

LAND REGISTRY AND THE CROSS-BORDER CIRCULATION OF DIGITAL PUBLIC DOCUMENTS IN THE EUROPEAN UNION

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I. TOWARDS THE DIGITALISATION OF NATIONAL LAND REGISTRIES WITHIN THE EU: CHALLENGES OF A WORK IN PROGRESS

Globalisation and regional integration processes, in which the development of the Information Society and the irruption of the Fourth Industrial Revolution play a key role, have a decisive effect in the increase of cross-border mobility of and of real estate transactions in a region like the European Union (EU). Most importantly, such phenomena have a direct impact in the increasing digitalisation of national Land Registries of the Member States, closely linked to the gradual digital transformation of their public administrations, also boosted by several recent legislative initiatives of the EU.

In this regard, as well as national systems encourage the digitalisation of their public administration, also they are concerned with the digitalisation of public documents and of Land Registries. However, those current national legislative efforts pose relevant legal challenges for the cross-border circulation of public documents in a digital form and for an effective cooperation between national Land Registries. Therefore, despite the mentioned national legislative and technical efforts, there is still room (and need) for International and UE regulatory initiatives in order to suppress the mentioned obstacles, which may hamper the development of the internal market.

In relation to this, and before referring and analysing those International and EU legislative initiatives, it is of importance to take into account which are the common features of the current national initiatives related to the digitization of Land Registries –as well as their pros and cons⁻².

² See: https://e-justice.europa.eu/109/EN/land_registers_in_eu_countries?init=true

a) On the one hand, Member States usually share the objective to adapt traditional analogical systems of national Land Registries to the current and increasing digital reality, in order to benefit from Information Technology tools – in terms of efficiency and speed- and minimize the challenges which such technology may entail. In this respect, a close analysis of the legal systems of the Member States reveals the increasing use of Information Technology tools for the conveyancing and for the registration process in national Land Registries. An objective which also takes into consideration the importance to establish an adequate and secure legal framework relating to questions like the Protection of Personal Data and to the due respect of Fundamental Rights.

b) Nevertheless, and on the other hand, several are also the obstacles which national legislative initiatives meet related to the digitization of Land Registries and the public documents which they produce. Particularly, in relation to cross-border situations which may take place within the EU. For a start, national legal initiatives related to the digitalisation of their administration do meet a different level of development from one Member State to the other, respect both to the requirements and scope of regulatory measures which they implement and the technological tools they use in the electronic-processes of national public administrations. Particularities and differences which, as a result, also affect to the national solutions provided by Member States for the electronic conveyancing and registration processes before national Land Registries.

Moreover, national systems of the Member States related to electronic conveyancing and registration processes are usually designed and considered for the sole use by national public authorities and, as a consequence, they have the effect to severely limit -or even to avoid- the electronic access of foreign public authorities to electronic Land Registries of the other Member States. As a result, Notaries and public Land Registry authorities of the Member States are commonly

confronted with the requirement of a double documentation for public digital public documents in both at the Member State of origin and at the Member State of destination of that document. A double request which not is inefficient as such, but also normally leads to a “bottleneck effect”, which negatively affect the UE circulation freedoms.

One of the reasons behind this so parochial and national-oriented perspective, affecting the cross-border electronic conveyancing and registration processes before Land Registries, refers to the common lack of awareness of the international element when national institutions of the Member States draft their new legislation. Thus, making it burdensome to guarantee the free circulation of foreign digital public documents within the internal market, as well as creating difficulties to the legal management of intra-UE electronic conveyancing and registration processes before Land Registries. Therefore, as long as national initiatives do not usually provide for specific solutions for those cross-border situations, authorities of the Member States must consider the subsidiary application of EU Private International Law rules.

However, it should be stressed that current EU Private International Law rules neither guarantee a complete free circulation of public documents within the EU judicial area, without any special procedure being required, nor are well designed to cover the particularities of intra-UE electronic conveyancing and registration³. Consequently, there is an urgent need to enhance legal security in the current system within the EU and, in relation to this, to develop supra-national legal initiatives in this area, in order to guarantee the acceptance of foreign public

³ In this respect, as an example, Arts. 58 and 60 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), *OJ L* 351, 20.12.2012.

documents in a digital form. And so, to eliminate obstacles for UE freedoms by achieving a greater level of cooperation in this field which allows a free UE circulation of Land Registry public electronic documents.

II. A PLEA FOR AN UE INITIATIVE TO FAVOUR THE FREE MOVEMENT OF LAND REGISTRY DIGITAL DOCUMENTS WITHIN A DIGITAL SINGLE MARKET

Apart from the mentioned difficulties derived from the application of national rules, neither current International nor UE solutions offer a sound solution for the circulation of Land Registry public electronic documents in the internal market.

In this respect, and from an International perspective, The Hague Conference on Private International Law (HCCH), has played an active role in relation to this issues, connected to the Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents⁴. However, the HCCH 1961 Apostille Convention posed important challenges in relation to the digitalization process of national public documents, which derived in the launching an Electronic Apostille Programme (“the e-APP”) in 2012⁵. Briefly, the HCCH e-App basically consists of two main technological elements –i.e. e-Apostilles and e-Registers- and it has already been implemented by 46 Contracting Parties.

Nevertheless, and although its undeniable practical benefits, the HCCH e-APP also appears to offer just a limited solution to fully guarantee the acceptance of foreign public documents in a digital form and, as a result, the free UE circulation of Land Registry public digital documents without any special procedure being required. In this regard, the e-APP only provides for a digitised

⁴ At: <https://www.hcch.net/en/instruments/conventions/specialised-sections/apostille>.

⁵ See: <https://www.hcch.net/en/instruments/conventions/publications1/?dtid=49&cid=41>.

authenticity stamp, which should be confronted with the more ambitious aims of the EU for a free circulation of public documents in the area of Civil Justice.

Therefore, it should be affirmed that there is a need for a decisive step forward the free circulation of Land Registry public documents (including those in a digital form) by the EU institutions in this respect. In connection to this,

a) On the one hand, a full application of Art. 67 of the Treaty for the Functioning of the European Union (TFUE) has a paramount importance for a genuine intra-European circulation of public documents, in order to develop an Area of freedom, security and justice. However, as mentioned before, Regulations in the area of EU Civil Justice only offer a limited solution to guarantee their free circulation and they do not directly relate to Land Registry digital public documents.

b) On the other hand, during the last two decades we are witnessing an increasing interest of the UE institutions in order to develop an interconnected digital single market, for “A Europe fit for the digital age”. In relation to this, the significant Communication of the Commission of 2015, “A Digital Single Market Strategy for Europe”, should be highlighted⁶. This digitalisation effort has also reached the particular area of freedom, security and justice, as stressed in the of 2020 “Digitalisation of justice in the European Union. A toolbox of opportunities”⁷. As a result, the EU not only is developing an UE digital infrastructure, but also this strategy is affecting several significant regulatory aspects –both legislative and technical-, of Civil Justice in Europe.

⁶ COM (2015) 192 final. See: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age_en.

⁷ COM (2020) 710 final.

In relation to this, several EU Regulations are developing a digital infrastructure for Europe, connected to EU Civil Justice matters, which should be considered. In this respect, close attention should be paid to Regulation (EU) No 910/2014 of the European Parliament and of the Council of 23 July 2014 on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93/EC⁸; to Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration and amending Regulations (EU) 2018/1726, (EU) 2018/1862 and (EU) 2019/816⁹; or even to Regulation (EU) 2022/850 of the European Parliament and of the Council of 30 May 2022 on a computerised system for the cross-border electronic exchange of data in the area of judicial cooperation in civil and criminal matters (e-CODEX system), and amending Regulation (EU) 2018/1726¹⁰.

In this regard, attention should be paid to two recent UE legislative initiatives. Firstly, Regulation (EU) 2020/1784 of the European Parliament and of the Council of 25 November 2020 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) (recast)¹¹. An instrument which, as a default system, provides for the communication and exchange of documents between the agencies and bodies designated by the Member States to be carried out through a secure and reliable decentralised IT system -comprising national IT systems that are interconnected

⁸ *OJ L* 257, 28.8.2014.

⁹ *OJ L* 135, 22.5.2019.

¹⁰ *OJ L* 150, 1.6.2022.

¹¹ *OJ L* 405, 2.12.2020.

and technically interoperable-, based on e-CODEX; also accepting direct electronic communication and cooperation between competent public authorities of the Member States.

Secondly, and even more closely related to this objective, the significant Regulation (EU) 2016/1191 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012¹², should be mentioned the first European instrument to deal specifically with the problem of the free movement of authentic acts within the EU. However, it should be highlighted that, from the literal wording of its Art. 2, it can only be concluded its non-application to the circulation of Land Registry (regardless in paper or electronic) documents.

As a consequence, and despite the remarkable legislative efforts conducted by EU institutions, the persistence of the above mentioned legal challenges and problems in relation to the circulation of public electronic documents produced by Land Registries of the Member States still remain. Therefore, if we also consider the above mentioned disparities of national solutions within the EU and the limited solutions present in international Conventions, there is a need to reconsider the current model from the perspective of the EU, so that the European principles of free circulation and mutual recognition is fully guaranteed in the field of Land Registry electronic public documents.

¹²*OJ* L 200, 26.7.2016

III. SOME ELEMENTS OF AN FUTURE EU MODEL FOR THE CROSS-BORDER CIRCULATION OF LAND REGISTRY DIGITAL DOCUMENTS

With the aim to develop an EU legal framework which eliminates current legal obstacles and provide for the free movement and mutual recognition in relation to public digital documents accessing Land Registries, the basis of the EU legal response should be modelled, as well as the main operational elements described.

Respect to the basis and main objectives of the EU model, future legislative efforts should have as an objective the full application and development of Art. 67 of the TFEU. In connection to this, and informed by the principles of mutual trust, technology neutrality and of functional equivalence, EU legislation should aim at pursuing the full development of a Single Digital Market, also affecting the cross-border circulation of public documents which may access Land Registries. As a result, the ultimate objective of the future model, and parallel to what happens to judgements, should be to accept the control of the authenticity and validity of a foreign public document by the competent public authority of the Member State of origin, while respecting local Land Registry regulations and requirements of the Member State of destination.

Moreover, the European system should be inspired by objectives like the cross-border accessibility and transparency of Land Registry information (something which could be achieved through the use of the e-Justice Portal), as well as to facilitate the registration of cross-border public documents (with the help of the e-Codex platform). In relation to such goals, EU institutions should take full advantage of the opportunities offered by Information Technologies, and reducing legal obstacles to the cross-border circulation of public documents, providing also a sound level of protection of personal data and Respect of Fundamental Rights.

Furthermore and in terms of the legislative instrument, it should be advisable that the EU use a Regulation –either modifying an existing one or developing an *ad hoc* instrument- to develop this new legislative framework.

In addition to that, and respect to the digital elements of a future EU model for the cross-border circulation of public documents which may access Land Registries and its possible operation, EU institutions could take advantage of the diverse noteworthy initiatives and treasured experience of the European Land Registry Association (ELRA). Thus, close attention should be paid to ELRA projects and initiatives, such as the development of a European Land Registry Network (ELRN) and the European Land Registry Document (ELRD), as well as the lessons learned for the successive CROBECO and IMOLA (I to III) Projects¹³.

Furthermore, respect to the operation of the model from the perspective of UE institutions, and in order to favour a full guarantee of the free circulation and the mutual recognition for public electronic documents accessing Land Registries, several technical elements of the system could be considered.

a) Land Registers should be fully interconnected and be intraoperative through a decentralised Information Technology EU system. An interconnected platform, which also provide access to foreign authorities from other Member State to the other (thus, following the example of the Service of documents Regulation by using the e-Codex platform).

b) Moreover, the future EU system should also accept direct electronic communication and cooperation between competent public authorities of the Member States, as well as provide online information mechanisms and assistance tools (by using the e-Justice Portal and also with the assistance of the ELRN).

¹³ See: <https://www.elra.eu/>

c) Furthermore, in order to facilitate the transmission of those documents between Member States, multilingual forms with standard digital documents should be enclosed in Annexes (maybe considering the use of the ELRD developed by ELRA). The system should also take into account the development of electronically accessible Manual, Glossary and a common semantic model (following the example of the several IMOLA Project, or even the outcomes of the EU-Adapt Project¹⁴), as well as including Guidelines, FAQs, and examples of Good practices.

¹⁴ See: <https://www.elra.eu/wp-content/uploads/2021/06/EU-ADAPT-Professor-Patrao.pdf>

IV. TO CONCLUDE

At present and in contrast to judgements, EU legislation does not fully guarantee the free circulation of all public documents, making it difficult the free access of digital public documents to Land Registries in the UE –both paper and in a digital format-. Such negative legal environment harms legal certainty and hinders the objectives of the proper functioning of the internal market and the development of an area of civil justice in the Union, as well as the consolidation of a Single Digital Market. As a consequence, the current situation should be reversed and it is the responsibility of the EU institutions to act courageous and take the necessary steps to correct the current situation.

As a consequence, it is advisable to reconsider the current EU model to eliminate the legal obstacles that the current situation generates. In order to do so, EU institutions no need to start from scratch, but may find good models in the current EU legislation in the areas of Civil Justice and internal market. In this regard, they should consider the possibilities which Information Technology offer, but also the solutions already present in the EU acquis affecting for the recognition and enforcement of judgements, the transmission of electronic service of documents or even in the more recent legislation simplifying the requirements for presenting certain public documents. Besides, in order to achieve such goal, EU institutions must pay close attention and take into consideration the rich experience and expertise of ELRA and of the ELRN.