systems in Germany and Austria, in the sense that the third party in good faith acquires the right of those who appear in the register as the holder and is guaranteed in its purchase even when there are defects in the title of the transmitter or in its law, provided that these do not result from the register (effect of public faith, art. 34 L.H).

What are, then, the differences between the two registration systems?

1. registry organisation;
2. registration content;
3. registration objective;
4. registration format;
5. registration effects.

Nature of the Register and its location within the judicial and/or administrative structure

The Land Register in Spain, as in Italy, is a legal register: it not only contains facts and circumstances but adds effects to any registered legal act. This means that an unregistered purchase may not be invoked against a registered purchase and that an unregistered mortgage cannot even exist.

The Registrars are responsible for the recording of the property, playing a dual role: they are public officials who exercise their functions as private professionals. Being invested with a public function, they necessarily belong, by law, to a corporation governed by public law, the Colegio Oficial de Registradore[16] that has the task of ensuring the adequate provision of public service in the Land Registry offices. As private practitioners, they are enrolled (on a voluntary basis) in a trade association for the defence of their professional interests. Each Registrar organises his/her office as a private individual and the clerical staff is not composed of public officials but of personnel recruited by direct call. On the other hand, in their capacity as public officials, they depend on the Ministry of Justice, through the Directorate General of the Registers and of Notarial Affairs, precisely because their mission is fundamentally legal: they must check all deeds and contracts subject to registration in order to ensure that they are valid, correct and must make available information on real estate property and on the related burdens. The above characteristics, which can be traced back to the status and to the rules of law that regulate the function of the Spanish Registrar, are considered true strengths of the registration system in force in Spain.

The legal status granted to the *Registradores* (independence and unmovability), the methods of recruitment and the constraint of their direct and personal responsibility for any damage caused in the exercise of their profession, along with granting proportional remuneration to the rights (not taxes) collected, have been characteristics common to all systems under Napoleonic law, but survive today in some jurisdictions with extreme difficulty (Greece, Portugal, Belgium) and have disappeared from the others. In Italy, for example, the Registrars, whose *status* was comparable to that of the *Registradores*, have been employed by the Ministry of Finance since 1972 (although they maintained direct civil liability for a further ten years) while remaining subject to the supervision of the Ministry of Justice with regard to the legal functions they perform. Converging into the Agenzia del Territorio as a result of the financial administration reform of 1993, they are currently employed by the Agenzia delle Entrate, which in 2012 incorporated the Agenzia del Territorio, assuming the related functions (Cadastre, Cartography, Real Estate Notices, Real Estate Market Observatory).[17]

16 www.registradores.org

17 The Civil Code, in articles 2673 and following, and the special laws subsequently intervening (among which the fundamental law no. 52 of 1985, govern the responsibility of the registrars in the conduct of the legal functions assigned to them.

Content of the registration: Registration of rights/Registration of titles

In Europe there are two basic types of land registers: those that register deeds and contracts contained in authentic documents - known as Deed systems- and those that register rights, known as Title systems. The Spanish register belongs to this second category, which represents the majority of registration systems in Europe[18] and is characterised by the fact of ensuring not only that everything that has not been registered cannot compete with a registered title but also by the existence of the predecessor's title. In this system the register provides a single ownership of a given right and the purchaser in good faith can never be disturbed by the possibility of eviction or of loss of the title of the predecessor.[19]

In the Italian territory, alongside the system of transcription[20] in force since the unification of Italy and confirmed, albeit with important corrections, with the Civil Code of 1942, survives the Land Book system, which arose in the territories of the former Habsburg monarchy, and maintained in force in these lands, once they were reunited with the motherland after the First World War. This system (so-called Austrian tavolare) was preserved in the new Italian provinces (Trento, Bolzano, Trieste and Gorizia), as well as in the mandates of Cervignano and Pontebba in the province of Udine, Cortina d'Ampezzo, Pieve di Livinallongo and Colle Santa Lucia in the province of Belluno and Valvestino in the province of Brescia with the Royal Decree 28 March 1929, no. 499. The *"tavolare"* system differs markedly, by nature and effects, with that of the transcription system governed by the Civil Code of 1942. Fundamental in this sense is art. 2 of the "Tavolare" Act, which reads as follows: *"unlike the provisions of the Italian Civil Code, the right of ownership and other real rights on immovable property are not acquired by deeds between living persons if not with the inscription of the right in the land book"*.

The subject of the registration

In Spain, the numerus clausus principle does not apply to real rights; in addition to typical real rights, recognised and regulated by law, it is allowed that private autonomy can develop new real rights, even if with some limitations.[21] Therefore, the real rights on immovable property are subject to registration and among these, first and foremost, the broadest in terms of content and faculties, are property rights.

18 For an overview of the land registration systems in Europe, please refer to my previous article published in this magazine, in no. 1/2016.

19 The system of registration of rights is in use in the central European "Land book" (Austria, Germany, Poland, Switzerland), in the new "Land register" in the British Isles (England, Scotland), in the Nordic system (Denmark, Finland, the Netherlands and Sweden) and in the Hispanic subgroup of "Mortgage register" (Portugal and Spain).

20 This paper refers only to the system of transcription, in force in the greater part of our territory, referring moreover to the extensive literature available for the necessary insights on the Tavolare system.

21 This can be deduced by artícles 2 of the Ley Hipotecaria and 7 of the Regulation that show:
Article 2
"En los Registrosexpresados en el artículo anterior se inscribirán:
Primero. Los títulostraslativos o declarativos del dominio de los inmuebles o de los derechosrealesimpuestossobre los mismos.
Segundo. Los títulos en que se constituyan, reconozcan, transmitan, modifiquen o extingan derechos de usufructo, uso, habitación, enfiteusis, hipoteca, censos, servidumbres y otros cualesquiera reales."

In the implementation of this obligation, artícle 7 of the ReglamentoHipotecario establishes:
"Conforme a lo dispuestoen el artículo 2 de la Ley, no sólodeberáninscribirselostítulosen que se declare, constituya, reconozca, transmita, modifique o extinga el dominio o los derechos reales que endichospárrafos se mencionan, sinocualesquieraotrosrelativos a derechos de la mismanaturaleza, asícomocualquieracto o contrato de trascendencia real que, sin tenernombrepropioen derecho, modifique, desdeluego, o en el futuro, algunas de las facultades del dominiosobrebienesinmuebles o inherentes a derechos reales."
However, case-law has greatly restricted the possibility of creating new real rights: from the set of conditions highlighted by case-law, the doctrine of the Directorate General of Registers and of notaries has expounded the requirements that the right must possess in order to be ascribed to the category of real rights: Social and economic needs, Licit purposes, Complete delimitation of the content of the right, Possession of the typical requirements of the real right, i.e. immediacy and absolute effectiveness.

Limited real rights, also known as real rights on things of others, through which powers and faculties are exercised which can even reduce those of the proprietor of the primary right to a "bare ownership" (usufruct, surface, use and dwelling, servitude, emphyteusis). Then there are the real rights of guarantee, first among them the mortgage, with respect to which the notice provided by the register is very important in that the holders of such rights have no direct relationship with the property.

Conversely, and as an exception to the general rule, according to which only what is registered can be enforced against third parties, there are cases where certain legal situations may be opposed against the purchaser of the goods even if not registered, such as some pre-emption rights established by law, or even the so-called tacit legal mortgages, such as the burden on an apartment for the payment of the last two years of property tax or the last two years of maintenance costs. Rights of a personal nature, instead, cannot be registered.

In the Italian system of transcription, the deeds and contracts subject to the requirement of declaratory publicity in view of their enforceability against third parties are listed in some of the rules in the Civil Code and numerous special laws. The" numerus clausus" of deeds subject to transcription is, according to the best doctrine, a principle which is attributable not to the deed itself (contract, deed, judgment, judicial request, or other judicial or administrative measures) but to the effects that it is likely to produce: effects of the transfer of the property, that constitute, amend or extinguish a real property right (see the combined provisions of articles 2643, 2645, in relation to art. 2644).

Format of the registration[22]

In general, the systems such as the Italian one follow the technique of the "PERSONAL FOLIUM", in the sense that the recording is executed on behalf of (for or against) the subject that appears in the deed and that, in relation to the content of the deed, it will be "registered" in favour of or against, according to who acquires the right and who loses it or undergoes a limitation. The object, *i.e.* the property purchased or the real right constituted, amended, transferred or extinguished, is connected to ownership and must be specified with the precise indication of the cadastral data that identify it and its borders (the latter to indicate only in the title). Therefore the search in the registers may be performed only according to subject or only according to the property or by cross-referencing the two data.

22 In general, under the profile of the format, there are two "basic" types of registration: The registration of rights (title system) always follows the technique of the "REALFOLIUM" while the registration of the deeds (deed system) follows that of the "PERSONALFOLIUM". The form of the registration is regulated in detail by each system, since only a detailed regulation can ensure that uniformity which represents a precondition for a quick and easy search in the register. There is no a common European format of registration, indeed, the profound difference between the two systems requires a prior analysis of the same in order to highlight the common traits and build a model that returns the information in an understandable way, exact and therefore useful for real estate transactions within Europe. As we will report below, the ELRD model (European Land Registry Document) processed through the IMOLA project was designed to harmonise the set of information obtainable from a large part of the European real estate registers and taking into account the fact that in the majority of the systems the realfolium has a similar structure, consisting of three distinct parts containing: a) the description of the property, b) the ownership of the title c) rights and burdens, sometimes distinguished in rights of use and rights of security. In the countries of the Deed system, such as Italy, although the information is organised according to separate sections or blocks, and although the research is facilitated by the possibility of crossing the subject/property data, an adaptation of the model is still necessary, especially in order to make apparent to third parties the effects that registration produces in the concrete case. In such systems, in fact, the ownership of the right is not guaranteed by the registration, and only by fact can they approach the so-called positive systems, that are based on the protection of good faith and on the conclusiveness of the purchase title.

Systems such as the Spanish one instead follow the technique of "REALFOLIUM", according to which the rights and related ownership are recorded with reference to the property object of the agreement. This means that registrations are structured on the basis of the property: a sheet is opened for each new immovable property and that sheet will contain the entire legal history of the property and its ownership. Any burden, circumstance or restriction that has not been registered in the real sheet will not disturb the potential buyer. Therefore the limited real rights, rights of servitude and in general any burden or limitation of the property must be registered on the sheet concerning the above-mentioned property in order to have effect with regard to third parties.

Constitutive or declarative effects in general

Examining the substantial effects of the registration, it is necessary to draw a distinction between its constitutive effects and declarative effects:[23] in this regard, both the Spanish and the Italian registers are counted among the systems with declarative effects. As already mentioned, in fact, in both legal systems the contract with real effects is perfected with the consent of the parties legitimately manifested and transfused in an authentic deed (*escritura* in Spain) and transcription (*transcrizione* in Italy) or registration (in Spain) performs the same general function: to make knowable to third parties the substantial legal event that has already occurred (for example the transfer of ownership).

THE PRINCIPLES OF THE SPANISH MORTGAGE LAW: SIMILARITIES AND DIFFERENCES WITH RESPECT TO THE ITALIAN SYSTEM OF TRANSCRIPTION

The differences between the two systems are manifested even more clearly when we analyse the inspiring principles of the registration of property that are contained in the Spanish Ley Hipotecaria.

1. Authenticity of the title
2. The control of the Registrar
3. Principle of specialty
4. Chain of title or Tracto sucesìvo
5. Priority
6. Unenforceability
7. Conclusive title
8. Good faith

Authenticity of the title

The principle of authenticity of the title responds in general to the need to check - with privileged evidentiary effects - the identity of the parties of the act to be transcribed, in order to document the provenance of the same with certainty and to increase the reliability of land registers in order to promote the greatest possible degree of safety in legal circulation concerning the properties.[24]

23 For a brief discussion of the substantial effects of registration in European countries please refer to my previous article in this magazine, no. 1/2016.

24 See G. Petrelli, L'autenticità del titolo della trascrizione nell'evoluzione storica e nel diritto comparato, in Rivista di diritto civile, year, LIII, no. 5, September, October 2007,CEDAM, Padua.

In the Spanish legal system this principle, established by art. 3 of the Mortgage Law, requires as a general rule that the title to register is formalised in a public act, *i.e.* in a document drawn up by public officials authorised to do so: notaries, judges and public administrations. Therefore the public notarial act is the privileged instrument for making the contractual deeds public.

In the Italian legal system, art. 2657 of the Civil Code identifies three titles suitable for transcription, in the absence of which the same can not and must not be carried out: (a) the judgement (and other measures taken by the judicial authority);[25] (b) the public record; (c) the private contract. This latter must necessarily be authenticated by the notary[26] (or by another public official expressly authorised by law)[27] or ascertained in judgement.[28]

There are, however, some forms of private contracts (for example, the report of consensual separation between spouses, ratified by decree of the Court, containing asset/real estate attributions of negotiating character) that have access to the system as a title for transcription; according to some, however, their eligibility would be excluded to the extent that you agree groundlessness of the obligations of the Court and/or registrar comparable to those foreseen by the art. 28 of Notarial law and by art. 54 of its regulation for notaries.[29]

Some recent legislative interventions, aimed at the streamlining of the jurisdictions of the courts, have introduced new procedures in the system for the consensual regulation in civil and commercial

25 Among these, also the decree of homologation of the written statement of consensual separation of spouses which, by virtue of the judgment of the Constitutional Court no. 454 of 27 July 1989, must be transcribed, like the judgments of separation and divorce, whenever it contains real estate asset allocations.

26 According to Petrelli, The authenticity of the title of the transcription, see p. 633, the principle of the authenticity of the title in the Italian legal system "is founded also and perhaps especially in the need to ensure adequate control of legality, capacity and legitimacy to the work of the public official. The finding is confirmed in the systematic interpretation of Italian regulations in force. Notaries are public officials by law "instituted to receive the deeds between living persons and last will, give their public faith, keep documents on record, release copies, certificates or extracts" (art. 1, paragraph 1, of Law no. 89 of 16 February 1913); such exclusive competence, attributed by law at the outcome of a rigorous specialised competition with examinations, after adequate practice and subsequent apprenticeship, ensures that all the legal acts of the negotiations, received or authenticated by the notary, are subjected to strict preventive supervision of substantial legality (art. 28 of Law no. 89 of 1913, as amended by art. 12 of l. no. 246/2005
The intervention of a notary also allows the verification of legitimacy of the parties and in particular the existence of the powers of representation and the required authorisations for the fulfilment of the deed (as imposed by art. 54 of Royal Decree 10 September 1914, no. 1326). It would be, moreover, objectively strange, and unreasonable, for the legal system to have available the tools necessary for ascertaining the identity of the formal parts of the deed, without at the same time ensuring that the same have actually been entrusted with the powers necessary for constraining the subjects they represent, given that the transcription is evidently performed against or for the latter."

27 Pursuant to art. 2703 of the Civil Code and of the special laws on the notary office, only the notary has a general authority regarding the authentication of private contracts.
The other "authorised public officials", alluded to by articles 2699 and 2703 of the Civil Code, are the subjects specifically indicated by exceptional regulations, whose power of formal authentication or conferment of the public form is not general, like that of the notary, but limited to the acts expressly identified by the single provision that authorises them: thus, relative to the contracts of public administrations, the law provides that the title suitable for transcription can also be formed by officials of those administrations, such as the municipal secretary.

28 It is necessary, in this regard, to indicate that the judgement which verifies the authenticity of signatures of a simple private contract - suitable in itself, to achieve a transfer between the parties - may be transcribed only together with the contract itself, the "true" title for transcription, on which, however, no legality check (beyond that of capacity and legitimacy) is imposed on the Court. Check, that in jurisdictions such as the Italian one, is not carried out even by the authority responsible for the Registries, but mainly by the notary, to whom were reserved the powers to form the official contractual title.

29 In this regard it is important to distinguish between simple "autograph certification" (so-called "minor authentication") from "authentication of the signatures", in the technical sense, referred to in art. 2703 of the Civil Code. The first consists in the simple certification that the signature affixed by the parties is real, with elementary formulas such as "true signature of...", "signed by signatures of..." or "passed as true the signature of..."; the second supposes the further activity and formality, required by law for the authentication of signatures (so-called "formal authentication", provided and governed by art. 2703 of the Civil Code).

disputes[30] The agreement between the parties, intervening at the conclusion of the the "conciliation" procedures, substitutes (takes the place of) the corresponding court decision. Said agreement shall be enforceable for the forced expropriation, the execution for delivery and release, the execution of the obligations to act and not act, as well as for registration of a judgement mortgage, as long as all the parties to the mediation are assisted by a lawyer, the agreement has been signed by the parties and the same lawyers, who attest to the veracity of the signatures and certify the compliance of the agreement with the mandatory rules and with the public policy. But if, with the agreement, the parties complete acts subject to transcription, the law requires that the signatures be authenticated by a public official authorised to do so.[31]

The control of the Registrar

Control is a task of the Spanish Registrar that is alongside the duties of the notary or of the competent administrative or judicial authorities that form the deed. In practice, to the first is left the decision as to or not an act is valid or invalid, in the form or in the content, and if it has the characteristics required by law for its registration, the second is responsible for the task of drawing up a deed in accordance with the law. The control function of the Spanish Registrar is included among the activities of voluntary jurisdiction, that traditionally are found halfway between the judicial function and the administrative one. The characteristic trait of this function lies in the fact that it is exerted by a legal practitioner that is independent of the parties to the deed. The validity check is therefore intended as a support to the system of presumptions that derive from the registration.[32] A series of provisions allowing the applicant to react against the decision of the Registrar: a new inspection by another registrar designated by the Ministry of Justice may be requested and, in the case of the confirmation of the first decision, an appeal may be made to the Directorate General of Registers and Notarial Affairs. The party may also appeal directly to the judge in the Court of first instance in civil proceedings.

The control by the Italian registrar was considered by case-law and the prevailing doctrine, of a formal nature, as its principal objective is to verify:

a) that the title is presented in accordance with the provisions of art. 2658 (certified copy or, in certain cases, original) and that it belongs to one of the types listed in arts. 2657, 2660, first paragraph, 2835 and 2837 of the Civil Code (judgment, public deed, authenticated private written agreement or ascertained legally);
b) that the note (filled out in digital format) contains the information provided for in arts. 2659, 2660, 2839, numbers 1), 3), 4) and 7).

30 See Legislative Decree no. 28 of 4 March 2010, laying down the "Implementation of Article 60 of Law no. 69 of 18 June 2009, in terms of mediation aimed at conciliation in civil and commercial disputes".

31 The process of assisted negotiation was introduced with Legislative Decree no. 132/2014, converted into Law no. 162/2014. Pursuant to art. 5 (Enforceability of the agreement reached following the agreement and transcription), 1. "The agreement that forms the dispute, signed by the parties and by the lawyers that assist them, shall be enforceable for the registration of a judgement mortgage. 2. The lawyers certify the autograph of the signatures and the compliance of the agreement with the mandatory rules and with the public policy. 2-bis. The agreement referred to in paragraph 1 must be fully transcribed in the precept pursuant to Article 480, paragraph 2 of the Civil Procedure Rules. 3. If with the agreement the parties conclude one of the contracts or carry out one of acts subject to transcription, to proceed to the transcription of the same the subscription of the minutes of the agreement must be authenticated by a public official authorised to do so. The following art. 6 provides that the agreement of assisted negotiation can also replace the judicial measures regarding the separation of spouses.

32 This control of the Registrador is regulated by art. 18 L.H. and it is of great importance. It concerns both the formal and substantial aspects of the deed and its relationship with the content of the register.
Article 18. *"los Registrado rescalificarán, bajo on responsabilidad, legalidad de lasformasextrínsecas de los documentos de todaclase, en virtudcuyasoliciteifthe inscripción, asícomocapacidad de los otorgantes y la validez de los actosdispositivoscontenidos en lasescrituraspúblicas, por lo queresulte de ellas y de los asientos Register. El plazo máximo para inscribir el document será de quince días contados."*

As can be inferred from the rules referred to above, the Italian registrar cannot assess the concrete and substantial validity of the deed, but only its compliance with the requested formal requirements. The substantial verification of the validity of the deed is attributed in our legal system in an exclusive way to the notary or to the authority that draws up the deed. Therefore it can be said that the smooth operation of the notice mechanism is entrusted to both the registrar and to the attesting public officer with notarial powers. If the latter is a notary, the position of independence and impartiality that the Notarial Law gives him would guarantee the correct drafting of the act and therefore the embodiment, not only of the private interest of the parties, but of the more general interest of the protection of the rights of third parties, which are served by the rules on the real estate notice.[33] In substance, it must consider that the control of legality, capacity and legitimacy carried out by the notary, at least when in the presence of a public deed,[34] has entirely absorbed the control that in other jurisdictions such as the Spanish or German ones, is entrusted to both the notary and to the authority empowered to the register. The control of the legitimacy of the transferor to have the right is something different: coming into play here is a professional obligation of the notary toward his own clients, obligation of which he may be exempted by the same parties of the deed. In this case, no preventive check is done with the consequent possibility of access to the system of public notice of invalid deeds due to lack of legitimacy.[35]

Principle of specialty

The Spanish registration system is characterised in that it follows the archiving technique of the so-called real sheet. This means that the registration archives are organised on the basis of the real estate property; a sheet is opened for each real estate property and it contains the legal history of that property. Any restriction or burden or circumstance which may compromise this law and that has not been previously registered should not worry the purchaser. In addition, every other real right of which registration is requested must be clearly defined in relation to its ownership, content, transferability and duration.[36]

This principle is also present in the Italian system,[37] which instead follows the personal sheet technique. Also in the Italian land registers the effects of transcription (and mainly that of the enforceability against third parties) can be achieved only if the principle of specialty is respected:

33 In the systems known as Deeds Recording Systems (such as the U.S. system) the absence of any prior control has generated the widespread practice of Title Insurance, which is practically unknown in Europe. See Real Property Law and Procedure in the European Union, General Report, by C.U. Schmid and C. Hertel, 31.5.2005, p. 58, in http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw

34 See Petrelli, L'autenticità del titolo per la trascrizione. cit. Until the amendment of art.28 of the Notarial Act, operated by art. 12 of Law no. 246/2005, there were strong reasons to doubt that the control of legality capacity and legitimacy precisely of the public deed could extend to authenticated private written agreements. This amendment, together with the provision contained in art. 54 of the Royal Decree no. 1326 of 10 September 1914 - Notarial Regulation - according to which *"The notaries may not derogate contracts, in which people intervene who are not assisted or authorised in the way that is by law expressly provided, so that they can in their own name or in that of their representatives legally bind themselves"* has brought the public deed very close to the authenticated private written agreement.

35 For further discussion on the duties of the notary in the authentication of contractual deeds, see "Rule no. 3" of the protocols of notarial activities which complement the code of ethics of the notary in http://www.notaioricciardi.it/ Ufficio/deontologia_ispezioni/protocolli%20-%20codice%20deontologico.pdf

36 Seearticle 9 L.H. *"El folio real de cada finca incorporará necesariamente el código registral único de aquélla. Los asientos del Registro contendrán la expresión de las circunstancias relativas al sujeto, objeto y contenido de los derechos inscribibles según resulten del título y los asientos del registro, previa calificación del Registrador."* Omissis

37 See arts. 2659, 2660, 2839 of the Italian Civil Code.

the real estate property must be exactly as described in the title, and the correspondence between the cadastral findings and the actual reality of the sold property must be confirmed; moreover the note must contain (upon penalty of compulsory refusal by the registrar), in addition to the complete full personal details of the parties and their property regime, if married, the nature and the situation of the goods to which the title refer, with an indication of their cadastral identifier. Therefore the law, as a consequence of the omission or inaccuracy of the compulsory particulars required, indicates the invalidity of the note, which can be remedied only through its repetition in the corrigendum.

Chain of title or *Tracto sucesìvo*

"Chain of title" is the name applied to the registrations joined to one another in an uninterrupted chain. In particular, according to the doctrine,[38] the principle requires that the legal history of each property is recorded in the register in a seamless way, so that the predecessor of today is the purchaser of yesterday and that the purchaser of today is the one who transmits tomorrow.[39] Therefore, so that the titles that declare, transfer, limit, modify or extinguished the ownership or other real rights in immovable property can be registered or recorded, the rights of the preceding person must be previously registered or recorded.

It is generally said that the registered owner must transfer the title to the subsequent owner, therefore there must be a consecutive chain of entries in the register and this applies not only to the titles of transfer,[40] but also to the establishment of limited real rights[41]
When such a chain of registration is missing, the chain is broken and the registrar must reject the enrolment request. This circumstance can be remedied in various ways. The first and simplest way is to publish a notice of the intermediate title. The second, as an alternative, is to undertake a process of judicial assessment of the property.

The principle of the chain of titles is known in our legal system with the term "continuity of the transcriptions" and it is contained in art. 2650 of the Civil Code. Its value and its strength are inferior at the start of the chain of titles in the Spanish system. In fact, if an earlier title has not been transcribed, the consequence of the interruption of the chain will be exclusively the ineffectiveness of the successive transcriptions until the moment in which the chain is restored. Above all, no verification will be conducted by the registrar and the absence of the earlier title will not prevent the applicant from obtaining transcription in the registers.

38 Jose Manuel Garcia Garcia defines theprinciple of the *"tracto sucesivo"* as *"aquel principio hipotecario en cuya virtud, para que se pueda inscribir, anotar, cancelar o consignar por nota marginal un derecho o una situación jurídica inscribible, es necesario que conste previamente inscrito o anotado dicho derecho a nombre de la persona que otorgue o en cuyo nombre se otorgue el acto o contrato o contra la cual se dirija un procedimiento judicial o administrativo".*

39 The principle of the *tracto sucesìvo* is imposed by the system of the r*eal folium*, precisely of the Spanish mortgage legal system, which implies an organisation of the register on the real basis of and that therefore requires a connection of the real right recorded on property with its ownership. Itiscontained in art. 20 LH. "*Para inscribir o anotartítulospor los que se declaren, transmitan, graven, modifiquen o extingan el dominio y demásderechosrealessobreinmuebles, deberáconstarpreviamenteinscrito o anotado el derecho de la persona queotorgue o en cuyonombreseanotorgados los actosreferidos*".

40 For example, A sells to B who then sells to C: so that the latter sale can be registered it is necessary that the title of A has been registered.

41 Therefore, if A sells to B and B wants to ask the bank C for a mortgage financing: so that the mortgage can be entered, the purchase must first of all be registered.

Priorità[42]

This term means that the registered right earns a position of preference on any right registered after it. Opposed to the general rule according to which the preference between various real rights is based on the date of their creation (*prior in tempore potior in iure*), and which concerns the property subject to the first registration, the priority is based on the date of entry of the title in the register. A consequence of the principle of priority is that if a title that declares or constitutes a real right on a certain property has been registered, no other title, even if of an earlier date, having as its object the same property or which is incompatible with the same may be registered. This principle is also proclaimed in art. 1473 of the Spanish Civil Code that regulates double disposals: on the basis of it, if an asset is sold to different subjects, the property will be recognised to whoever registers it first.
In the Italian system the principle of priority operates substantially in the same way. It is expressed in art. 2644 of the Civil Code, which enshrines the ineffectiveness of deeds subject to the obligation of transcription in respect of those third parties who have acquired rights over the same real estate property on the basis of a transcribed or registered deed at an earlier date. Therefore, in the case of dual disposal, the buyer from the common author who has not transcribed his purchase earlier (even if it dates back to an earlier date) cannot enforce it against the second purchaser (first transcriber).

Unenforceability

Unenforceability means that only the burdens and rights that are registered can be invoked against those who buy a property, trusting in the information of the register, whose primary function is to protect the public faith, and that no other burden or right can be invoked against the buyer. An exception is made for what is called tacit legal mortgage, consisting of a constraint to secure the payment of property taxes or the payment of maintenance costs for the last two years. The principle of unenforceability proclaimed in section 32 of the mortgage law is one of the most important sections, together with section 34, which regulates the principle of conclusive title.

Conclusive title[43]

This is the typical effect deriving from the law on registration of property in Spain. The register ensures a single title of ownership and then guarantees it against third parties, so that a buyer that registers his title will never lose it through an action of eviction. The registration does not eliminate all levels of invalidity of the title of the buyer but eliminates any level of invalidity of the previous title (title through which the person that is now the seller has purchased the property).

42 Basedon art. 32 of the mortgage law approved with the Decree of 8 February 1946, *"Los títulos de dominio o de otrosderechosrealessobrebienesinmuebles, que no esténdebidamenteinscritos o anotados en el Registro de la Propiedad, no perjudican a tercero."*

43 Basedonarticle 34 LH, "El tercero que de buena fe adquiera a título oneroso algún derecho de persona que en el Registro aparezca con facultades para transmitirlo, será mantenido en su adquisición, una vez que haya inscrito su derecho, aunque después se anule o resuelva el del otorgante por virtud de causas que no consten en el mismo Registro.
La buena fe del tercero se presume siempre mientras no se pruebe que conocía la inexactitud del Registro.
Los adquirentes a título gratuito no gozarán de más protección registral que la que tuviere su causante o transferente.
La Sentencia TS (Sala 1.ª) de 19 de mayo de 2015, Rec. 530/2013, fija como doctrina jurisprudencial que la neutralización de los principios registrales que se deriva del supuesto de la doble inmatriculación de fincas registrales no resulta aplicable en los casos en que concurra un sólo adquirente del artículo 34 LH , debiendo ser protegida su adquisición conforme a la vigencia del principio de fe pública registral."

It therefore can be said that the possible invalidity of registered titles or inaccuracy in the register cannot be used to counter *sub* buyers who were not parties to the contract and have confided in the information in the register. Only if the register reveals some potential level of invalidity, for example through a *caveat* that signals a dispute, the buyer will not be protected by a conclusive title. These are therefore the necessary requirements so that third parties are protected: the person must really be a third or *sub* buyer, the person must have acquired the right for consideration, the purchase must be made by the registered owner, the seller must have registered his title and no level of invalidity of the title must result from the register.

Good faith

Unlike the Italian system, in which the declarative registration does not protect good faith,[44] the Spanish system, which we have seen to be also of a declarative type, instead protects good faith. This characteristic would place the Spanish system halfway between the constituent systems to which Austria, Germany, Sweden, etc., belong and merely declarative systems such as the Italian, French, Luxembourg and Belgian ones.[45] However, it must also be remembered that the Italian legislation of the transcription of the judicial questions, to the extent that it also protects some rights acquired in bad faith and free of charge (see, in particular, art. 2652, nos. 1 and 8 of the Civil Code), creates an effect of "public faith" even more meaningful than that present in the Spanish system and in the German one of Land Books.[46]

44 Vice versa, in almost all the countries in which registration has constitutive effects, the good faith in the register is protected (examples are: Austria, Croatia, Czech Republic, England, Estonia, Germany, Hungary, Scotland, Slovakia, Slovenia, Switzerland). Greece represents an exception, being a constitutive system but without the protection of good faith.

45 The protection of the good faith of the purchaser represents, in the Spanish system, an aspect of the more general principle of the protection of public faith and is a condition which must be shared by the purchaser for consideration to obtain unassailable protection. There is also talk of "positive effect" of the registration (as opposed to that of mere enforceability, precisely of the so-called "negative systems") because it still protects the purchaser even if the transmitter is not the owner, thereby giving rise to a purchase not known to the public, as long as the other requirements provided by law are fulfilled. Thisprincipleisenshrined in art. 34 L.H.: *"El tercero que de buena fe adquiera a título oneroso algún derecho de persona que en el Registro aparezca con facultades para transmitirlo, será mantenido en su adquisición, una vez que haya inscrito su derecho, aunque después se anule o resuelva el del otorgante por virtud de causas que no consten en el mismo Registro.*
La buena fe del tercero se presume siempre mientras no se pruebe que conocía la inexactitud del Registro.
Los adquirentes a título gratuito no gozarán de más protección registral que la que tuviere su causante o transferente."

46 The function of the transcription of the proceedings is brought to light by art. 111 paragraph 4 of the Code of Civil Procedure, which lays down the principle of the insensitivity of the process in regards to disposal deeds of the right in dispute. By virtue of this principle, the unfavourable judgment to the defendant also upsets any purchase made by third parties. The process however is considered in course only at the moment of the transcription of the application, so that if third party purchasers have transcribed before the transcription of the document instituting the proceedings, their purchase will be saved (2652 - 2653). The effect of the transcription consists then in an advance notation of the effects of the acceptance judgment, which although intervened after the possible purchase by the third party, shall prevail over the latter if the document instituting the proceedings had been transcribed before it. Vice versa, if the document instituting the proceedings was transcribed after the purchase by the third party, this shall prevail even if free of charge and in bad faith (nos. 1 and 8 of art. 2652).

The cases envisaged by no. 6 of art. 2652 (Application for a declaration of invalidity and revocation) then provide an important exception with respect to the general scheme of invalidity that involves the non-applicability of statute of limitations of the action and enforceability *ergaomnes*. In this hypothesis it speaks of Corrective notices in that the course of 5 years from the transcription of the purchase by third parties, makes the purchase itself definitively without prejudice and effective. However this particular effect takes place only on the purchase by the third party in good faith (who has transcribed the invalid title of origin and his valid purchase), without prejudice therefore to the invalidity of the deed of the predecessor that shall be enforceable against anyone else (for which in the case of conflict between invalid and valid title the latter always prevails). While part of doctrine had argued that the purchase by the third part should take place in an original capacity, case-law has held that this is only an effect (exceptional) of the transcription. It is also believed that the rule cannot be applied to ineffective agreements.

In the case of cancellation due to legal incapacity, the rules laid down regarding invalidity apply. For all other cases of invalidity, instead, the judgment of invalidity that grants the application, shall not affect rights acquired by third parties in good faith for consideration if the deed was transcribed at least 5 years earlier. It is believed that the term is of forfeiture and not of limitation, for which any facts of interruption or suspension are not relevant.

CONCLUSIONS

From the comparative summary examination of two registration systems apparently so different, but in reality much closer than commonly believed, some reflections can be made.

First: given that the substantive law of the right to property and other real rights in immovable property, as well as the legal rules laid down for their circulation, are comparable, the differences between the two systems could be overcome, which would seem to be desirable, at least under the profile of the guarantee that the register can provide, even under the evidentiary profile regarding the accuracy of the findings contained therein.

Second: the history of the Italian system of real estate notices, that up to the post-unification code had not deviated much from the Napoleonic model, shows how the legislature, starting from the issuing of the new Civil Code of 1942 and up to the recent reforms of the system, has always tried to strike a balance between the public interest in the transparent, effective and safe movement of goods and the protection of the private rights in play. For example, to allow the widest possible effectiveness of the contract or the legal deed, and for ensuring at the same time the realisation of numerous public interests - fiscal, economic, urban planning, etc. - the Italian legislature has placed, charged to the notary and other public officers who have drafted, received or authenticated the deed subject to transcription, the obligation of ensuring that this is carried out in the shortest possible time, considering themselves obliged to pay compensation for any damage caused by delay or omission, and without prejudice to the application of tax penalties due if the request of transcription is delayed for over 30 days from the date of the received or authenticated deed, all in a regulatory context that imposes to the notary the control on the capacity and legitimacy of the parties (art. 54 of Royal Decree no. 1326/1914), and forbids him to receive or authenticate acts contrary to the law, public order or morality (art. 28 of Law no. 89/1913).[47] Another important sign of this trend is discerned in the progressive extension of the cases that can be transcribed and in the corresponding recognition by the Registrar of the power/duty to call into question the "ability to transcribe the deed or the inability to transcribe the mortgage", powers that go well beyond the mere extrinsic and formal control mentioned previously. Think of the prediction of ability to transcribe of the preliminary contract, access to the system of numerous special allocation strictures and those more general and atypical ones referred to in articles 2645 ter and 2645 quater, as well as numerous cases of relevance regarding the notice (agreements and obligations in urban matters, constraints deriving from the regional legislation, preventive measures, etc.). Yet, always in the direction of the protection of the safety and efficiency of movement are to be considered some recent legislative measures aimed at increasing the competitiveness of the Italian legal system concerning the movement of real estate: consider, in particular, Legislative Decree no. 80/2005, with which the actual protection granted to heirs has been resized, by the introduction of the twenty-year time limit now provided for in the amended art. 563 of the Civil Code, and with the new transcription of the deed of opposition to the donation; also consider the initiatives aimed at streamlining the real estate enforcement procedures, implemented through art. 2 of Decree Law no. 35 of 14 March 2005, converted into Law no. 80 of 14 May 2005, with amendments in art. 1 of Law no. 362 of 28 December 2005. Another decisive factor in the evolution of the Italian real estate notices system can be recognised in the progressive

47 In our system, however, unlike what happens in the Spanish system, in which it is the Register to guarantee the interests of the parties and third parties, the decisive and exclusive role of the control of legality, legitimacy and capacity carried out by the notary emerge clearly, whose intervention in the drafting of the deed (public deed or authenticated private written agreement) significantly reduces the cases of invalidity, and therefore the concrete possibility of infringement of the rights of the parties.

computerisation of the registers, started with the fundamental law no. 52/85, which, in addition to promoting the modernisation of the system, ensured more effective protection of legitimate expectations to third parties, emphasizing its general relevance for the legal system. At the same time, the introduction of the generalised compulsory indication of the cadastral data for the purposes of the implementation of the notice, and the greater integration between the mortgage and cadastral data banks have made possible an expansion of search opportunities and greater flexibility and usability of the registers, also allowing inspections of the same in real terms.

It has been authoritatively stated that in this way the Italian system of transcription is closer to that of the Land Books, and in particular to the Austrian one, at least for what concerns the principle of legality and the corollary "accuracy" of the notices.[48] The evolution of the Italian system of transcription also appears to be consistent with the constitutional principle of the "social function of property", and with the need, expressed therein, to harmonise the protection of the rights of the owner with the social need to protect the legitimate expectations.[49] Additionally the protection of credit and access to housing justify, always from a constitutional perspective, our discipline of transcriptions and registration.

Lastly, mention is to be made to some very important principles of European Community law, that go in the direction of balancing private interests with the general ones of the protection of legitimate expectations and of the efficient and safe movement of rights. Among these, attention needs to be given the freedom of establishment and the free movement of capital, which obviously require the safeguarding of rights in immovable property purchased by a citizen of another Member State of the European Union and duly transcribed or registered, preferably with respect to fees payable to other subjects and that have not adequately had public notice[50] On the other hand, those national rules that impose to subjects who are not citizens or residents higher charges compared to those of its citizens or residents (as for example those which required only the subjects of a foreign state to avail themselves of a notary in the State in which the property is located for the drafting of a suitable title for transcription)would be incompatible with said freedoms.[51] Consider again, the European Community principle of proportionality, which clearly needs to be applied - in the presence, for example, of vices of the title of origin - in evaluating ways of resolving conflicts between the transferor and the third party buyer, on the basis of notice charges thereto respectively imposed, and taking account of the need for protection of both; a principle that now appears to be respected by Italian legislation, and of the balancing it has achieved thanks to the preventive control of legality of the title by the notary and the discipline of the so-called corrective notice.

48 Among others: Gabrielli, Lineamenti di una comparazione fra il Sistema della trascrizione e l'ordinamento tavolare, in *the Proceedings of the Study Conference on the problems of the Land Book,* Trieste 1974.

49 On the constitutional importance of the principle of legitimate expectations, see, among others Carnevale, «...Al fuggir di giovinezza... nel doman s'ha più certezza » (Brevi riflessioni sul processo di valorizzazione del principio di affidamento nella giurisprudenza costituzionale), in G. cost., 1999, p. 4045; Nico, la Corte costituzionale tra affidamento e *jus superveniens* (note to Corte Cost. 19 July 2001, no. 268), in G. cost., 2001, p. 2239. In case-law, see Cass. sect. un. 12 June 2006, no. 13523, in G. it., 2007, p. 937.

50 Because of the importance of legal security in real estate movement in order to meet the requirements of consumer protection in the European context, also as a function of the Community freedom of establishment and movement of capital, which require an increase in the efficiency of the real estate notification, Pau, *La Convergencia de los sistemas registrales en Europe, Madrid 2004, p. 16 ff.; Rajoy, La calificación registral en el marco de La Union Europea, Madrid 2005, p. 9 ff.*

51 See the European Commission Decision of 27 January 1998, which declared the Spanish legislation then in force as illegitimate, in that it required the preventive filing in the deeds of a Spanish notary of all the real estate deeds made by non-residents.

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