Proprietary Security Rights in the Western European Countries

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The present volume gathers unpublished essays on the various fields of private law as they evolve in a growingly integrated Europe. These texts are designed to offer a comprehensive overview of each chosen area of the law and to display as well as provoke debate, both from a substantive and a comparative point of view. By offering a concise account of the most relevant legal issues, the book presents what European private law as well as its institutions and cultures are now and could become in the future.

This volume – soon to be followed by a second one – contains contributions on property law, contract law, tort law, restitution and unjust enrichment, securities rights, family law and successions, with some written also from an Eastern European perspective. It also includes a contribution on consumer law and one on fundamental rights and private law.
Mauro Bussani and Franz Werro

European Private Law:
A Handbook
Proprietary Security Rights in the Western European Countries

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Summary


1. Taxonomy

In the field of security rights, as in any other area of private law, the task of elaborating taxonomy has been undertaken by legal scholars and almost everywhere in Europe, legislators adhere to scholarly classifications when es-
European legal thinking agrees on a basic, general notion of ‘security right’ intended as a protected right conferred upon the creditor for the purpose of strengthening its claim towards the debtor. On the basis of this general notion, a unanimously-recognized distinction is drawn between Proprietary Security Rights and Personal Security Rights.

The category of Personal Security Rights comprises a variety of contractual relationships creating a personal obligation of a third party (security provider) towards the creditor. The personal security provider has an obligation to pay, or to render another performance, assumed to secure the exact fulfilment of the debtor’s obligation owed to the creditor. Therefore, the typical feature of personal security contracts is that they create a personal liability of the security provider, which reinforces the debtor’s liability.

Proprietary Security Rights are security devices which have a wholly different structure. This category comprises rights ‘in rem,’ which are conferred upon the creditor in order to secure the debtor’s obligation. A common feature of these rights is that, in the case of default by the debtor, they confer the creditor with the right to preferential satisfaction (i.e., the right to prior payment) from the encumbered assets vis-à-vis other (unsecured) creditors.
brief account of the latter term in the above distinction is provided by this chapter.

2. Security Rights’ Efficiency

Empirical data show that recourse to proprietary security has been widespread and constant in the western countries, and that it is increasing.5


Data show that security over immovables offers even more advantages than security over movable assets. In the U.S. market, loans secured by immovables are 10 times larger than unsecured loans and loans secured by movable property only 4 time larger; moreover, loans secured by immovable property can be repaid over a period 5 time as long as that for an unsecured loan: H.W. Fleisig, N. de la Peña & M. Safavian, Reforming collateral laws to expand access to finance, The World Bank (Washington 2006) 1 ff.

Differently, in transitions economies where titling to immovable property is scarce and land registration system are not (efficiently) developed, security over immovables is more expensive and less efficient: Commission on Legal Empowerment of the Poor, Making the Law Work for Everyone, Somerset, NJ: Toppan Printing, 2008, vol II, Ch. 2, 63 ff., 77, 82 ff., 100 ff. and Ch. 4, 195 ff., available at: http://www.undp.org/legalempowerment/docs/ReportVolumeII/making_the_law_work_II.pdf; The International Bank for Reconstruction and Development/The World Bank, Land Policies for Growth and Poverty Reduction (Oxford 2003) 1 ss.; 3 ss.; 17 ss.; 27 ss.; 32 ss.; 44 ss. (Asia); 46 s. (Africa); 47 (Latin America Latina); 48 ff. for the interconnections between formalization of property rights and access to credit. As well-known, the thesis of the centrality of land registration systems to foster economic development has been promoted by H. De Soto, The Mistery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (London 2001), passim. In this vein, see Celebrating Reform 2008, Doing Business Case Studies (World Bank & International Finance Corporation, Washington 2008), 34 ff. for the case of the 2006 Egyptian land registration reform; and p. 47 ff. for the 2004 reform in Honduras; see also P. Machoka, The Need for Efficient and Effective Secured Transactions Regimes in Sub-Saharan Africa: The Case for Kenya, in 20(8)J.I.B.L.R., 2005, 395; P. Larmur, Policy Transfer and Re-
It is widely believed internationally that the phenomenon is of such magnitude because security for credit has some sort of intrinsic efficiency. Therefore, the reasons why banks pursue “the taking of security with apostolic zeal,” as well as the efficiency of security rights, have been subject to close analysis conducted by a large body of literature. In the same vein, one observes that
the ‘justification’ of security rights has become a ‘topos’ of every introductory chapter on the topic.\textsuperscript{9}

It must be stressed, however, that it is not yet evident how the results of such studies should be used. They are very often mutually conflicting, so that the factors inducing the market to seek security rights still remain—to a certain extent—covered: rational EAL models are not always sufficient to explain decision-making processes in the credit sector.\textsuperscript{10}

Carrying out an EAL analysis of security rights would be beyond the scope of this chapter. Nevertheless, it is worth providing a frame of reference for the possible economic meanings of such legal devices. To this end, I shall outline the two main points put forward in the specific literature and on which there is general consensus.

(a) Security rights maximize the creditor’s expectation to be satisfied in all cases of inability to pay by the debtor. The empirical evidence shows that, in the event of debtor insolvency, unsecured creditors have very low expectations of receiving anything in satisfaction of their claims.\textsuperscript{11} The secured creditor’s position is also stronger where (e.g., in some common law jurisdictions), in the event of non-performance by the debtor, the former is entitled to take possession of the secured assets and to sell them out of court.\textsuperscript{12}


\textsuperscript{10} Indeed, there also seem to be psychological reasons that prompt creditors to take security over the assets of their debtors. These reasons are not dealt with by the efficiency literature to any great extent, but they are emphasised, for instance, by R. Goode, \textit{Security: A Pragmatic or Conceptualist’s Response} (1989) 15 Mon ULR 361 ff., 363. The potential cost of subjective judgement and discretion in credit decisions is studied by R. Inderst & H.M. Möllers, \textit{Credit Risk Analysis and Security Design} (London 2003), CEPR Discussion Paper No. 3686; A. Saunders & L. Allen, \textit{Credit Risk Measurement}, 2nd ed. (N.Y. 2002). On all these aspects see also Alb. Candian, \textit{Le garanzie mobiliari. Modelli e problemi nella prospettiva europea}, Milan 2001, 47 ff.

\textsuperscript{11} For England, see the data reported by G. McCormack, \textit{Secured Credit under English and American Law}, 7. The problem of the insufficiency of the insolvency asset for the satisfaction of unsecured creditors (the so-called Massenarmut) was at the basis of the German insolvency law reform of 5.10.1994 (Insolvenzordnung, in force since 1.1.1999): W. Uhlenbruck, \textit{Das neue Insolvenzrecht} (Herne 1994) Introduction.

\textsuperscript{12} This is the case of English law, according to the Law of Property Act 1925, sec. 101(1) (iii), the Insolvency Act 1986, sec. 29(2), the Enterprise Act 2002, sec. 248; Schedule 16. In the practice of larger quoted U.K. companies, the secured creditors’ powers of control over the debtor’s business have developed into very flexible informal procedures
(b) Security rights enable the creditor to control the debtor’s behaviour and strategies during the credit relationship. The interest rate charged by the creditor to the debtor for a loan is affected by the creditor’s evaluation, during the negotiation stage, of the probability of the debtor’s misbehaviour. The problem is that, after signature of the loan agreement, the creditor has no means with which to compel the debtor to behave in a manner consistent with that agreement. Moreover, there is evidence that the debtor has an incentive to misbehave, i.e. undertake riskier activities, because in this way it can obviously obtain cheaper financing for risky activities. By contrast, if the debtor is compelled to grant a proprietary security, it loses exclusive control over its assets and will therefore be more likely to act properly so that it can repay and thus avoid forfeiture of the secured assets.

3. A Panorama of Western European Legal Systems

In western Europe, a multiplicity of legal devices exist that perform the function of proprietary security, or which are used by the parties for the purposes of security.

Needless to say, this variety has historical origins: in particular, it is due to the intermingling of the Roman and Germanic traditions in the shaping of continental law and to the differences between civil law systems and common law ones. The abundance of techniques has induced scholars to resort to conceptual oppositions in order to explain this area of law. The traditional distinction is between possessory and non-possessory security rights, the former being those where the secured asset is held by the creditor (creditor-held security intended to avoid, or postpone, formal statutory insolvency procedures. The most important example of this is the so-called ‘London Approach,’ which applies to multi-banked companies in financial difficulties: references in G. McCormack, Secured Credit under English and American Law, 11.


14. This may be the prime reason for a creditor to take security over the debtor’s assets, in particular when those assets are necessary for the debtor’s business: D. Baird, Security Interests Reconsidered (1994) Va. L. R. 2249 ff., 2252.

15. This multiplicity is reflected in the intricate terminology of the different legal systems: F. Dahan, Secured Transactions Law in Western Advanced Economies: Exposing Myths (2001) 16(2) Butterworths J. of Int’l Banking and Financial Law, 60 ff.
There are at least two further classifications which facilitate the task of establishing order to this multiplicity of legal devices. One centres on the type of assets subject to security and distinguishes security rights between those which concern movable assets and those which concern immovable ones.\textsuperscript{17} As pointed out below (n. 6), this is an opposition deeply rooted in legal theory, as well as in legislation, and as such it will be adopted here, as well.

The other classification depends on whether the legal device considered is recognized and regulated by the legal system as a right specifically designed to perform the function of security (‘formal’ security right) or whether it is another kind of proprietary right or relationship which is recognized and regulated by the legal system to serve other ends, but is used by the parties to perform a security function (‘functional’ security right).\textsuperscript{18} This distinction is similar to that between ‘typical’ and ‘atypical’ security rights — a manner of qualifying legal devices which is very familiar to continental lawyers and, as well-known, is based on the existence of regulation by positive law of such devices as security rights in a technical sense.\textsuperscript{19}

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\textsuperscript{17} Alb. Candid, \textit{Le garanzie mobiliari,} 20.

\textsuperscript{18} In this chapter I choose the opposition between the ‘formal’ and ‘functional’ security right. Although reference to a ‘formal’ security right may seem something new to some reader, I chose it for clarity’s sake because it refers to the form of security right which has been ultimately recognized in almost all western countries at least since modern time as a limited right \textit{in rem} which allows the security provider to remain owner of the encumbered asset while conferring upon the creditor a limited right \textit{in rem} over the same asset, formally designed by the legal system to have function of security. Here the security function is expressed in a specific form or structure of the right, and not in its function as performed according to the parties’ intentions. The terminological choice of the opposition between ‘formal’ and ‘functional’ security rights aims to also recall to the well-known opposition existing in the realm of the ideologies living behind western security rights regimes, i.e. that between ‘formalism’ and ‘functionalism’; see for all A. Veneziano, \textit{Le garanzie mobiliari non possessorie. Profili di diritto comparato e di diritto del commercio internazionale} (Milan 2000) 112 ff.; see also \textit{infra} fn. 101.

The substance of this distinction has been the basis of analysis by the Research-Team on Security Rights over Movable coordinated by Prof. U. Drobnig at the Max Planck Institute for Comparative and International Private Law (Hamburg), within the Study Group on a European Civil Code; see \textit{infra}, n. 8.2.

\textsuperscript{19} E.g., see, for Italy, F. Fiorentini, \textit{Garanzie reali atipiche,} in \textit{Riv. dir. civ.} 2000, 253 ff.
we shall see (n. 8.1), recourse is usually made to ‘functional’ or ‘atypical’ security rights in order to remedy certain inefficiencies which affect ‘formal’ security rights, given that the former normally prove to be more efficient than the latter for creditors.

Whereas the first two classifications are merely descriptive, the one that counter poses ‘formal’ and ‘functional’ security rights is more interesting, as it seems to contain the core of the challenges that Europe—indeed, all the western economies—will have to face in the near future, namely the limits to place on freedom of contract in the field of proprietary security rights.20

The crucial point is that, whereas ‘formal’ security rights are generally considered to be unproblematic as to their legal discipline, there are differences among legal systems to the extent to which they recognize ‘functional’ or ‘atypical’ security rights. Below is a brief discussion for the reasons of this phenomenon.

4. Techniques of Regulation

When investigating the grounds for these differences, one must necessarily consider the ways in which the various legal systems approach the problem of the conflicting interests underlying the law of proprietary security rights.

As is well known, the rules governing proprietary security rights aim to resolve the conflicting interests of (a) the debtor (and its stakeholders), (b) the secured creditor (and its stakeholders), but also (c) third parties, like the debtor’s other creditors, or the purchasers of the secured assets.21 From this point of view, secured credit regimes govern not only private interests but public and general ones as well.

To be noted is that continental jurisdictions tend to control such conflicts by resorting to a strict system of mandatory rules that restrict the parties’ autonomy in governing their secured transactions, the purpose being to prevent detriments to the general interests involved.22 A series of prohibitions have

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20. As to the relations between contract and property in European law: see Ch. von Bar & U. Drobnig (eds.), The interaction of contract law and tort and property law in Europe (Munich 2004), 322 ff. for analysis of proprietary security rights.

21. On the interactions between those conflicts and the policy choices behind the different models of regulation of proprietary security rights see Alb. Cândian, Le garanzie mobiliari, 53 ff., 68.

22. Scholarly descriptions of the law of secured transactions in most civil law countries show that the system is organized on the principles of ‘universal patrimonial liability’ and par condicio creditorum, according to which the preference accorded to some of the debtor’s creditors through rights of preferential satisfaction is considered an exception to the gen-

23. The main example is the prohibition of forfeiture clauses in security agreements and its broad interpretation by courts and jurists in some civil law countries: M. Bussani, *Il problema del patto commissorio* (Turin 2000).


26. P.R. Wood, *Comparative Law of Security and Guarantees* (London 1995) 5 ff., 7 ff. distinguishes among world regimes of secured credit according to the concepts of sympathetic and hostility towards security rights; the common law jurisdictions are among the more ‘sympathetic’ regimes.
a paternalistic approach to credit predominates where the rigidity of public control prevents the parties from finding new, flexible solutions to their interests.

However, I shall demonstrate that there are also differences among civil law jurisdictions as to the flexibility of legal regimes, so that any strict opposition between civil law and common law in this regard is to be considered an over-generalization.

5. Assessment of Legal Regimes’ Flexibility

In every legal system, the link between freedom of contract and the efficiency of security rights law is the key criterion with which to assess the regime’s ability to meet the security needs of all law users, including the main market actors.

Such assessment usually proceeds as follows:

(i) Examination of whether the parties are able to mitigate the rigidity, typical of ‘formal’ security rights, which requires a strict connection between the security right and the encumbered asset, on the one hand, and between the security right and the secured claim, on the other (rule of specificity). In the former case, the mitigation should allow for so-called real subrogation for the encumbered asset, i.e. the possibility of replacing the asset originally subject to security with a different asset of the same value or an asset subsequently acquired by the security giver (revolving security rights). The occurrence of real subrogation in any case of fungible assets subject to security would highlight the fact that security encumbers specific assets considered in their value rather than in their specific individuality. In the latter case, the mitigation involves acknowledgment of so-called ‘global security rights,’ i.e. rights securing not only a claim which is determined in its existence and amount from the outset, but also future claims which may arise in the relationships between the creditor and the debtor and whose amount cannot be specified at the time when the security is created—of course, within the limits of a maximum amount of liability of the immovable which must be fixed by registration.

Needless to say, any weakening of the rule of specificity should not be prejudicial to the priority given to the security at the time of its creation.

(ii) Assessment of the mobility of the security, given that the creditor is able to transfer its security separately from the secured claim to other creditors of the debtor, enhances the economic value of the security as a fully disposable

right of its owner. Therefore, the extent to which security rights are mobile seems to be a factor that influences the cost of access to credit.

(iii) Investigation of the extent to which a legal regime is open or closed to functional security rights alternative to (or merely concurrent with) ‘formal’ ones.

(iv) Evaluation of the efficiency of national enforcement procedures for security rights over immovable assets, also taking into account whether there exist ‘self-help’ procedures enabling creditors to gain out-of-court satisfaction from the secured asset.

These four points provide the basis for the following brief account of the current situation of proprietary security rights in the western European legal systems.

6. Movables and Immovables: Distinct Paths

As mentioned above (n. 3), a common feature of security rights regimes in all European systems is the tendency, rooted in the historical development of this province of the law, for rules and problems concerning security rights over movables to be treated separately from those concerning security over immovables. Since the two sectors have developed different problems—mainly related to (or a consequence of) the differing physical natures of the assets—and because the efforts of law reform and/or legal integration in recent decades tend to affect them separately, distinct analysis of immovables and movables is nowadays common and justifiable.

7. Security Rights over Immovable Assets

The classic form of security over immovables is the hypothec/mortgage. It is regulated by positive law not only in all the continental codes but, since 1925, in England as well.

In very general terms, despite the different historical origins and paths of development of the continental devices with respect to the common law ones, the outcome has been the same almost everywhere: that of a limited right in rem whereby possession of the encumbered assets remains in the hands of the debtor and which confers on the creditor, in the event of the debtor’s default, a right to preferential satisfaction from the encumbered assets.

A survey of the main features of the law of security rights over immovable assets follows in Western Europe.

7.1. The Rule of Accessority

A feature shared by common and civil law is the special link that they establish between a security right and a secured credit (accessority rule). This bond signifies that a security right can only exist if a secured credit (or, once certain requirements are met, a future credit to be secured) exists, and with the extinction of the latter, the former is also extinguished. In reality, however, the rule is applied with differing degrees of rigidity among countries.

It is evident that the degree of rigidity of the accessority rule also affects the extent to which the security can be transferred to other creditors of the debtor, independently of the original, secured obligation.

Italy is an example of a system where only one single type of security right is regulated and is largely considered to be rigidly accessory to a secured obligation: that is, its existence is regarded as depending on the existence of the original secured obligation. Therefore, the transferability of the security separately from the (original) secured obligation is generally not allowed.

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29. Dutch c.c., art. 3:260 ff. (hypotheek); English common law (mortgage); German c.c., §1113 ff.; 1191 ff. (Hypothek, Grundschuld); Greek c.c., art. 1257 ff.; French c.c., art. 2393 ff. (hypothèque); Italian c.c., art. 2808 ff. (ipoteca); Portuguese c.c., art. 686 ff. (hipoteca); Spanish c.c., art. 1874 ff. (hipoteca).

30. The 1925 Law of Property Act, in force since 01.01.1926, is considered to mark the beginning of the modern era of the English law on mortgage: Cheshire and Burns, Modern Law of Real Property, 16th ed. (London 2000) 8.

31. G. Tamburrino, Della tutela dei diritti. (Delle ipoteche), in Commentario del codice civile, 2a edn. (Turin 1976), 250. Greek law (cc., art. 1258) adopts the same rule.
Conversely, the German BGB codifies a plurality of types of security rights, differentiating them in terms of different degrees of accessority. Thus, besides the Sicherungshypothek, which is a strictly accessory security device, there exists a Verkehrshypothek, whereby the bond with the secured obligation is relaxed: the link with the credit is not regarded as being a necessary connection with the original secured obligation, so that the security right can be straightforwardly transferred to other creditors of the debtor and therefore connected with other secured obligations. German law also regulates the Grundschuld, which is a proprietary right completely independent from a secured obligation, but that in practice is connected to an obligation to be secured by means of a contractual agreement between the parties (in this case it is called Sicherungsgrundschuld).

These different situations can be regarded as indicating the prevalence in Italy, at the time of the civil codification of 1942 as well as today, of a paternalistic approach to secured credit. The impossibility of dissolving the bond between a security and a secured obligation reflected (and reflects) a protective function for the debtor, who is mainly regarded as a person in need of special protection. In Germany, by contrast, the legislature has been much readier to provide different solutions to different needs: market actors are free to choose riskier security devices if they deem them suitable, and the fact that the debtor is not always a subject in need of special protection is overtly recognized.
Towards modernization, some civil law countries have now remarkably weakened the rule of accessority of security rights over immovables. The 2006 French reform\(^{36}\) has introduced the so-called ‘rechargeable hypothec’ (c.c. new art. 2422). This security is created for a maximum amount of liability of the encumbered asset. Within this limit it can be used several times by the security provider to secure either new credits provided by the same initial creditor, or new credits provided by different, successive creditors. The advantage from the borrower’s point of view is obvious, since s/he no longer has the burden of paying off the old security set up in favour of the original creditor, in order to be able to set up another in favour of the later lenders. The lender under this type of arrangement, on his part, benefits by enjoying the same position of priority as under the original security, thereby being able to take priority over all the creditors who have provided credit secured on the same property after the creation of the rechargeable security, but before its ‘recharging.’

In the same direction goes Spanish Law no. 41/2007, reforming the national mortgage market.\(^{37}\) This law regulates an hipoteca de máximo (new art. 153 bis Ley Hipotecaria), i.e. a security that can secure present or future obligations within a maximum amount resulting from the registration of the security and that can be created only in favour of banks and credit institutions subject to banking supervision.\(^{38}\)

Owing to the empirical nature of the English law of mortgage, which was developed by courts and not by legal scholars or by statutory rules, across the English Channel there has been little discussion of theoretical issues like the accessority of a security. However, in general the English mortgage can secure also obligations different from the original one, and future, if that results from

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\(^{36}\) For the French reform of proprietary security rights, both over movables and immovables, see, e.g., P. Crocq, *La future réforme du droit français des sûretés réelles*, 20 Rev. Lamy Droit Civil, 2005, 1 ff. The reform has been enacted by *ordonnance* of 23 March 2006 n. 346, in J.O. of 24 March 2006. The result of the reform has been the introduction into the French civil code of a new Book IV on security rights.

\(^{37}\) Ley 41/2007, de 7 de diciembre, por la que se modifica la Ley 2/1981, de 25 de marzo, Regulación del Mercado Hipotecario y otras normas del sistema ipotecario y financiero, de regulación de las hipotecas inversas y el seguro de dependencia y por la que se establece determinada norma tributaria, in BOE núm. 299, de 8 de diciembre de 2007, in force since 9 December 2007.

registration.\textsuperscript{39} Furthermore, the value incorporated in the mortgage acquires a high degree of mobility from the possibility granted to the mortgagor to create sub-mortgages: the sub-security confers on its owner the same rights to which the mortgagor is entitled.\textsuperscript{40}

The positive value of a flexible notion of accessority of the security seems to be confirmed by the facts that the German model has been followed by the secured transactions law reforms of several Eastern European countries in recent years\textsuperscript{41} and that the same pattern is proposed for a possible ‘Eurohypothec’ (see n. 7.4 below).

\section*{7.2. The Rule of Publicity}

One of the main differences that persisted until quite recently between common and civil law is the effect of registration for the creation of security rights over immovable assets.\textsuperscript{42}

On the continent, as is said, general systems of registration have developed mainly since the national civil codifications, but the legal effect produced by the registration requirement differs among countries. In France, Belgium and Luxembourg the security arises between the parties at the moment when the notary records the document creating the security: here registration (only) affects the outcome in regard to third parties and establishes the security’s order of priority. In Austria, Germany, Greece, Italy, Spain, Switzerland and the Netherlands registration is necessary for the existence itself of the security between the parties.

Another solution used to operate in the English common law. Here, the historical existence of broad territories without a (compulsory) land registration system,\textsuperscript{43} as well as the dichotomy between common law and equity, for

\textsuperscript{39} This is achieved with an institution called tacking of further advances, regulated by LRA 2002, s. 49.

\textsuperscript{40} In areas of registered land, a sub-charge is created by registration: LRA 2002, s. 23(2)(b); Fisher and Lightwood’s Law of Mortgage, 11th ed. (London 2002) 391.


\textsuperscript{42} The following considerations are limited to the so-called voluntary hypothec/mortgage, i.e. the security created by the contractual autonomy of the parties, leaving aside the security devices created by the courts or arising by operation of law.

\textsuperscript{43} The English Land Registration Act of 1925 introduced a system of voluntary land registration for certain territories. However, since 1 Dec. 1990 (S.I. 1989, n. 1347), all land
a long time hindered land registration as a general requirement for the creation of a mortgage. Only in some territories was registration necessary for the effectiveness of the security to all purposes, but not for its validity between the parties. This system obviously influenced the certainty of land transactions and introduced an element of irrationality into the English system—otherwise quite flexible—which called for legal reform. Yet legal reform has taken place with the enactment of the Land Registration Act of 2002,\(^4\) intended to complete the institution of a compulsory land registration system in England and Wales and foster development of fully electronic conveyancing. The full implementation of the electronic conveyance will also impact the relationship between a mortgage and the publicity of its creation, for it will no longer be possible to create a valid mortgage without simultaneously registering it.\(^4\) Hence, the present and future direction of English law seems to be towards the recognition of the 'constitutive' effects of registration, i.e. registration is going to be the requirement necessary to create a mortgage also \textit{inter partes}.

\section*{7.3. Enforcement}

I have already mentioned, in regard to the crucial aspect of the enforcement of a security, that security rights in continental Europe have been traditionally governed by mandatory rules requiring public proceedings usually regulated by judicial orders. By contrast, in English legal practice, where a proceeding before the courts (the foreclosure) is possible, recourse to private enforcement techniques prevails, in that it is more rapid and therefore better suited to the needs of creditors.\(^4\)

\footnotesize{in England and Wales has been subject to compulsory registration. A joint publication by the Law Commission and the HM Land Registry in 1995, \textit{Law Comm.}, n. 235 made recommendations concerning \textit{land registration} which were included in and developed by the Land Registration Act of 1997, in force since 1st April 1998, modifying the LRA 1925.\(^4\) In force since 13 October 2003. The LRA 2002 (and its implementing legislation lastly completed by the Land Registration (Amendments) Rules 2008) is the last stage in a slow legislative process which began with the Land Registry Act of 1862; the basic guidelines for this statute were laid down in 1844 by a solicitor, Robert Wilson; J.S. Anderson, \textit{Lawyers and the Making of English Land Law 1832–1940} (Oxford 1992), 58 ff., 63 ff.\(^4\) LRA 2002, s. 27. It is no longer generally true that if a legal mortgage has been created but not registered it takes effect only in equity. Moreover, the role of equitable mortgages, which in theory can still be voluntarily created, will decrease more and more; P. Birks (ed.), \textit{English Private Law}, L. Smith in \textit{Supplement} (Oxford 2004), 44.\(^4\) Nicholls V.-C. in \textit{Palk v. Mortgage Services Funding Plc} [1993] Ch. 330, 336: “So far as I am aware, foreclosure actions are almost unheard of today and have been so for many
Widespread delays in rendering civil justice\textsuperscript{47} have forced the civil law countries to introduce legislative reforms which shift control over enforcement proceedings from the courts to different subjects or institutions,\textsuperscript{48} so that a caus-

\textsuperscript{47}years. Mortgagees prefer to exercise other remedies. They usually appoint a receiver or exercise their powers of sale. Take the present case: the security is inadequate, but Mortgage Services is not seeking to foreclose, nor is it seeking to sell at once. It is seeking to hold on to the house, preferably without becoming accountable as a mortgagee in possession, with a view to exercising its own power of sale at some future date'. To be noted is that the General Report of the Law Commission n. 204, "Transfer of Land—Land Mortgages" of 13.11.1991, n. 7.26 f. suggested the abolition of foreclosure actions. On the power to appoint a receiver see LPA 1925, sec. 101 ff. The power to appoint a receiver for company floating charge holders has undergone some changes by the Enterprise Act 2002: G. McCormack, \textit{Secured Credit under English and American Law}, 62 f.

However, also in Dutch law, in the event of debtor's default, the mortgagee may assume management of the property, if expressly agreed in the deed of mortgage and with the authorisation of the President of the District Court: J.H.M. van Erp, L.P.W. van Vliet, \textit{Real and Personal Security}, in 2002 64 EJCL, 121: http://www.ejcl.org/64/art64-7.doc.

Also in Swedish law, private sale is admitted in certain cases if there is a significant possibility of obtaining a better purchase price: Swedish Enforcement Code, Chap. 12, sec. 57.

The time taken by court proceedings has become one of the key issues regarding the efficiency of justice. It has been a major concern for the the European Commission for the Efficiency of Justice (CEPEJ), which has adopted a Framework Programme on this issue: Framework Programme—"A new objective for judicial systems: the processing of each case within an optimum and foreseeable timeframe" (CEPEJ(2004)19 Rev). Data concerning the evaluation of European judicial systems in general, including the time-issue, can be found in the Report: Council of Europe (ed.), \textit{Systèmes judiciaires européens}, 8.10.2008 (données 2006): Efficacité et qualité de la justice, available at http://www.coe.int/t/dg1/legal-cooperation/cepej/default_FR.asp?.

As well-known, the enforcement of court decisions, in particular within a reasonable elapse of time, is regarded as an integral part of the right to a fair trial under Article 6 of the ECHR. For this reason, following proposals made by the European Ministers of Justice, two recommendations have been prepared on the execution of decisions in the administrative field and on enforcement in all other matters (except concerning deprivation of liberty). These texts were adopted by the Committee of Ministers of the Council of Europe on 9 September 2003 and are available, with an explanatory memorandum, at: http://www.coe.int/t/e/legal%5Faffairs/legal%5Fco%2Doperation%5Fof%5Fjustice/Enforcement%5Fof%5Fjudgments.


\textsuperscript{48}Notaries, for instance, as in Italy, according to law 03.08.1998, n. 302, in G.U. 24.08.1998, n. 169; in Italy law no. 80/2005 introduced a new art. 591-bis in the code of civil procedure to enlarge the delegation of enforcement power to other professionals than
tious trend towards alternatives to the traditional judicial enforcement procedures—though not yet the introduction of genuine ‘self-help’ arrangements—can also be identified in the civil law countries of Europe.

The efficiency of enforcement procedures is especially crucial in the debtor’s insolvency. Empirical research shows that defective bankruptcy procedures can destroy the beneficial effects of substantive laws governing security rights.49

7.4. Security Rights over Immovables and European Legal Integration

The field of security rights over immovable assets has attracted less interest than security over movables for legal integration purposes. The reasons for this difference reside in the idea—deeply-rooted in the western legal tradition—that real property law is the sector of private law most closely connected to the lex rei sitae, and therefore to the local dimension.50 This idea has always been backed by emphasis on the technical obstacles against legal integration in this area, such as the differences among land registra-

49. B. Schäfer, The Law and Economic Debate About Secured Lending: Lessons for European Lawmaking? Commentary, in H. Eidenmüller & E.-M. Kinninger (eds.), The Future of Secured Credit in Europe, 30 ff.; the Author shows (at p. 32) that, according to world Bank data of 2007, recovery rates in insolvency proceedings are the following: Netherlands 86.3%; U.K. 85.2%; Germany 53.1%, France 48.0%, Italy 39.7%, just to take a few examples. Among the analyzed countries that have been classified as high income countries Japan has the highest recover rate: 92.7% and Italy the lowest.

50. The local dimension of the law of property in general has been made official by art. 295 EC Treaty and it receives further support from the subsidiarity principle set out in art. 5 of the same text. The problem of the tension between global and local in the field of property law is addressed, e.g., by U. Mattei, I diritti reali. 1, La proprietà, in Tratt. dir. civ., edited by R. Sacco (Turin 2001) 37 f.; A. Gambaro, European Aspects of Property Law, in F. Werro (ed.) New Perspectives on European Private Law, (Friburg 1998), 75 ff. On the diversities of property laws in Europe see, in this book, the Chapter on Western Property Law by A. Gambaro.
However, it is difficult to deny that also immovable assets as means to secure credit have economic weight. Indeed, in the advanced market economies, it is security over immovables that enables the creditor to obtain the best financing conditions, even in comparison with security over movables.\textsuperscript{52}

This is why the European Community has not been insensitive to the issue of legal integration in the field of mortgage credit. The first approach of the EU Institutions to the issue has been discussion of the possible introduction a so-called Eurohypothek in the substantive law of the member states. This was envisaged as a security over immovables to be used in EU cross-border transactions and, therefore, as a device to be developed besides—and not in substitution for—the already-existing national institutions.\textsuperscript{53} However, excessive divergences among the various national laws (not yet mitigated by sufficient comparative law knowledge about the subject) were considered a major obstacle to the legal integration in this field and the project was soon suspended. Subsequently, concerns about legal integration in European mortgage law has shifted from the perspective of intervention in substantive law to that of the EC Institutions as mechanisms to create an internal capital market including trans-border mortgage lending. Use was made of the mutual recognition technique, but this soon proved markedly inadequate.\textsuperscript{54} Therefore, EC institutions sought to promote this sector by resorting to devices other than "legislative" integration. In 2001, the EU Commission consequently approved a Self-Conduct Code intended to standardize the pre-contractual

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\textsuperscript{51} B. Foëx, \textit{L’

\textsuperscript{52} See data reported supra, fn. 5.

\textsuperscript{53} For an account of the Eurohypothek-debate since the time of the Segré-Commission of 1966 see: O. Stöcker, \textit{Die Eurohypothek} (Berlin 1992); B. Foëx, \textit{L’

duties of information incumbent upon banks and credit institutions towards ‘consumers’ of mortgage credit. The inadequacy of this scheme, too, soon became evident.  

A subsequent trend in EU strategy has therefore been developed, aiming at evaluating the opportunity to return to the idea of “legislative” integration in substantive law. Thus, in 2003 the EU Commission established the Forum Group on Mortgage Credit, which in 2004 published guidelines for a Eurohypothek. Set up in 2004, under a Spanish initiative, was an international research group called “The Eurohypothek: A Common Mortgage for Europe”. This, too, has elaborated guidelines for a Eurohypothek.

In July 2005, the EU Commission published a Green Paper on Mortgage Credit with the purpose to begin evaluation of whether EU “legislative” intervention in this sector would be advisable. Pursuant to this document, in August 2005 the EU Commission commissioned a study from the London Economics consultancies on costs and benefits of EU integration of the mortgage market. Following the Commission’s evaluation of this study, a White Paper was issued.

55. The code was applicable only to residential lending for the purchase of the first home: http://europa.eu.int/comm/internal_market/finservices-retail/home-loans/index_en.htm#code. See also the results of the Second Report on Implementation of the said Code in the European Union, issued by the European Banking Industry Committee in December 2005, available at the same webpage.


57. For the working papers of the group see www.eurohypothec.com and for the guidelines on the Eurohypothek see A. Drewicz-Tułodziecka (ed.), Basic Guidelines for a Eurohypothek (Warsaw 2005) in Mortgage Bulletin, 21/2005). As a result of this institutional input, academic studies in recent years have analyzed mortgage law in Europe, not necessarily with a view to legal integration, but mainly in order to acquire greater knowledge of the operational rules existent in the various jurisdictions. In 2004, a research group on Security Rights over Immovable Assets was established within the “The Common Core of European Private Law”; the coordinators of the research group are Prof. C. van der Merwe (Aberdeen), G. Watt (Warwick) and the author of this Chapter. The results will be published by Cambridge University Press; see www.jus.unitn.it/dsg/common-core/questionnaires.html. Comparative research on Real Property Law and Procedure in the European Union, concerning also mortgages/hypothecs, is ongoing at the European Institute of Florence and its results have already been published: http://www.iee.it/LAW/ResearchTeaching/EuropeanPrivateLaw/ProjectRealPropertyLaw.shtml.

58. COM(2005) 327, of 19 July 2005 (according to the Green Paper, possible interventions by the EU should be restricted to residential mortgage lending).

Paper has been published in December 2007,\textsuperscript{60} setting out new EU’s strategies, goals and measures to promote efficiency and competitiveness in the European mortgage market.

The White Paper shows that the future orientation of the EU Institutions will be no more focused on the introduction of a “Eurohypothek” as the primary means to enhance legal integration in Europe, but will adopt a multi-level approach to the issues at stake. Therefore, the EU Commission intends to achieve an efficient single mortgage market by removing, by means of “legislative” instruments, relevant legal and economic obstacles to its growth. These obstacles are identified in national divergences on consumer protection standards in the mortgage credit; in a still lacking diversity of mortgage products; in insufficient infrastructures supporting the mortgage credit (like credit reporting systems); in the existence of different domestic legislations on land registration and enforcement of security rights over immovables.\textsuperscript{61} Especially the opportunity to increase diversity in the supply of mortgage credit is connected to the target of enhancing consumers’ trust \textit{vis-à-vis} the new products. To this aim the Commission supports the prospective introduction of “legislative” innovations in the contractual terms of mortgage loans that should sound very similar to those contained in the new Directive on Consumer Credit Agreements.\textsuperscript{62} In this direction the White Paper promotes a \textit{responsible lending}, i.e. a lending system based on a series of measures, like a detailed assessment, in the precontractual stage, of the creditworthiness of the devised borrower\textsuperscript{63} and the institution of independent legal advice for consumers seeking access to mortgage credit.\textsuperscript{64} These measures are regarded as essential not only to the integration of the EU mortgage market but also to the protection of the latter from the spreading of dangerous phenomena like the U.S.A. \textit{sub-prime} turmoil.\textsuperscript{65}


\textsuperscript{61} \textit{White Paper}, quoted supra, fn. 60, pt. 3.


\textsuperscript{64} \textit{White Paper}, quoted supra, fn. 60, pt. 3.3.

\textsuperscript{65} \textit{White Paper}, quoted supra, fn. 60, pt. 3.1 and see infra, n. 7.6.
7.5. The Economic Reasons Behind Legal Integration in the EU Mortgage Market

The content of the White Paper shows very clearly what are the reasons behind the actual interest of the EU Institutions for “legislative” interventions in the field of security over immovable assets. These are economic reasons, strictly connected to the needs of expansion of banking and financial markets, as they were perceived by the relevant industries before the explosion of the international credit crunch triggered by the failure of sub-prime securitizations in the United States.66

The strategic role of mortgage credit in the building of a common financial market is repeated in many passages of the EU documents mentioned above. They all point out that this common financial market shall be grounded on the value of immovable property as leverage of wealth for land owners, banks and financial institutions, as well as for the real economy of the European countries.67 According to EU data, mortgage markets—that are largely still domestic—build a significant part of the EU economy: the outstanding residential mortgage loans amount approximately to the 47% of the EU’s GDP.68 The same sources underline that the trans-national mortgage credit

66. As well-known by this time, the so called sub-prime mortgage loans are loans granted by banks to borrowers who do not possess an adequate creditworthiness to get access to traditional mortgage loans. This is usually due to low income capacity, or to the filing against such borrower of previous defaults vis-à-vis banks. The U.S.A. credit reporting system for consumers is based on statistical analysis provided by few agencies, such as Equifax, Experian, TransUnion e Innovis: R.M. Hunt, A Century of Consumer Credit Reporting in America, June 2005, FRB Philadelphia Working Paper No. 05-13, available at: SSRN: http://ssrn.com/abstract=757929; Id., Development and Regulation of Consumer Credit Reporting in the United States, in G. Bertola, R. Disney & C. Grant (eds.), The Economics of Consumer Credit, 301 ff. In 2007 sub-prime mortgage loans in U.S.A. have reached the 20% of all outstanding loans. The price fall in the real estate sector and the raising of interest rates determined an increased number of insolvencies. This originated a liquidity crisis for banks that could not buy and sell financial instruments without high oscillations in prices. Financial instruments derived from securitizations of sub-prime mortgage loans remained immobilized in the originator’s balance sheets. For details see, e.g., Y. Demyanyk & O. van Hemert, Understanding the Subprime Mortgage Crisis, Feb. 29, 2008, SSNR Working Paper Series, available at: http://ssrn.com/abstract=1020396; C.M. Reinhart & K.S. Rogoff, Is the 2007 U.S. sub-prime financial crisis so different? An international comparison, Working Paper N. 13761, Jan. 2008, National Bureau of Economic Research, Cambridge, Ma, available at: http://www.nber.org/papers/w13761;

67. E.g., White Paper, quoted supra, fn. 60, pt. 1.

market developed slowly, to increase to a certain significance only in the last decade, and still presents wide possibilities of growth which have been quantified as amounting to the 0.7% of the EU’s GDP and the 0.5% of private consumption for the next 10 years.69

The European Union has made of the exploitation of the above margins of growth one of the symbols of its economic and financial policy.70 In this perspective, the project of the integration of the EU mortgage market is based on two interconnected pillars. The first one aims at promoting the widest access to mortgage credit for consumers; the second combines banking with finance markets and focuses on the strengthening of the securitizations of mortgage loans as an indispensable liquidity source for credit institutions.71 This last point, however, is problematic today, since the still ongoing global financial crisis, and therefore deserves further examination.

7.6. Mortgage Securitizations in Europe after the Sub-Prime Crisis

That security rights over immovables are particularly suitable asset for structured finance operations targeted to refinance credit institutions is widely demonstrated by the spreading of securitizations based on mortgage loans, be these techniques based on the U.S.A. model,72 or inspired to the German pat-
tern of the issuance of Pfandbriefe. Suffice here to recall that the German model of the so-called covered bonds has been successfully copied overall through Europe, although not so in U.K. nor in the U.S.A.

Up to the international financial crisis of September–October 2008 the policy of the European Institutions was centered in fostering legal integration of security rights over immovables precisely in order to promote the widest possible recourse to the refinancing techniques based on the so-called originate-to-distribute model. This means originating credits as an asset deemed to be

73. The issuance of Pfandbriefe does not depend to an assignment or sale of the pool of credits to a vehicle. The mortgage loans remain on the balance sheet of the originator, but form a segregated asset, separate from the whole asset of the originator itself. The segregation of the mortgage loans is purported through a registration of them in a special register of the originator (Deckungsregister), held by a trustee (Treuhändler). Mortgage and loan are registered together in this register, ex §18 para. 2 Pfandbriefgesetz. On the basis of the value of the mortgage loans that are registered, the originator issues covered bonds called Pfandbriefe, incorporating the right of its holder to reimbursement in a certain time which is determined in accordance with the date of maturity of the mortgage loans. In case of insolvency of the originator/issuer of the bonds, the bonds holders have a right to preferential satisfaction over the asset registered in the Deckungsregister (ex §30 para. 1 Pfandbriefgesetz). The combination between a bond (Pfandbrief) that is standardized by statute and the security of a mortgage (within the maximum limit of the 60% of the value of the immovable, ex §14 del Pfandbriefgesetz) allows the product of a bond extremely reliable for investors. The issuance of Pfandbriefe was regulated since 1900 by Hypothekenbankgesetz, today substituted by Gesetz zur Neuordnung des Pfandbriefrechts, 22.5.2005 (BGBl. Nr. 29 of 27.5.2005, S. 1373). The replacement of the older law was necessary since the abrogation of the state guarantee for German banks in 2005. Cp. Deutsche Bundesbank, New Legal and Regulatory Framework for the German Securitisation and Pfandbrief Market, in Monthly Report, March 2006, 37 ff.

74. The success of the German mortgage credit market fostered an “internationalization” process of the Pfandbriefe. In 1995 a new version of Pfandbrief was introduced, called Jumbo Pfandbrief and destined to the wholesale market. Its characteristics in comparison to the normal Pfandbrief are a higher liquidity and a stronger standardization of the modalities of its issuance. Since 2000, and even during the actual global crisis, the Jumbo covered bond has maintained a sufficient return on investment ratio. This is why the International Monetary Fund has proposed this type of covered bond as an alternative to the U.S.A. securitizations affected by the crisis: IMF, Regional Economic Outlook, Europe Dealing With Shocks, October 2008, 41 f.

Since the Nineties, the German Pfandbriefe system has been emulated by several western and eastern European countries that promulgated new legislations to regulate German style issuance of covered bonds. These national legislations are available at the website of the European Covered Bond Council: http://ecbc.hypo.org/content/default.asp?PageID=318. See also ECBC, European Covered Bond Factbook, Bruxelles, September 2008.

The need to expand such funding model derives from the unsuitability of the classic method of financing mortgage loans based on retail deposits by bank clients. The latter show today a higher propensity to invest in financial products, relying less on saving deposits. Moreover, retail deposits are insufficient means to fund mortgage loans, being they a source of liquidity potentially subject to a short-term reimbursement, while mortgage credits typically produce gradual reimbursement of the credit in the long-term. This obviously creates difficulties for banks in the asset-risk management.

The need to overcome the classic funding system also results from the implementation of the EU Banking Directives. These aimed at introducing the universal banking model as opposite to the specialized banking system that was widespread throughout Europe. This evolution imposed on banks the need—in order to successfully compete in the market—to add to traditional banking activities all other activities that allow funding through the financial market conduit, thereby opening the gates to complex asset management operations, such as structured finance techniques.

Another factor that pushed banks towards securitisations in the originate-to-distribute form has been the implementation of the Basel Accords on capital adequacy requirements for banks as established by the Basel Committee on Banking Supervision.
According to Basel I of 1988—which has been implemented by more than a hundred of countries in the world including U.S.A.—to each lending activity a quote of capital (so-called regulatory capital) must be retained by the bank to cover the default risk connected to the loan. Basel I fixed this quote in the 8% of the risk-weighted credit activities. To assure stability and confidence in the banking systems this regulatory capital cannot be re-invested in other credit or financial activities. The point is that Basel I is now considered as one of the contributing elements to the springing up of the innovative structured finance that lead to the north American crisis of the securitizations market. This is because, first, Basel I provides that the quote of regulatory capital be the same, irrespective of the default risk of the borrower, thereby incentivizing investments in riskier activities.\footnote{Basel Committee on Banking Supervision, Capital requirements and bank behaviour: the impact of the Basel Accord, Publication No. 1, April 1999, at p. 20 ff., available at: http://www.bis.org/publ/bcbs_wp1.htm; H. Price Tarbert, Are International Capital Adequacy Rules Adequate? The Basel Accord and Beyond, 148 U. Pa. L. Rev. (2000) 1771 ff., 1803.} Second, banks intensified recourse to the originate-to-distribute model of securitization, that enables banks to escape from the mandatory rule of retaining a quote of regulatory capital. Indeed, the credit pools are transferred—usually by means of a true sale—to entities different from the originator and therefore do not result from the balance sheets of the latter. It has been noted how this phenomenon lead to the formation of a “shadow banking system”, living outside the capital adequacy regulations.

To correct these distortions in the development of international banking a new Accord known as Basel II has been elaborated and finalized in 2004.\footnote{See supra, fn. 80.} This Accord maintains the quote of the 8% of regulatory capital for banking activities, but improves the techniques of risk measurement, imposing to banks a stricter control over the creditworthiness of the borrower.\footnote{The risks that must be covered by the regulatory capital are divided in three types: credit risks, market risks and operative risks. Three methods to calculate these risks are introduced: Standard, IRB Foundation, IRB Advanced. See Basel Committee on Banking Supervision, International Convergence of Capital Measurement and Capital Standards: a Revised Framework, June 2004, http://www.bis.org/publ/bcbs107.htm.} However, the operative success of Basel II is hindered by the high implementation costs attached to it: the new standards and methods of risk-weighting are complex and require careful and time-consuming training for banks’ operators. It is also for this reason that Basel II has remained almost not implemented in the
U.S.A., this being an element that contributed to the degeneration of U.S. securitizations towards always riskier schemes.

The American sub-prime phenomenon clearly demonstrates that the interaction between credit risks, market risks and liquidity risks can produce a dangerous trans-national domino effect, facilitated by the growing integration of financial markets around the globe. In this context, the open challenge for (not only) European financing is now to rebuild, or strengthen, a regulation framework suitable to recover market confidence in relation to securitizations of mortgage loans. It cannot be a task for these pages to show the path to be followed for such an ambitious, and dramatically necessary, enterprise. To be stressed here are rather the limits of the EU institutional project regarding the integration of the EU mortgage market as set out the White Paper.

The EU is indeed focusing in the production and implementation of new rules deemed to standardize in Europe some contractual and procedural aspects of mortgage loans. The sub-prime crisis, however, shows that among the technical difficulties surrounding securitizations many other factors are relevant. Reference must be made to the unsuitability of supervisory authorities on financial markets and the imperfections of regulations governing rating procedures and companies—in the U.S.A. the existing regulation allowed rating activities to be remunerated by the subjects who commissioned them; in the same vein, the lack of transparency regarding financial instruments hindered to investors an easy evaluation of profitability and risks connected to


85. See Basel Committee on Banking Supervision, Liquidity Risk: Management and Supervisory Challenges, February 2008, available at: http://www.bis.org/publ/bcbs136.htm. This document highlights that many banks had failed to take account of a number of basic principles of liquidity risk management when liquidity was plentiful. Many of the most exposed banks did not have an adequate framework that satisfactorily accounted for the liquidity risks posed by individual products and business lines, and therefore incentives at the business level were misaligned with the overall risk tolerance of the bank. Many banks had not considered the amount of liquidity they might need to satisfy contingent obligations, either contractual or non-contractual, as they viewed funding of these obligations to be highly unlikely.

86. See supra, n. 74.

such products. The frontline on financial battle will be world-wide regulation of supervisory systems on banks and financial institutions, improvement of risk measurement techniques to be applied to financial operations and instruments, and transparency of the financial system more in general. After the global financial crisis, “legislative” EU action on the substantive laws of European member states, aiming at modifying selected aspects of the mortgage loans, or of the security rights attached to them, will never suffice to assure the economic splendors envisaged by the EU Institutions as direct consequence of the expansion of the European mortgage market.

8. Security Rights over Movable Assets:
‘Formal’ Security Rights

As mentioned above, each European system recognizes the pledge as a traditional ‘formal’ security over movable assets, the creation of which depends on delivery of possession to the creditor or to a third person, in order to prevent the impression of false wealth being given. Although at the time of the continental codifications of private law the market demanded non-possessory security devices (given that in most cases it is highly undesirable, if not impossible, for a debtor to give up possession of its inventory or equipment), the possessory pledge was the main form of security over tangible movables cho

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88. On these aspects see also European Central Bank, EU Banking Structures, October 2008, quoted supra, fn. 76, 19–21.

89. The possible impact of this financial crisis on future behavior of the market actors, together with a list of advisable regulations to be implemented can be found in European Central Bank: EU Banking Structures, October 2008, quoted supra, fn. 76, 24 ff.

90. Dutch c.c., art. 3:236 (pand); English common law (pledge, pawn): L. Smith, Security, in P. Birks (ed.), English Private Law, 1 (Oxford 2000) 411; French c.c. old arts. 2071, 2076 (after the 2006 reform, the new arts. 2333 ff. concerning the gage for tangible movable assets and 2355 ff. on the nantissement for intangible movable assets no longer consider the delivery of possession as a requisite for the creation of the security); Belgian c.c., art. 2071 (nantissement); 2073 (gage) and art. 1 Law of 5 May 1872 for the commercial pledge (gage); German c.c., §1205, 1206 (Faustpfand); Greek c.c., art. 1211; Italian c.c., art. 2786 (pegno); Portuguese c.c., art. 669 para. 1 (penhor); Spanish c.c., art. 1863 (prenda). Sometimes other formalities are required for the right of preferential satisfaction of the creditor to be valid: in Italy, art. 2787, para. 2 requires possession of the encumbered asset by the creditor or the third person, and para. 3 requires, in the case of a secured credit to the amount of Euro 2.58, evidence of the pledge deriving from a document with a ‘certain date’ and sufficiently stating the pledged asset and the secured credit.
sen and regulated by the civil codes from 1804 to 1992. Consequently, as far as movables are concerned, the codes were ‘born old.’

As to the enforcement of pledges, generally the continental countries regulate public auctions, which are usually authorized by a judge. The reason for the introduction of public procedures is that creditors are not normally deemed to be the proper subjects to obtain a fair price from the purchase of pledge. If the secured asset has an official market price, it can in most instances be sold by a broker. The automatic transfer of ownership to the creditor in the event of debtor’s default is forbidden in almost all countries by the prohibition of forfeiture clause (lex commissoria). In England, by contrast, the creditor is allowed to arrange the private sale of the secured assets after maturity, and it is bound by case law to set a reasonable price.

Although all European countries have shaped the pledge as an accessory proprietary right in the terms above mentioned in n. 7.1 (i.e., strictly dependent for its creation and extinction on a principal obligation), economic needs have sometimes led to mitigation of the consequences ensuing from overly strict accessority of the pledge, with greater ease than could have been possible in the field of security over immovables. In some countries, especially in the commercial and bank credit sector, the rule that the security must be specific to the secured credit, as well as to the secured assets, has been attenuated. In this way, the practice seeks to get global security rights (i.e., pledges securing all future undetermined credits arising from any contractual relationship between the same creditor and debtor) mostly on the pattern of per-

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91. Dutch c.c., art. 3:235; see French c.c., former art. 2078, para. 2 (the prohibition has now been strongly weakened by the reform of 2006: see new arts. 2347, 2348 for the gage and 2365 for the nantissement; French c. comm., art. L521-3 para. 4 as amended by the reform; note however that the prohibition of forfeiture clauses is still existent for the gage de stocks: French c.comm. art. L527-2); German c.c., §1229; Greek c.c., art. 1239; Italian c.c., art. 2744; Spanish c.c., art. 1859.

92. Ex p Hubbard (1886) 17 QBD 699; Consumer Credit Act 1974, s. 121; M. Bridge, Personal Property Law, 3rd ed. (Oxford 2002), 175 ff.

93. In Italy, the creation of pledges securing future credits is allowed if the future credits are to arise from a contractual relationship already existing between the parties. The problem of the omnibus clause is different, because in this clause not only the (exact amount of) the secured credit is not determined at the time of the creation of the security, but also the relationship from which the credits to be secured are to arise is not determined: E. Gabrielli, Pegno, in Tratt. dir. civ. edited by R. Sacco (Turin 2005), 138 ff. However, opinions differ greatly as to the full validity of this device, and Italian case law restricts the validity of the omnibus clause to the inter partes relationship between creditor and debtor, not to the effects concerning third persons: Cass. 5.7.2000, n. 8970, in BBTC, 2000, II, 606; Cass. 28.10.2005 n. 21084, Foro. It. Mass., 2005, 1631. In Dutch law, pledges secur-
sonal security contracts. ‘Revolving’ pledges have also been accepted: that is, security rights over movable assets that may be substituted by other assets of the same value during the secured relationship. This has proved useful in the case of assets to be manufactured, or in the financial sector. The pledge as the central device for security over movables can be created over movable tangible assets, but also over intangibles. This concerns the case of claims to payments of money, for which the legal scheme of the pledge over tangibles has been applied more recently, so that publicity of the creation of the security is performed through notice to the account debtor. Owing to

The Catalanian law, n. 19 of 5 July 2002 (Llei de drets reals de garantia), art. 13 para 2 states that the pledge can secure obligations whose amount is not known at the time of the creation of the security if a maximum amount has been agreed; para. 3 of the same article states that the pledge can secure different present or future obligations arising between debtor and creditor within an agreed time limit and for an agreed maximum amount.

New rules on the gage de stocks as revolving proprietary security have been introduced in the French commercial code by the French reform of security rights of 2006: c.comm. arts. L527-1 to L527-11. For the so-called pegno rotativo in Italy see E. Gabrielli, Il pegno “anomalo” (Padua 1990)181 ff., 216 ff.; Id., Sulle garanzie rotative (Neaples 1998) 87 ff.; Cass. 28.5.1998, n. 5264, in GC 1998, I, 2159. The Dutch Supreme Court has ruled that in the case of pledges on large amounts of claims the principle of specificity is applied leniently because the pledge does not require a full list of all claims (subject to security) to be registered. A shortened list suffices as long as it enables determination of the exact security objects, e.g. references to detailed computer lists which are not themselves registered (HR 14 October 1994, NJ 1995/447). The Supreme Court has extended the pledge on claims in an unusual way by stating that, according to art. 3:246(5) CC, a pledgee who demands payment of the claim himself will not lose his right of pledge: because of real subrogation it will subsist on the money as the new security object (HR 17 February 1995, NJ 1996/471; HR 23 April 1999, NJ 2000/30); cp. J.H.M. van Erp, L.P.W. van Vliet, Real and Personal Security, 120. In Spain, Catalonian law n. 19 of 5 July 2002, art. 16 and 17, recognizes real subrogation as to the object of the security.


96. Most codes expressly regulate the pledge over claims. When this option is not recognized by positive law, it is admitted by the interpretive formants, as in Spain: A. Carrasco, E. Cordero y M. Martin, Tratado de los Derechos de Garantías (Cizar Menor 2002), 862.

97. German c.c., § 1280, Italy, cc. art. 2800, Greece, art. 1248 c.c.; Portuguese c.c., art. 681, para. 2.
the burden of this notice requirement, and often also owing to a desire for discretion on debtor’s side in commercial transactions, the tendency soon developed to use other means of creating security over receivables, like the assignment to security purposes. This ‘functional’ form of security is today the most common form of proprietary security over claims (see infra, n. 8.1.a).

Where registration systems have taken the place of delivery of possession by the debtor, specific laws (usually covering credit to enterprise only) have been enacted to regulate non-possessory pledges or hypothecs over movable assets.98

English case law has developed the floating charge as a non-possessory security for corporate financing.99 In this case, the security does not encumber the assets in their individuality but rather in the universality of present and future assets of the company. The latter is free to dispose of the assets until the time of the so-called ‘crystallization’ of the charge from a floating into a fixed one. This is because of the occurrence of an event that is agreed upon by the parties to effect crystallization—usually the default of the company,

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98. This is the case of Spain: Ley sobre hipotheca mobiliaria y prenda sin desplazamiento de posesión, of 18th Dec. 1954, BOE n. 352; and of the registered pledge introduced in Poland by the Act on Registered Pledges and the Register of Pledges adopted on 6 Dec. 1996, in force since 1st Jan. 1998: Gdansk Academy of Banking, Analysis of the Economic Impact of the Registered Pledge System in Poland, (Gdansk Nov. 2003). Also to be mentioned is the Italian ‘contractual privilege’ for banks: this is regulated by decree-law 1.9.1993, n. 385 (Italian Bank Law) art. 46; Although termed a ‘privilege’, it seems more like a proprietary security right (G. Tucci, I privilegi, in Trattato di diritto privato diretto da P. Rescigno, 19, 2nd edn., Turin 1997, 717). Swedish law regulates enterprise mortgages with the Enterprise Mortgage of Act 1984. However, as to the extent and effect of registration the various countries offer very different solutions: U. Drobnig, Present and Future of Real and Personal Security, 643 f. In the Netherlands, the ‘fiducia’ banned by the new civil code of 1992 has been replaced by the ‘silent’ pledge on movables (art. 3:237 CC) or claims (art. 3:239 CC). By means of the ‘silent’ pledge, the pledgor remains in actual possession of the movables, or, in the case of a claim, the pledge will not be notified to the account debtor. A silent pledge requires a private deed registered with the tax department or, alternatively, a notarial deed. These formalities prevent antedating but are not intended to make the security interests public. The register at the tax department is not a public register: J.H.M. van Erp & L.P.W. van Vliet, Real and Personal Security, 119. The French reform provides for a pledge with delivery of possession and a non-possessory pledge with registration (new art. 2337 c.c.); consequently, the notion of gage itself has changed. It has become a consensual contract, because delivery of possession is no longer a requisite for the existence of the security (art. 2333): L. Aynès y P. Crocq, Les sûretés, La publicité foncière, 3e éd., Paris, 2008, no. 500, p. 214.

99. The first recognition of this legal device is in Re Panama v. New Zealand and Australian Royal Mail Co. (1870) 5 Ch App 318.
the opening of an enforcement procedure against it, or the interruption of its activity, etc.100

8.1. ‘Functional’ Security Rights: Ownership and Ownership-Related Contractual Arrangements

Recourse to ‘functional’ security rights has been made by commercial practice especially in countries where non-possessory ‘formal’ security rights have not been regulated, or have been so only fragmentarily—and, therefore, insufficiently. However, the outcomes of such recourse have differed greatly among countries.

The expression ‘functional security rights’ denotes various forms of recourse to ownership as security, in particular the transfer of ownership to the creditor for security purposes, or the retention of ownership by the creditor for security purposes. Other contractual arrangements—like financial leasing or sale and lease-back transactions—producing proprietary effects may also be regarded as performing a security function. A feature common to ‘functional security rights’ is that physical control over the assets serving as security remains with the security provider.

The widespread recourse to these arrangements for security purposes highlights another crucial issue of the law of secured transactions: the formalism as opposed to the functionalism existing in each national legal regime.

Put it briefly, where hostility is expressed against ‘functional’ security rights, a formal or structural approach to the topic prevails, because only rights with a specific structure are considered to be security rights (‘formal’ ones). Here,

100. M. Bridge, Personal Property Law, 188 ff. The difficulty with this device has been the weak priority which it gives to the secured creditor: the priority of a subsequent fixed charge, in fact, prevails over a previous floating charge; moreover, certain unsecured creditors with a preference ranking, such as employees for back wages, are given a special statutory priority that places them after fixed charges but before floating ones (Insolvency Act 1986, s. 386 and Schedule 6). In England, the registration and priority of floating charges, as well as of company security rights in general, are currently being reformed: G. McCormack, The Floating Charge in England and Canada, in J. De Lacy (ed.) The Reform of UK Company Law (London 2002) 389–414 and the last Law Commission Paper of 31 Aug. 2005, Company Security Interests (Law Com N. 296): http://www.lawcom.gov.uk/docs/lc296.pdf. More in general, on the risks of enterprise mortgages for the debtor’s other creditors and the consequent statutory limitations existing in the European countries, see U. Drobnig, Present and Future of Real and Personal Security, 648.
the focus is on the structure, or form, of the security rights: a limited right in rem is a valid security; transfer of absolute title or retention of title is not.

By contrast, where the legal regime is open to 'functional' security rights, a pragmatic approach to security prevails: when the security purpose is proven, every legal device or arrangement between the parties is considered a valid security right—and is therefore legally treated as such—without any reference made to the form of the transaction. Needless to say, the prime example of this system in the sector of security over movables is the U.S. system set out in Art. 9 U.C.C. In addition, it is precisely the influence of this model that impacts the current European debate concerning legal reform in this field (see infra, n. 8.2). Moreover, the prevalence of formalism is a feature common to the laws of the western European countries, and in this respect, the English common law is perfectly aligned with the civil law.101

Because 'functional' security rights are arrangements quite different from each other, they warrant brief, separate consideration.

(a) Transfer of Ownership: Economic demand for non-possessor security devices has induced recourse to the (fiduciary) transfer of ownership over movables,102 this being the very first method of creating real security to appear in legal history. The use of ownership for security purposes brings advantages, but also some disadvantages. As to the former, not only does transfer of title give rise to a non-possessor security, but it enables publicity of the burden on the security provider asset to be avoided, and also the costs of creating/registering a 'formal' security. Moreover, in the event of the debtor’s default, more effective satisfaction is achieved because transfer of title to the creditor becomes final. This gives rise to the principal problem with these devices, namely the

101. The orthodox definition of a security right under English law is, in fact, that of the ‘grant of an interest less than absolute ownership by a person who already has or will obtain an interest in property’: L. Gullifer, Quasi-security Interests: Functionalism and the Incidents of Security, in I. Davies (ed.), Issues in International Commercial Law (Aldershot, Burlington 2005), 3 ff., 5; therefore, a retention of title is not a security right. The English law on company security rights is undergoing reform; the most recent Consultation Paper of the Law Commission, n. 296 of 31 Aug. 2005 (see supra, fn. 100) proposes the introduction of a functionalist approach to company security rights so that also quasi-securities, including the assignment of claims within factoring transactions, will be considered security and treated as such. For the civil law side of the problem see A. Veneziano, Le garanzie mobiliari non possessorie, 112 ff.

102. The phenomenon also exists in the case of immovable assets, but here it is of sometimes lesser magnitude, because of the costs of land transactions, and also because in some jurisdictions the needs of the market are covered by mortgages/hypothecs. This is the case of Germany or France for instance: M. Cabrillac, C. Mouly, Droit des sûretés, 452.
fact that they transfer to the creditor “more title” than the latter needs for security purposes, and this fact—mainly by reason of historical path dependency—is often considered dangerous for the debtor. I now provide a brief overview of the legal treatment of ownership as security in western Europe.

In most continental countries with prevalent Roman-law traditions, such security transfers of ownership tend to be banned for a variety of theoretical reasons, such as the existence of a *numerus clausus* of proprietary rights, or the unsuitability of the security purpose as the legal *causa* of a transfer of ownership. However, the essential reason for this ban seems to be the deeply-rooted idea of debtor protection against usury—and it is this that constitutes the rationale for the prohibition of the *lex commissoria* in the mentality of the interpretive formants. In Italy, the *lex commissoria* ban is often applied by courts in order to declare the nullity of security transfers of ownership. Substantially, the same ban can be observed in Spain and in the Netherlands.

By contrast, German law is well-known for its liberality in the development of fiduciary transfers of ownership or assignment of claims for security purposes (*Sicherungsübereignung, Sicherungsabtretung*), also in broader forms whereby the security also covers processing assets. Here, prohibition of the *lex commissoria*—although it exists in the code—does not have operational relevance, in that it has almost never been applied by courts in cases concerning (the validity of)

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105. In Spain, the problem is not the validity of the transfer of ownership for security purposes but its limits and effects towards third persons, also in consideration of the par condicio creditorum and the prohibition of the forfeiture clause: A. Carrasco, E. Cordero y M. Marín, *Tratado de los Derechos de Garantías*, 1058 ff. However, the ban of the *lex commissoria* has a more limited scope of application in Spain than in Italy (Id., 1064). The *Fuero Nuevo de Navarra*, Law n. 466 expressly regulates the *fiducia de garantía*.

106. To be noted is the recession of Dutch law on the subject. Security ownership was recognized by the Dutch Supreme Court in 1929 (HR 25 January 1929, NJ 1929, 616; HR 21 June 1929, NJ 1929, 1096) because a non-possessory security right over movables was needed. Gradually, over many decades following recognition of security ownership in 1929, the Supreme Court reduced the security owner’s rights to the rights of a pledgee, maintaining that the owner is under a duty to sell the security object in execution and satisfy himself from the proceeds of sale. Any surplus money must be given to the debtor. It was thus accepted that security ownership is different from normal ownership. The 1992 Civil Code abolished *fiducia* at art. 3:84(3), mainly on the ground that security ownership gives the creditor more than is needed: ownership rather than a limited real right: J.H.M. van Erp & L.P.W. van Vliet, *Real and Personal Security*.

security transfers of ownership. Control over the proportionality of the security to the amount of the credit to be secured is exerted in Germany through an ex-post judicial assessment based on general clauses (esp. §138 German c.c.).

The hostility shown by some European systems towards security ownership is difficult to understand if we bear in mind that where it is fully recognized, security ownership is also treated as a ‘formal’ security, and not as an absolute ownership, for instance in the debtor’s insolvency, so that any danger of disproportion in the enforcement of the security is easily averted.¹⁰⁸

A slightly different path has been followed by English law, for which a mortgage over movables has always been essentially a transfer of ownership to the creditor, where the proportionality of the transaction has always been checked by the rules of equity.¹⁰⁹

Security ownership is generally valid even in the jurisdictions (like Italy) most adverse to it when the asset to be transferred for security purposes is a claim (security assignment). Two meta-positive reasons for this notable exception to the ban on security ownership may be identified where claims are concerned: (a) it is easier to check the proportionality of the secured relationship at the time of the enforcement—set-off often operates between the parties; (b) dogmatic objections may not stop actual bank practices worldwide in the sector of commercial lending.

(b) Retention of Title (RoT): The RoT is the classic security for credit granted by suppliers of goods, who sell the goods to the purchaser but grant him delayed payment of the purchase price, usually in instalments. In these cases, title passes to the purchaser only with full payment of the price (suspensive condition), so that the retention of the title by the seller/creditor has an evident function of security. The legal regimes on the validity and effects of RoT vary significantly among the European countries.

In general, validity of a RoT requires an express contract term which states the particular effect of the RoT, i.e. the transfer of title in the sold goods only at the time of the full payment of the purchase price.¹¹⁰

¹⁰⁸ This is the legal treatment of the security ownership in Germany (Insolvenzordnung, §50 and 51), but it is also the legal treatment of the ‘irregular pledge’ of money or fungible assets in Italian law, which evades the ban of forfeiture clause because it is expressly regulated by the code (art. 1851): S. Palumbo, Pegno irregolare e fallimento, Fall. 2004, 383 ff.
¹¹⁰ An express contract term is usually necessary also in order to extend the effects of the RoT to the proceeds deriving from the sale of the goods. An exception is represented by French law: M. Cabrillac, C. Mouly, Droit des sûretés, 7th edn., (Paris 2004), 609 ff. For the legal regime of RoT in French law see c.c. new arts. 2329 n. 4, 2367–2372.
In England, Germany, and Sweden there is no registration requirement for the RoT to be valid between the parties, as well as *erga omnes*, and the security is treated as ownership in the case of the debtor’s insolvency so that the supplier can reclaim the sold goods as its own.\(^{111}\) In Spain, RoT produces effects against third persons if it is registered, and in the case of the debtor’s insolvency it is regarded as full ownership.\(^{112}\) In Italy, a ‘certain date prior to the time of the attachment’ is required for the validity of the RoT against third persons. In the case of machinery, when the price exceeds Euro 15,49, the RoT is effective against third persons provided that it has been entered on a special register kept at the Tribunal with jurisdiction in the place where the machinery is located.\(^{113}\)

Finally, in England, Germany, Ireland, and Scotland, a RoT can secure not only payment of the purchase price but also any other obligation of the buyer towards the seller.\(^{114}\) In Germany, the RoT extends not only to the goods sold but also to the products resulting from their manufacture or to proceeds deriving from their sale, whereas such cases are regarded as creation of a new security the Netherlands.\(^{115}\) In England and Scotland, proceeds clauses are not favourably regarded by case law.\(^{116}\)


\(^{112}\) The *Ley de venta a Plazos de Bienes Muebles* (Law n. 28 of 13 July 1998, art. 15) creates a register of movables on which the RoT must be registered in order to produce its effects: A. Carrasco, E. Cordero, M. Marin, *Tratado de los Derechos de Garantías*, 967 ff., 981 ff.; Spanish c.c., arts. 1922 para. 2, 1926 para. 1; *Ley de venta a Plazos de Bienes Muebles* art. 16 para. 5.

\(^{113}\) Italian c.c., art. 1524. In addition to that requirement, and as concerns newly manufactured goods and machines with a value of at least euro 516,45, the Law of 28.11.1965, n. 1329 (so-called *legge Sabatini*) provides that the asset must bear a plate in a prominent position with the name of the seller as owner and information identifying the machine for a RoT to produce effects against third parties (see also decree of 21 February 1973 for the implementation of the *legge Sabatini*). Moreover, the contract containing the RoT clause must be registered on a special register kept at the Tribunal with jurisdiction in the place where the contract has been concluded.


The main issues treated differently by national jurisdictions are (i) the effectiveness of the RoT against a good faith purchaser from the buyer; (ii) the requirements of validity of the RoT against the buyer’s creditors, especially in the case of the buyer’s insolvency; and (iii) the possibility to qualify the buyer’s expectancy as a proprietary right. In this way, the buyer may be entitled to dispose of it (also as security), because the expectancy may have a substantial economic value depending upon the outstanding amount of the purchase price. It is evident that these divergences may obstruct recognition of foreign RoT clauses in cross-border transactions among European countries.

(c) **Financial leasing and lease-back**: In financial leasing and sale and lease-back transactions, contract and property law are inextricably bound up together to produce arrangements which may (but not always) have purposes of security.

Financial leasing usually involves a three-party situation in which the lessor purchases assets from the producer and leases them to the lessee. The economic purpose of this arrangement is to enable the entrepreneur (lessee) to use specific assets—especially machinery—without disbursing the amount of money necessary to purchase full ownership of those assets. In fact, the lessee is bound to pay (only) a periodic rent which reflects the discounted value of the goods and the finance charges of the operation until termination of the contract, when, in some countries, he will have the option (a) to purchase the full ownership of the leased assets, (b) to renew the leasing contract, or (c) to return the assets to the lessor. To be qualified as such, a finance leasing must transfer substantially all the risks and rewards of ownership (except legal title) to the lessee.

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118. Only some fragmented aspects of RoT clauses have been object of European legislation: EC Directive 2000/35 of 29 June 2000, on combating late payments in commercial transactions: EC O. J. L 200 of 8.8.2000, 35 ff., see particularly arts. 2, 3 and 4; and see also arts. 7 and 41 of EC Regulation n. 1346/2000 on insolvency proceedings, in EC O.J. L 160 of 30.6.2000, 1 ff.


120. See, for all, R. Goode, *Commercial Law*, 777.
The sale and lease-back schema is a unique version of the financial leasing transaction mentioned above. It is normally based on a bilateral transaction in which the entrepreneur sells the ownership of his assets to the lessor but continues to use it in his business on the basis of a lease contract. It is evident that this arrangement gives the lessee access to financing, which is alternative to the traditional bank loan.

Because of the strict factual connection of those transactions with financial strategies of the enterprise, it is sometimes difficult to distinguish them from transfers of ownership for security purposes. However, despite the economic framework in which leasing contracts are placed, in Western Europe such arrangements are normally classified not as ‘security rights’ but as ‘business contracts,’ as far as dogmatic classifications are concerned.\(^{121}\) It is thus possible to discern a trend towards the development of a legal regime for such devices which differs from that of ‘formal’ security rights, at least when it is necessary to ensure market access to such arrangements. Exemplifying this trend is the relationship between leasing contracts and the prohibition of the \textit{lex commissoria} in those legal systems that prohibit the security-ownership, such as those of Italy, Portugal, or the Netherlands. In these countries, the problem of saving such devices (particularly lease-back) from applicability of the \textit{lex commissoria} ban has been solved by differentiating leasing arrangements from security rights and legitimating the former.\(^{122}\) By contrast, some issues concerning the regulation of leasing transactions could be treated in a similar way to retention of title arrangements, as in the case of the formal requirements necessary to oppose the lessor’s ownership to third parties.\(^{123}\)

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\(^{123}\) In Italy, despite the fact that no formal requirements are established by the civil code for leasing transactions, the lessor’s rights will be protected in case of execution only
8.2. Security Rights over Movable Assets and Legal Integration

As mentioned above, the engine of the legal integration began to operate much earlier, and with much more intensity, in the field of security over movables than it did in that of security over immovables. The need to remove the most evident divergences among the legal regimes of the various jurisdictions, which hindered the recognition of foreign security devices and techniques in international commercial transactions, very soon stimulated international efforts for legal integration.124

In this respect, however, the first results have only been achieved in recent years, and mostly at regional level: the International Institute for the Unification of Private Law (UNIDROIT), the Organization of American States (OAS), the European Bank of Reconstruction and Development (EBRD), the Organisation pour l’Harmonisation en Afrique du Droit des Affaires (OHADA), the United Nations Commission on International Trade Law (UNCITRAL) have accomplished ‘legislative’ integration by means of model laws or international conventions.125

if the formal requirements provided by art. 1524 para. 1 for RoT clauses are fulfilled (documentary evidence with certain date: M. Bussani, I contratti moderni, 322 ff. In France and Greece, leasing contracts must be registered to render the lessor’s ownership of the leased assets enforceable against third parties: for France see art. 8 of decree n. 72-665 of 4 July 1972; Code com. art. L 621-116; for Greece see art. 4 law n. 1665/1986, modified by law n. 2367/1995.


Of course, not even the EU Institutions have been indifferent to the issue, particularly since they openly acknowledged that the existing divergences are a de facto obstacle to full implementation of the internal market.\textsuperscript{126}

The European legal integration of security rights regimes has two aspects, one ‘legislative’, the other ‘cultural’.


Regarding the ‘legislative’ actions taken by the EU Institutions, the main results have been achieved by the financial collateral arrangements envisaged by Directive 2002/47/EC.\textsuperscript{127} Notwithstanding the limits of any integration brought about by means of a directive, national implementation of this directive has been an important step towards convergence of legal rules in Europe: traditional principles of proprietary security rights, such as the rule of accessority, the rule of specificity, the prohibition of forfeiture clauses, have been eroded by the directive, so that exceptions to such principles have increased homogeneously. Nevertheless, it can also be noted that European legal integration through directives can also produce ‘disintegrative’ impacts.\textsuperscript{128} In fact, traditional presentations of security rights national regimes may not correspond to the operational level of the empirical solutions developed by the interaction between European and national law. All of this also explains the increasingly urgent need for national legal reform. Of course, it is also because of the inputs from ‘top down’ EU actions that national legislators are undertaking reforms of their legal regimes of security for credit. The main example is France, which has reformed in quite a uniform manner the broad sector of security for credit, including personal and proprietary security over movables and immovables.\textsuperscript{129} ‘Cultural’ integration is represented by academic activity, which is also, in most cases, a consequence of the EU’s interest in the matter, given that the EU Commission is financing an ambitious research network on private law, which includes the law of security for credit.\textsuperscript{130}

Two main approaches can be identified among research projects. One can be termed the ‘cultural approach’ and is the path chosen by the “The Common Core of the European Private Law” of Trento, directed by M. Bussani and U. Mattei.\textsuperscript{131} This project aims to deepen comparative law knowledge in

\textsuperscript{127} EU Financial collateral directive 2002/47/CE, in O.J. L 168 of 27.6.2002, 43 ff. For the regulation of some aspects of RoT clauses by EU directives see supra, fn. 118.


\textsuperscript{129} See supra, fn. 36.

\textsuperscript{130} Since May 2005, the ‘Study Group on a European Civil Code’ has been part of the Joint Network on European Private Law, a Network of Excellence funded by the European Commission under the Sixth Framework Programme for Research: www.copelc.org.

rope in order to promote the formation of a truly European legal culture, a feature which seems necessary if any 'legislative' legal integration is to be successfully applied throughout Europe. It is well known that any 'top down' intervention will be fruitless if national traditions, interpretive usages and mentalities are not nourished and assisted by a European common culture. The factual approach developed by R. B. Schlesinger in the 1950s and 1960s for study of the "common core" in the formation of contracts and the dissociation of legal formants developed by R. Sacco are applied in comparative analysis which measures the degree of convergence or divergence among different legal systems. The main advantage of this technique is that it removes false analogies and false differences produced by merely formal descriptions deriving from the juxtaposition of analyses of individual legal systems made by municipal scholarship. The Common Core research project on security rights over movable assets has been carried out by a group of international researchers directed by Prof. E.-M. Kieninger, which has published its results in 2004.132

A different approach is taken by the Research Team working on Security Rights under the direction of Prof. U. Drobnig (Max Planck Institute for Comparative and International Private Law—Hamburg), within the European network known as the 'Study Group on a European Civil Code.'133 The aim of this comparative inquiry into the national laws of the member states of the EU is to develop a complete set of rules governing the law of security over movables (as well as personal security contracts). Hence, in this case, the research work is based on a 'legislative' approach. Interestingly, the Study Group on the Proprietary Security Rights over Movables seems to have adopted the functional approach, although to an extent and with a meaning not equal to the functionalism of the U.S. Art. 9 U.C.C. Indeed, the provisional text of the black letter rules defines a 'Proprietary Security Right' as a category including both 'formal' and 'functional' security rights. However, a certain degree of differentiation between the legal regime of financial leasing and that of other functional security rights like RoT is still under discussion. A system of registration will be established for all the various domestic security rights—which in a distant future will probably lose their original, national names and become just 'security rights'—but

what features and effects this registration will have is also still under discussion.\(^{134}\)

What the future of Study Group-Rules will be is not easy to predict, for it will mainly depend on the political aims of the EU—as well as of the member states—once the rules have been completed. Of course, any national implementation of such rules will require national legislative intervention, together with legislative reforms of many sectors of the national private law in general, because any instrument of soft law harmonization will have no impact on property law.

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\(^{134}\) The provisional text of the black letter rules is available at: www.sgecc.net.


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