The rationale of publicity in the law of corporeal movables and claims

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5 Meeting the Requirement of Publicity by Registration

The previous two chapters have dealt with three forms of publicity in the law of property: possession (Chapter 3), notification to debtors (Chapter 4), and documental recordation (Chapter 4). Possession is an abstract and thus ambiguous means of publicity for corporeal movables. It cannot completely solve the problem of information asymmetry in a transaction concerning corporeal movables. In some special fields, such as goods warehoused, possession is substituted by securities to goods, a type of document having the legal effect of delivery. In general, securities to goods can provide more reliable and clear proprietary information concerning the goods than possession. Moreover, the reliance of third parties on securities to goods is generally protected by law.

In the transaction of claims, especially receivables, a method of publicity is notification to the debtor. As has been shown in Chapter 4, it is often held that this method creates a chance for third parties to obtain proprietary information concerning the claim. This is why notification is in some jurisdictions treated as a basis of priority in favor of third parties, including subsequent acquirers and general creditors.[1] However, this research contends that notification does not qualify as a means of publicity for claims because it rarely conveys any useful information to third parties. The priority on the basis of the formality of notification lacks a sufficient ground. Moreover, notification is not an outward appearance of claims. General protection is not provided to third parties who act in good faith and might rely on the notification. Unlike notification to debtors, securities can function as a means of publicity for the claim embodied. In Chapter 4, we demonstrated that monetary securities can "tangiblize" the claim of payment, and securities to goods can "tangiblize" the claim of recovery. As a result, these two types of claim obtain an outward appearance, and third parties can safely rely on the information conveyed by securities.

It can be concluded from Chapter 3 and Chapter 4 that property rights of corporeal movables and claims are often in a hidden or semi-hidden state. This *status quo* is distant from the notion that property rights should be transparent to third parties. In the viewpoint of many lawyers, it is desirable to make these (semi-)hidden property rights visible to third parties

1 Dutch law provides an example here, see 4.1.2.3 and 4.1.3.3. In the case of double assignment, the assignee who notifies the debtor earlier has a stronger position under English law, which is discussed in 4.1.3.1.

through registration.[2] Registration, traditionally a method of publicity for immovable property, should be introduced in the law of corporeal movables and claims. It is time to deny possession and notification as a qualified means of publicity. However, there is fierce resistance to this move because registration has various side effects.[3] Moreover, the system of registration constructed for corporeal movables will be different from that for immovable property in many aspects.[4] Nowadays, the debate mainly arises in the field of secured transactions of movables.[5]

On the basis of the preceding discussions, Chapter 5 provides a further and conclusive analysis of the rationale of publicity in the law of corporeal movables and claims. In this Chapter, we first discuss the rationale of publicity from a general perspective (see 5.1). After that, we point out that hidden property rights exist ubiquitously in the law of corporeal movables and claims and argue it is desirable to have a system of registration (see 5.2). Section 5.3 focuses on the question of how to construct a system of registration for corporeal movables and claims. After dealing with this question, we discuss three specific topics: publicity of secured transactions of corporeal movables and claims (see 5.4), publicity of the trust of corporeal movables and claims (see 5.5), and publicity of motor vehicles (see 5.6).

5.1 The Rationale of Publicity

5.1.1 Merits and Disadvantages of Publicity

5.1.1.1 Publicity as a Formality

Patricia Critchley in her article on legal formalities begins with the distinction between "substance" and "form". Formalities are defined as "*a requirement that matters of substance must be put into a particular form (in order to have a specified effect)*".[6] In her opinion, the relationship of a property right is treated as the substance, and publicity can be seen as a formality of this right. If the property right fails to satisfy the formality of publicity, then it will either fail to be validly created in law or will be recognized as partially enforceable. This is illustrated by the distinction between the translative system and the consensual system (see 5.1.4.1). Under the former system

2 Baird and Jackson 1983, p. 200; Bridge, Macdonald, Simmonds and Walsh 1999, p. 567.
3 Baird and Jackson 1984, p. 299; Bridge, Macdonald, Simmonds and Walsh 1999, p. 567.
4 Sigman 2008, p. 156; Von Wilmowsky 1996, p. 160-162. For some special corporeal movables, such as aircraft and vessels, it is possible to construct a land-register-like system.
5 About the arguments for a system of registration, see Struycken 2009, p. 115; Hausmann 1996, p. 427. As to the objections against a system of registration, see Van den Boezem and Goosmann 2010, p. 43; Lwowski 2008, p. 174; Stürner 2008, p. 166.
6 Critchley 1998, p. 508.

contrary to the latter, the formality of publicity is required as a constitutive requirement for the creation and transfer of property rights.[7]

After defining formality, Critchley concludes that formalities have importance for four groups of persons and entities: parties to the transaction, third parties, courts, and states. A formality creates a chance for transacting parties to "*stop and think*", protects them "*against outside pressures, such as influence or duress*", provide them with "*a beneficial protective effect*" where legal professionals have to present, helps them to "*clarify the terms of the transaction*", "*educates the parties as to the precise effects of their transaction*", and serves as a source of "*evidence it secures*".[8] Some types of formalities have a function of publicity for third parties, letting them know about the existence and the terms of a transaction and offering some protection "*when publicity is not forthcoming*".[9] The importance of formalities for courts mainly lies in "*evidence*": judges can use formalities to determine the facts of a transaction in dispute before making a judgement.[10] In the end, Critchley also points out that formalities are useful for the state which, for example, can collect data from the land register for the purpose of taxation.[11] These observations on the advantages and disadvantages of formalities are also demonstrated by Ben McFarlane in his book *The Structure of Property Law*.[12]

The concept of formality is broader than the theme of this research, namely publicity. This concept includes all external requirements concerning how transactions have to be carried out by individuals.[13] The concept also contains, in addition to publicity, the written form of contracts, the attendance of notaries, and so forth. There is no doubt that the statutory requirement of written form is a formality in making contracts, but it is by no means a method of publicity for third parties. The central feature of all methods of publicity is that a transaction must be verifiable or transparent for third parties, so that these parties have a chance to know about the occurrence and the content of transactions (see 2.2.3.2). The written form of contracts cannot make contractual relationships visible to third parties. In this research, we do not address those formalities that are not a means of publicity.

Moreover, the beneficiaries of the formalities mentioned above are broader than what this research focuses on. As just shown, formalities are not only useful for third parties and transacting parties, but also for courts and the state. Undoubtedly, this extensive inspection inspires us to view the principle of publicity in a broader context and guides our attention not only to civil law, but also to civil procedural law and even public administration.

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7 Snijders and Rank-Berenschot 2017, p. 276-278; Sagaert 2008, p. 18.
8 Critchley 1998, p. 513-516.
9 Critchley 1998, p. 516-517.
10 Critchley 1998, p. 517.
11 Critchley 1998, p. 518.
12 McFarlane 2008, p. 101-109.
13 McFarlane 2008, p. 101.

The extensive inspection also reminds us of the fact that the French land register was introduced by Napoleon for the purpose of taxation.[14] However, since this research focuses only on publicity in the area of property law, we do not examine the latter two beneficiaries (courts and states) and discuss only the importance of publicity for transacting parties and third parties.

5.1.1.2 The Merits of Publicity

A The Function of Evidence for Transacting Parties

In general, every method of publicity has an evidentiary function for transacting parties. It can be used to prove whether and in which way a transaction is carried out between the particular transacting parties. However, one method of publicity differs from another in this respect. As has been argued above, notification to debtors does not qualify as a means of publicity (see 4.1.1.2). For this reason, this formality is not included in the following discussion, despite the fact that it is a source of evidence.

Possession can be seen as a clue for the occurrence of a transaction or the enjoyment of a right by the possessor. This is reflected by the rule of presumption: the possessor is presumed to be the owner of the object possessed (§ 1006 (1) BGB and art. 3:119 (1) BW). In essence, the rule of presumption concerns the allocation of the burden of proof, as has been indicated above (see 3.2.1.3.C).[15] It applies when the facts of a dispute are unclear.[16] For example, when the owner of a bicycle is sued by another person who claims that this bicycle belongs to him or her, the owner can take possession as a means of defense. In this case, if the facts concerning ownership of the bicycle are unclear, namely that the opponent fails to provide sufficient contrary evidence, then the judge will presume that the possessor has ownership. In this sense, possession is *prima facie* evidence of ownership, which may be refuted by contrary evidence. All in all, possessors have an advantageous position in disputes concerning ownership of the object possessed.

The function of supplying evidence has diminished in modern times. This is because proprietary legal relationships are often indicated by written documents, such as written contracts, certificates, receipts and the like.[17] In earlier times, it was expedient to prove property rights, and the person who had possession enjoyed a great advantage in judicial proceedings. Nowadays, refuting the legal presumption by the real owner has become much easier by presenting contrary documents.

The function of evidence of securities is obvious. Securities embody rights that are assumed to be validly existent. This is the reason why they are a type of document of evidence (*Beweisurkunde* in German law and

14 Dekker 2005, p. 237.
15 Füller 2006, p. 291; Brehm and Berger 2014, p. 135; Van Schaick 2014, p. 83.
16 Rosenberg, Schwab and Gottwald 2010, p. 644.
17 Bond 1890, p. 278.

schriftelijk bewijsstuk in Dutch law).[18] In general, the holder of securities enjoys a substantial advantage in proving his or her legal position with respect to the embodied right.[19] For example, a holder of a bill of exchange is *prima facie* deemed to be a holder in due course, and it is the person aiming to refute the presumption who has to bear the burden of proof.[20]

Registration is a means of publicity for immovable property. This method of publicity also has a function of preserving evidence. To understand this function, we need to note two aspects. The first aspect is that the contract concerning transactions is preserved by a registry. This excludes the risk that the contract might be forged or destroyed later. From the history of land registers, it can be found that the register is initially constructed for the purpose of preserving written contracts.[21] The second aspect is that registration might be presumed to be correct, which implies that it has a function to distribute the burden of proof (§ 891 BGB).[22] As a result, the opponent has to provide sufficient evidence contrary to the facts registered.

Before turning to the function of publicity for third parties, it should be mentioned that the function of evidence only relates to the issue of allocating the burden of proof in civil proceedings.[23] If there is no dispute, then the effect of presumption will not be invoked. The problem of proof in civil proceedings only arises between two particular parties (i.e. the plaintiff and the defendant), thereby having nothing to do with the collection of proprietary information by third parties. Preservation of evidence is at most a subordinate function of publicity. As McFarlane argues, "*if evidence […] is the key concern, signed writing may be enough; although if there is a pressing need for strong evidence, it may also be sensible to require a witness or two*".[24] Therefore, publicity is not the only method of preserving evidence; there are a number of other methods, such as written deeds, the statements of witnesses, and the presence of legal professionals. These formalities do not have the effect of publicity, but they are important sources of evidence.

B The Function of Publicity for Third Parties

In general, publicity can convey proprietary information to third parties, and their reliance on the information obtained from publicity is often protected. In this way, publicity can address the problem of information

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18 Bridge, Gullifer, McMeel and Worthington 2013, p. 638; Zevenbergen 1951, p. 10; Meyer-Cording 1990, p. 2.

19 Mulder 1948, p. 16.

20 Guest 2016, no. 4-081.

21 Simpson 1986, p. 121; Ellickson and Thorland 1995, p. 386.

22 § 891 BGB: "*(1) Ist im Grundbuch für jemand ein Recht eingetragen, so wird vermutet, dass ihm das Recht zustehe. (2) Ist im Grundbuch ein eingetragenes Recht gelöscht, so wird vermutet, dass das Recht nicht bestehe.*" English translation: § 891 BGB: "*(1) If a right has been entered in the Land Register for a person, it is presumed that the person is entitled to this right. (2) If a right entered in the Land Register is deleted, it is presumed that the right does not exist.*"

23 Brehm and Berger 2014, p. 135.

24 McFarlane 2008, p. 106.

asymmetry and facilitate the security of transactions.[25] If a property right enforceable against third parties is invisible because of the lack of a reliable means of publicity, two undesirable outcomes will ensue.

The first outcome is that third parties have to make use of "informal" methods to collect the proprietary information. Informal methods might be more costly than publicity. Publicity is a "formal" channel through which information concerning property rights is communicated. It is formal because it is provided for by property law (see 2.2.3.2). In principle, to know about the property rights existing on a certain thing, third parties only need to search the method of publicity provided for by property law for this thing. In principle, attention does not have to be given to other resources of information. On the contrary, there are various kinds of informal methods, and proprietary information is often conveyed by informal methods in a dispersed manner. For example, the third party can inquire with relevant parties, especially his or her counterparty, and independent and professional intermediaries may also be able to provide some proprietary information. Inquiry with these parties or intermediaries and collecting information via other information methods are not without costs, though. In many situations, the costs associated with informal methods are higher than those associated with the formal method, publicity.

The second outcome is that the information collected by third parties via costly informal methods might prove to be incorrect or incomplete. Publicity is an objective method of communicating proprietary information. Moreover, this method is presumed to be singular: all proprietary information concerning an object is conveyed through the same method (see 2.2.3.2). As a result, publicity can convey reliable and complete proprietary information. In contrast, informal methods are not as objective as publicity and often unable to provide complete information. This implies a high possibility of conflicts between the actual proprietor and the third party. Conflicts are undesirable. While a conflict implies that one of the competing interests or rights has to be subordinated to the other, and resolving the conflict triggers costs.[26]

Because of these two undesirable outcomes, the smooth circulation of property will be influenced (see 2.2.1.2.C). This is not difficult to understand. Where there is not sufficient proprietary information or where it is too costly to collect sufficient reliable proprietary information, third parties might choose to take no action because of the fear of conflicts. For example, if a person is interested in a bicycle but finds it difficult to ascertain whether the possessor is the actual owner, this person may, for the sake of security, decide not to purchase it. This simple example illustrates how important the possibility of obtaining reliable information cheaply is for the transac-

25 Arruñada 2014, p. 59.

26 In general, the costs triggered by resolving conflicts not only include the resources spent by the litigants ("*private costs*"), such as the fee paid to the lawyer, but also the judicial resources borne by the court ("*public costs*"). See Bayles 1987, p. 22.

tion of property. Smooth circulation is necessary for letting the asset flow to the person who can make the most of it, so that the asset can be utilized to the maximum. Thus, the lack of a reliable means of publicity influences the smooth circulation of property, which will further affect the maximum utilization of property.[27]

In general, an eligible system of publicity can avert two undesirable outcomes by making property rights visible (the principle of publication) and protecting the reliance of third parties (the principle of "public reliance (*öffentliche Glaube*)").[28] Firstly, publicity takes "*preventive justice*" as its fundamental notion: preventing the occurrence of conflicts by providing sufficient proprietary information.[29] Secondly, publicity also serves as a basis of *bona fide* acquisition. The purpose of publicity is not only to make property rights visible but also to protect third parties acting in good faith, so that they can rely on publicity without having to worry that the information conveyed is incorrect or incomplete.[30] In general, a system of publicity which cannot provide *bona fide* protection to third parties is doomed to fail because third parties will not generally use this unreliable system.

However, as we will see later, different methods of publicity differ significantly in their function as publicity (see 5.1.2). For example, possession is an abstract and thus ambiguous means of publicity, and possession is never a sufficient basis for *bona fide* acquisition of corporeal movables, while registration is much more reliable and associated with extensive protection.

5.1.1.3 The Disadvantages of Publicity

Apart from the merits presented above, publicity also has some disadvantages. According to Patricia Critchley, formalities have four downsides: the costs of compliance, the failure of informal transactions, the unfairness or injustice caused, and the detriment to other legal policy aims.[31] Publicity also has these downsides. In the following discussion, we focus on three main disadvantages of publicity: the increase of the cost of transactions,

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27 The rule of *bona fide* acquisition may allow the buyer to obtain the bicycle when the seller is proved to be not the actual owner of the bicycle. In this sense, the rule facilitates the security of transactions. However, the protection granted to the buyer does not necessarily guarantee that the bicycle will be utilized more efficiently. This is because the bicycle might be more valuable for the actual owner than for the buyer. For example, the bicycle may be worth € 1,000 for the actual owner and only € 900 for the buyer. The price agreed by the seller and the buyer is € 800. This price is appealing to the buyer, and this is why the buyer agrees to purchase the bicycle. However, the price is not acceptable for the actual owner. As a result, *bona fide* acquisition by the buyer cannot lead to an economically efficient outcome.

28 The principle of public reliance is also known as the "effect of good faith (*Guteglaubenswirkung*)". See Baur and Stürner 2009, p. 39. This principle requires that the means of publicity should be reliable, so that third parties acting in good faith can safely rely on it.

29 Lurger 2006, p. 50.

30 Füller 2006, p. 247.

31 Critchley 1998, p. 520-527.

the failure to balance the interests of relevant parties, and the restriction on the parties' autonomy. The fourth disadvantage, i.e. the detriment to other legal policy aims, will be passed over since it falls outside the scope of this research.

A Increase in Transaction Costs

Publicity requires certain positive acts, such as handing over the object involved in the situation of corporeal movables, applying for registration in the registry in the situation of immovable property, or delivering and/or endorsing the document in the situation of securities. These acts are not without costs. Therefore, where publicity is involved, it increases the total costs of the transaction.

In general, different methods of publicity are costly to different degrees, as we demonstrate later (see 5.1.2). For example, possession and delivery are a cheap method of publicity for corporeal movables, especially on account of the possibility of fictional delivery (*traditio ficta*), while registration is a more costly means of publicity.

B Failure in Fairness

The requirement of publicity might cause unfairness in some situations. In essence, publicity is a legal formality, forming a contrast to the substance of parties' will. McFarlane expressly asserts that rules concerning formality are "*obstacles – annoying hurdles […] before the parties' intentions*".[32] This is not difficult to understand. Publicity gives rise to technical complexities. It is not easy for all transacting parties to understand the legal consequences of publicity fully and correctly. As a result, the requirement of publicity may frustrate the parties' expectations and even cause some moral difficulties.

For example, a buyer of a bicycle mistakenly believes that mere agreement is sufficient for the acquisition of this bicycle and then pays the purchase price in advance, but the seller becomes bankrupt after the payment. Under the *traditio* rule, the lack of delivery prevents the buyer from acquiring ownership and obtaining a safe legal position against the seller's bankruptcy. The buyer's claim, which is personal in nature, is subject to the principle of equality of creditors (*paritas creditorum*). On the other hand, the money paid by the buyer become a bankruptcy asset under the rule of mingling (*confusio*) and cannot be recovered by the buyer.[33] To address this unfair outcome, some scholars propose a solution: "vindication of monetary value (*Geldwertvindikation*)".[34]

In another situation, a conflict might also arise with our sense of fairness. For example, a buyer reaches an agreement with the seller and pays the purchase price, but the required publicity is not completed. After that, the seller disposes of the same object to another buyer who knows about the

32 McFarlane 2008, p. 100.
33 Zwalve 1996, p. 85.
34 Van Vliet 2000, p. 26-27; Zwalve 1996, p. 91.

first sale, and the requirement of publicity is fulfilled in the second sale. If publicity is necessary for the transfer of the object, the second buyer might prevail, despite the fact that he or she does not act in good faith. To address this unfair outcome, a solution on the basis of tort law might be applied to prevent the second buyer acting in bad faith from acquiring the bicycle. However, we note that the requirements of this tort-law solution are comparatively strict.[35]

The preceding two examples require us to deal with the following question: in order to achieve a fair outcome between the relevant parties, should and how the failure to satisfy the requirement of publicity affect the acquirer's legal position? This question concerns the model of the acquisition of property rights and will be discussed in detail later (see 5.1.4).

C Restriction on Parties' Autonomy

As just mentioned above, publicity, as a kind of formality, forms a regulation of or an obstacle to parties' autonomy. In brief, parties' autonomy means that individuals are entitled to manage their own affairs as they think fit. One aspect of this principle is the "freedom from formalities (*vormvrijheid*)": in principle, parties should be allowed to determine the formality of transactions they carry out.[36] In some situations, the law may require a formality to be satisfied for some reason. As a result, the parties' purpose cannot be realized until this formality is fulfilled. In this sense, the formality forms a restriction on the parties' autonomy.

> "*Formality is something which is added to the basic requirements of the law in relation to a particular transaction. It therefore creates a separate obstacle which must be surmounted if we are to enter the transaction.*"[37]

It is always a question of whether publicity forms a justifiable restriction over the principle of autonomy in private law. For example, registration, as the prominent means of publicity for immovable property, might be treated as a "*public intervention on private contracts*".[38] This reminds us of the reason why French law constructs a consensual system in the field of land transactions: the freedom of parties would be improperly restricted if registration is necessary for the transfer of land ownership.

> "*Any system which subordinated the efficacy of such an agreement to the formality of registration was seen as contrary to the freedom of parties […]. The system of publicity [of land transactions] prevents families from keeping secret their affairs […] this secret has always been regarded as one of the principal aspects of individual freedom.*"[39]

35 Faber 2012, p. 336.
36 Hijma, Van Dam, Valk and Van Schendel 2013, p. 14.
37 Critchley 1998, p. 520.
38 Arruñada 2014, p. 58.
39 Bell, Boynton and Whittaker 2008, p. 281.

In addition to registration, the *traditio* rule is also deemed by some writers as "*unduly restrictive and inconsistent with contractual autonomy*".[40] According to this rule, delivery is necessary for acquiring property rights of corporeal movables. However, modern property law either straightforwardly dispenses with this rule or tempers this rule by recognizing various forms of fictional delivery. Consequently, parties are able to conduct proprietary transactions without affecting the state of actual control of the subject matter. In essence, as we have pointed out above, it is parties' autonomy that is treated as the starting point for the transfer of corporeal movables, whether under the translative system or the consensual system (see 3.4.2.4).

5.1.1.4 Conclusion

As a type of formality, publicity has its merits and downsides. It has a function of evidence for the transacting parties and a function of publicity for third parties. An eligible means of publicity not only allows third parties to obtain proprietary information, but also lays a basis of *bona fide* protection. On the other hand, publicity has several disadvantages. It gives rise to extra costs, might cause an unfair outcome between relevant parties, and forms a restriction on parties' autonomy. For this reason, it is necessary to determine the legal consequences of publicity carefully.

5.1.2 Comparison of Different Methods of Publicity

After examining the merits and downsides of publicity from a general perspective, we further compare different methods of publicity here. The main purpose of the comparison is to show the advantages and disadvantages of each method of publicity in the communication of proprietary information. The methods compared include possession, documental recordation, and registration. In general, the comparison is conducted on the basis of four aspects: clarity, comprehensiveness, conclusiveness, and operational costs.

5.1.2.1 Clarity

The aspect of clarity concerns whether and to what extent a method of publicity can show the content of proprietary relationships and convey proprietary information to third parties clearly. In general, registration is able to show the content of property rights registered clearly, and searchers can understand the information entered in the register easily. This method of publicity carries proprietary information in the form of words. In general, as a tool to communicate information, words are clear. Although words are

40 Parish 2009, p. 11.

necessarily vague,[41] there will usually be a need to interpret the information from the register.[42] However, the vagueness is limited and should not be exaggerated. In many situations, information can be communicated via words clearly, especially when the context in which the words are used is fixed. In this aspect, registration differs from possession.

Possession is merely an abstract and thus ambiguous method of publicity: possession cannot show the legal identity of the possessor accurately (see 3.2.1.2).[43] Possession can be acquired on the basis of different legal relationships, such as ownership, pledge, lease, and borrowing. However, it only makes these underlying relationships visible through physical proximity between the possessor and the object possessed. As a result, the details of the legal relationship cannot be presented by possession clearly. This is why possession is a weaker "indicator" than registration.[44]

It should be noted here that one type of registration might differ from another type in respect of clarity. For example, the notice-filing system constructed for secured transactions of movables simply conveys a "warning" of the existence of security interests, and third parties have to conduct further inquiries to know about the details (see 3.2.1.4). The system provides only "minimum information".[45] In contrast, the land register provides much more detailed proprietary information concerning immovable property.[46] Usually, the information collected from the land register is adequate for a person to make a decision with respect to the land.

Documental recordation, especially in the situation of order securities, resembles registration in the aspect of clarity. As a method of publicity, securities can also convey proprietary information concerning the right embodied in the form of words. The relationship of the right embodied is defined by the document visibly. The holder's identity, the sum payable or the goods involved, the due date, and even the encumbrance of a pledge can be known after glancing at the document, provided that the document is made to order. Compared with order securities, bearer securities convey information less clearly. Bearer securities are closely connected to possession of the document. The ambiguity of possession, as a means of publicity, determines that bearer securities are also ambiguous to some extent. For example, the holder's identity cannot be indicated by bearer securities, and the proprietary encumbrance over the right embodied cannot be known by glancing at the document.

41 Keefe 2000, p. 6.
42 Veenstra 2009, p. 47.
43 Lipson 2005, p. 433.
44 Lurger 2006, p. 47.
45 Van Erp 2004, p. 97.
46 Sigman 2010, p. 508.

5.1.2.2 Comprehensiveness

Comprehensiveness refers to the sphere to which a method of publicity can be applied. Registration is comprehensive. In principle, all details of every right can be presented in the form of words and recorded by the register. However, whether and how a right will be registered is contingent on legal policy in practice, being a question of "registerability". In general, for the purpose of simplicity and smooth operation of the register, law restricts the information that can be stored in the system. Otherwise, the register would be disorderly, which would cause a problem of overload and impose a heavy burden of searching on third parties.[47] In this sense, it is argued that the principle of *numerus clausus* of property rights facilitates the smooth operation of the system of registration.[48] The principle restricts the type and content of property rights and thus excludes personal rights from the register. However, it should be noted that, as an exception, some personal rights might be allowed to be entered in the system.[49]

Possession is also a comprehensive method of publicity. It can exist in different situations: (1) property rights and personal rights; and (2) consensual relationships and statutory relationships. In principle, where factual control of the object is involved, there might be possession. However, we note that only direct possession has the effect of publicity, and indirect possession does not qualify as a means of publicity (see 3.2.2). As a result, possession can only show a single legal relationship. If actual control is given up by the lessor to the lessee, making the lessee's right to use visible, then the lessor's right of ownership is doomed to be invisible. Registration is different in this respect: this means of publicity is able to publicize two or more property rights concurrently.[50] For example, where a parcel of land is encumbered with a property right of usufruct, both the usufructuary and the owner can be seen from the register.

In terms of publicity, securities are primarily used to show the ownership of the goods concerned or the claim embodied. Usually, the person who holds the document enjoys the right embodied or the goods concerned. However, there are exceptions. For example, where a bearer document is pledged, the pledgee holds the document but enjoys a right of pledge only. Different from bearer securities, order securities can indicate the existence of the encumbrance by recording a mark of pledge on the surface of the document. As a result, both the pledgor and the pledgee can be shown by the order document. In theory, it can be said that securities can record as much information as the parties desire. However, there is a problem of "recordability": the information which can be recorded by securities, even

47 Smith 2003, p. 1167-1173.
48 Smith 2003, p. 1172.
49 Brehm and Berger 2014, p. 224; Snijders and Rank-Berenschot 2017, p. 84-85.
50 Arruñada 2014, p. 215.

securities made to order, is limited by law. For example, the clause of reservation of ownership cannot be recorded on warehouse receipts, a form of security to goods.

Moreover, securities are only used in special situations, usually commercial transactions, and there is a principle of *numerus clausus* of securities in some jurisdictions.[51] For example, securities to goods are mainly used in the situation of the goods warehoused or transported. It seems impossible to have a document for all types of corporeal movables.

5.1.2.3 Conclusiveness

The term conclusiveness involves whether and to what degree a method of publicity is reliable. It amounts to reliability. A conclusive system of publicity implies that third parties do not have to pay attention to the other resources of information.[52] If third parties can rely on the information conveyed by a method of publicity, it can be said that this method is reliable or has public reliance.[53] Conclusiveness is an important attribute of publicity. It assures third parties that the information conveyed is reliable and their reliance on publicity will be protected.

In general, registers can be a conclusive source of proprietary information, and transactions made on the basis of the information entered in the register will be protected. If the registration is proven to be incorrect or incomplete later, the protection usually means that the actual proprietor's legal position will be subordinated. The degree of conclusiveness of a register is, in essence, a matter concerning legal policy and affected by multiple factors. The reliability of a system of publicity might vary from one jurisdiction to another. For example, there is a continuum from the positive system to the negative system of registration in land law, and the reliance of third parties is protected to different degrees in different jurisdictions.[54]

Possession is not a conclusive source of proprietary information in the situation of corporeal movables. A third party acting in good faith cannot be protected merely because of his reliance on possession. In principle, the third party has to pay reasonable attention to and use reasonable efforts to investigate the authority of disposal. As a result, gross negligence is often an obstacle to *bona fide* acquisition of corporeal movables. Moreover, where possession is commonly separated from the right of ownership, the claim of *bona fide* acquisition of corporeal movables will usually be rejected by

51 Benjamin 2014, p. 1395; Hueck and Canaris 1986, p. 25; Zwitser 2006, p. 83-84. Under Dutch law, securities are not subject to the principle of *numerus clausus*. See Zwitser 2006, p. 9-10.

52 The Law Commission 2001, p. 18.

53 Raff 1999, p. 427.

54 Here an example is that the German *Grundbuch* is a positive system, the French *publicité foncière* is negative, while the Dutch *Openbare Registers* are somewhere in between, being semi-positive. See Snijders and Rank-Berenschot 2017, p. 82-83.

courts.[55] In this situation, the third party is expected to be suspicious of the possessor's authority of disposal. In other words, the third party cannot just rely on the possessor's factual control. Instead, a third party needs to use other means to investigate the possessor's authority to dispose. In general, the unreliability or limited reliability of possession can be accounted for by the fact that possession is an ambiguous means of publicity for corporeal movables.

In principle, securities, especially securities of payment, is a conclusive and reliable source of information. The reliance of third parties on the documental recordation will be protected. The legal relationship indicated by securities cannot be denied or modified against third parties because of facts outside of the document. However, the strength of protection varies slightly between different jurisdictions (see 4.2.3.4.B). Generally speaking, extensive protection of third parties is necessary because smooth negotiations are the main function of securities.

5.1.2.4 Operational Costs

Operational costs refer to the resources that must be invested or consumed during the operation of a system of publicity. In general, possession is a very cheap method of publicity (see 3.2.1.2.A). The physical proximity between the possessor and the object possessed can be processed by third parties quickly. The function of publicity of possession is rooted in human nature and our daily customs. The abstract indication from possession can be immediately obtained by third parties once they observe the physical proximity. Moreover, delivery is cheap, especially because of the possibility of fictional delivery. For example, delivery can be realized through consent (such as *traditio per constitutum possessorium* and *traditio brevi manu*), assignment of the claim of recovery (such as *traditio longa manu* under § 931 BGB), notification to or acknowledgment by a third party (such as *traditio longa manu* under art. 3:115 (c) BW), and delivery of the document representing the goods (such as bills of lading). Unlike ancient Germanic law which confined delivery to be actual in the field of corporeal movables, modern private law recognizes various forms of fictional delivery. As we have pointed out above, modern private law has removed the obstacle of delivery to the transaction of corporeal movables (see 3.4.2.4).[56]

Compared with possession, registration is a more expensive method of publicity (see 3.2.1.2.A). The expense of registration results from several aspects, such as constructing and maintaining the system, recording new transactions in the system, and updating and when necessary rectifying the system. The high costs determine that, from the perspective of efficiency, registration should not be treated as a master key to the problem

55 Kieninger 2007, p. 653; Snijders and Rank-Berenschot 2017, p. 416-417.
56 Parish 2009, p. 12.

of information asymmetry in every situation. Before introducing a system of registration, it is necessary to weigh carefully the benefits this system will create and the costs it will bring. This is the theme of the subsequent discussion (see 5.3).

Compared with registration, documental recordation is also a cheaper method of publicity. For example, valid issuance only requires making a document and delivering this document to the creditor, and transfer of the document simply requires delivery of the document and, if necessary, endorsement. For transacting parties, the main burden is that the document must be issued and transferred in the way strictly stipulated by law. If one of the statutory requirements is not satisfied, the disposal might be unsuccessful. Moreover, securities have a risk of safety, and preserving the document is not without costs (see 4.2.2.5.C). Nevertheless, it can be generally said that securities are a relatively cheap means of publicity.

5.1.3 Publicity and Third Parties

Property rights should be made visible to third parties. This is known as the principle of publicity. However, this description of the principle is quite vague. It neither indicates which method of publicity is important for third parties and in what sense, nor does it clarify what information is desired by each type of third parties. In this part, we examine the importance of different methods of publicity for different categories of third parties: strange interferers, subsequent acquirers, and general creditors. To understand this, it is necessary to bear in mind the demand for proprietary information by the three types of third parties, as has been described above (see 2.2.2.2).

5.1.3.1 Publicity and Strange Interferers

As has been shown (see 2.1.3.2.A), strange interferers are a special type of third parties: they only need to know the boundaries between their free activities and the domain of others' property rights. Before knowing about the boundaries, a person cannot navigate his behavior without interfering with others' property. However, to avoid conducting illegal interference, it is unnecessary for strange interferers to know about the details of the proprietary legal relationships.

In general, possession is a navigating system for strange interferers and can satisfy their demand for knowing about the boundaries (see 3.3.2.2). Though an abstract and thus ambiguous method of publicity, possession can indicate the boundaries of corporeal things. In daily life, people can easily adjust their behaviors according to the abstract indication conveyed by possession. This, in turn, explains why the possessor's right should not be interfered with illegally. In this world crowded with tangible things, people are able to live in harmony with each other by relying on possession, forming the order of possession.

In principle, the problem of boundaries does not arise with respect to claims. The main reason is that claims are relative, and it is difficult for third parties to interfere with claims. The nature of relativity also explains why personal claims are allowed to be invisible. It also explains why the failure of notification to perform a publicity function does not cause a problem to strange interferers (see 4.1.2). Some scholars hold that every patrimonial right is "absolute" and claims are also enforceable against every person.[57] Truly, tort law protection is available to claims, and in this sense we can say that claims are also "absolute". However, this does not alter the fact that illegal infringement of claims only arises in rare cases, and the starting point is that claims are not generally protected under tort law.[58] This general denial of tort law protection can find its doctrinal justification from the notion that personal rights are a legal relationship between particular parties, i.e. the creditor and the debtor.

5.1.3.2 Publicity and General Creditors

In general, publicity is of limited value for general creditors who are mainly concerned about the debtor's overall financial health (see 2.2.2.2.C). This type of third party knows that the unsecured claim will not be realized in full if the debtor is declared bankrupt. Nevertheless, general creditors do not request the debtor to provide proprietary security, mainly because they believe that the debtor is able to pay and can offset the risk of underpayment through other means, such as increasing the loan rate or the selling price.[59] In addition, involuntary creditors, such as tort victims, are unable to require the debtor to provide proprietary security before the occurrence of the obligation.[60]

Even though there is a system of publicity for property rights, general creditors cannot know from the system whether the debtor will become bankrupt or to what extent their unsecured claim will be realized for at least two reasons. One reason is that the debtor's unencumbered assets are always in fluctuation, and the information general creditors obtain from the system of publicity will become outdated after a short period of time. The other reason is that the total amount of debts borne by the debtor cannot be shown by the system of publicity. In practice, general creditors usually evaluate the risk of underpayment on the basis of other factors, especially the debtor's reputation and (semi-)annual financial reports.[61]

Possession is not able to show which corporeal movables can be distributed among general creditors in the event of the debtor's bankruptcy. This is because some corporeal movables possessed by the bankrupt debtor do

57 Rank-Berenschot 1992, p. 328-329; Honoré 1960, p. 459.
58 Reehuis 2015, p. 358; Wolf and Neuner 2012, p. 227.
59 LoPucki 1994, p. 1941.
60 Bebchuk and Fried 1996, p. 882-891.
61 Sigman 2008, p. 151.

not belong to him or her, while corporeal movables not possessed by the debtor might belong to him or her (see 3.5.2).[62] Notification to debtors can neither indicate how many claims the debtor enjoys, nor does this formality indicates the total amount of encumbrances over the debtor's claims. The reason is simple: notification does not qualify as a means of publicity (see 4.1.1.2) and has very limited value to general creditors (see 4.1.5). For the same reasons, securities to goods and securities of payment do not provide useful information concerning the claim embodied to general creditors (see 4.2.2.6.B and 4.2.3.6).

5.1.3.3 Publicity and Subsequent Acquirers

It has been shown that possession, a means of publicity for corporeal movables, is important for strange interferers, and publicity is of little value for general creditors. However, this does not lead to the disappointing conclusion that publicity is dispensable in property law, because publicity is significantly important for subsequent acquirers, such as transferees, proprietary users, and secured creditors. These subsequent acquirers take publicity as an important source of proprietary information (see 2.2.2.2.B). In practice, most disputes about the third-party effect of property rights concern whether subsequent acquirers should be bound by a proprietary legal relationship that came into existence earlier.

Possession is highly relevant to subsequent acquisitions, such as the transfer and pledge of corporeal movables. Firstly, delivery is necessary for disposing of corporeal movables under the *traditio* rule. Secondly, possession is indispensable for *bona fide* acquisition by subsequent acquirers. However, this does not mean that possession qualifies as an outward appearance of ownership. This is because possession is an abstract and thus ambiguous means of publicity. This means of publicity cannot indicate the specific right the possessor has. Moreover, possession is not sufficient for *bona fide* acquisition, and even the indispensability of possession for *bona fide* acquisition of corporeal movables is mainly an outcome of legal policy (see 3.4.3.4.C). Therefore, publicity is important for subsequent acquirers of corporeal movables, but possession cannot satisfy the demand for proprietary information by this type of third party.

As has been argued above, notification to debtors does not qualify as a method of publicity for claims, and this is why *bona fide* acquisition of claims is in general impossible. Some scholars hold that notification implies a kind of factual control over the claim in question.[63] However, this formality can never make claims or the disposal of claims visible to subsequent acquirers. Moreover, it is not an appropriate method of publicity, especially in the situation of assigning or pledging a large number of claims (see

62 Lipson 2005, p. 431-432.
63 Fesevur 2005, p. 109.

4.1.1.2). Therefore, publicity is important for subsequent acquirers of claims, but notification cannot satisfy the demand for proprietary information by this type of third party.

Securities are different from notification to debtors. The former, especially securities made payable to order, is a means of publicity that can indicate the claim embodied, allowing subsequent acquirers to know about the proprietary legal relationships existing on the claim. In general, securities are important for subsequent acquirers in the following aspect: *bona fide* acquisition of the claim embodied. For subsequent acquirers, securities are a generally reliable means of publicity (see 4.2.2.5 and 4.2.3.5).

5.1.4 Publicity and the Model of Acquisition

The model of acquisition is linked with publicity in two aspects: (1) whether publicity is a condition for valid acquisition of property rights; and (2) whether publicity should be treated as an argument for the abstraction principle. According to this principle, any defect in the underlying contract does not affect the acquisition of property rights. In this section, we discuss the relationship between publicity and the model of acquiring property rights.

5.1.4.1 Publicity and the Consensual/Translative System

In this section, we examine the question of whether publicity should be a necessary condition for the acquisition of property rights. There is a distinction made here between the consensual system and the translative system. In some jurisdictions, such as German law and Dutch law, alteration of property rights must take publicity as a condition (the translative system).[64] In contrast, publicity has legal effect against third parties acting in good faith under English law (the consensual system).[65]

For the purpose of convenience, we use a hypothetical case involving four different parties (Figure 13). A *seller* intends to transfer ownership of an object to the *buyer*, but the requirement of publicity is not fulfilled yet. Before the fulfillment, a strange *interferer* illegally damages the object, and the seller becomes bankrupt. There is a *general creditor*. Moreover, the seller transfers the same object to another person, a *subsequent acquirer*. Here we examine, from the angle of publicity, the relationship between the first buyer with these three third parties: the acquirer (the second buyer), the strange interferer, and the general creditor. Before this, we first examine the legal relationship between the seller and the first buyer.

64 Wieling 2006, p. 40-41; Snijders and Rank-Berenschot 2017, p. 62.
65 Sagaert 2009, p. 10.

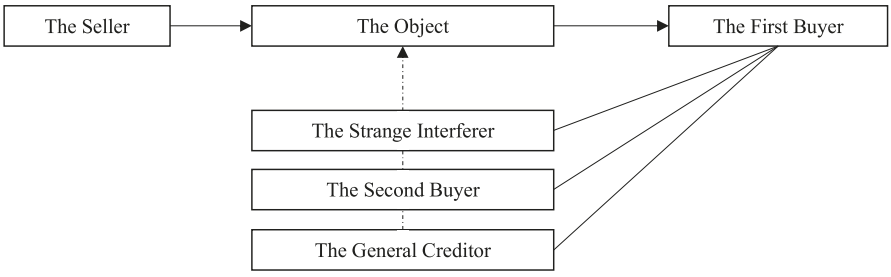

Figure 13

A The Transacting Parties

In the preceding case, the seller has validly reached an agreement of transfer with the first buyer. If the parties have an intention to transfer ownership, then there seems to be no reason to deny the first buyer's acquisition of the object, despite the lack of publicity. In general, the consensual principle is better in line with the rationale of publicity. In other words, publicity should not affect the acquisition of ownership *inter partes*. Of course, if the parties have no intention to transfer ownership, there is no reason that acquisition can take place.

In general, the principal value of publicity is making property rights visible to third parties, in particular subsequent acquirers. The two transacting parties (the seller and the first buyer) in the hypothetical case have known about the transfer of ownership, which means that there is no information asymmetry concerning ownership (see 2.2.2.1). For this reason, publicity is not relevant to the transfer between the two parties.

Private law enshrines the principle of parties' autonomy. Individual parties should be left to arrange their own affairs. Of course, a precondition of parties' autonomy is that no adverse effect is imposed on others, including third parties. Just as Mill argued in *On Liberty*, "*the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others*".[66] For the legal relationship of transfer *inter partes*, there is no sufficient reason to set up a barrier of publicity. This is why individual parties are allowed to decide the time of the transfer of ownership of corporeal movables (see 3.4.2.4).

In 5.1.1, we have demonstrated that publicity is a formality that has merits and downsides. In balancing these two aspects, the principle of proportionality should be observed: the imposition of a requirement of a formality is only justifiable when this formality is really necessary, suitable

66 Mill 1859, p. 26.

and reasonable.[67] For the acquisition *inter partes*, the requirement of publicity seems unnecessary and violates the principle of proportionality.

In examining publicity under the principle of proportionality, it is necessary to note that publicity is not of no value. Firstly, publicity has a function of preserving evidence for the transacting parties and making them more prudent with respect to the transaction. Nevertheless, these two functions are insufficient for treating publicity as a condition of acquisition. Other types of formality, such as the written contract, also have these two functions.[68] Moreover, possession, as a method of publicity, is not as effective as written contracts in preserving evidence. Possession is abstract and ambiguous, and delivery can occur for different reasons. Therefore, the two functions of publicity are not sufficient for treating it as a condition of acquisition *inter partes* without violating the principle of proportionality.

Secondly, publicity is, to varying degrees and in different senses, important for third parties. For this reason, publicity is often treated as constitutive for the acquisition of property rights. Implicitly, in the view of third parties, the value of publicity for third parties allows it to not violate the principle of proportionality. In the following discussion, we examine the value of publicity for third parties.

B The Strange Interferer

In general, allowing the buyer to acquire ownership independently from publicity does not give rise to any injustice to the strange interferer. For the tortfeasor who illegally interferes with the object, it is irrelevant whether the object is owned by the seller or the first buyer. The interferer is always able to navigate its acts on the basis of possession. For the interferer, it suffices that it knows that the object should not be interfered with because it is owned by others and not a *res nullius*. The failure to publicize the transfer should not be treated as a reason to restrict the first buyer's right to sue the interferer.

Therefore, the legal position of strange interferers does not have to be taken into consideration in answering the question of whether publicity should be treated as a prerequisite of acquisition of ownership. Even though the new owner is unknown to the interferer, the new owner should still be

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67 The "principle of proportionality (*Verhältnismäßigkeitsprinzip*)" existed in public law only, serving as a scheme to restrict the power of administrative authorities. It includes three sub-principles, namely the principle of "necessity (*Erfordlichkeit*)", the principle of "suitability (*Geeignetheit*)", and the principle of balance (*Angemessenheit*)". The third sub-principle is also known as the principle of proportionality in strict sense. Nowadays, the principle has crept into the area of private law in the context of constitutionalization of private law. It has taken on a constitutional law feature. According to the principle, both the legislature and court have to abide by the three sub-principles in the event of restricting the right and freedom of individuals. The principle now forms a fence against the legislative and judicial power. See Medicus 1992, p. 35-70.

68 McFarlane 2008, p. 106.

entitled to protect its ownership from any illegal interference. In English law, a buyer, after acquiring ownership of the goods in the absence of delivery, begins to have "*an immediate right to possession*" on the basis of which this buyer is entitled to sue interferers.[69]

C The General Creditor

The requirement of publicity can also not be explained by the legal position of general creditors. As has been argued above, general creditors do not rely on publicity to decide whether they will enter into a transaction without requiring any proprietary security (see 2.2.2.2.C). Truly, publicity might be able to address the problem of fraudulent antedating, which is beneficial to general creditors in the event of the debtor's bankruptcy.[70] However, this does not mean that general creditors have any reliance on publicity: general creditors rarely pay attention to publicity because the proprietary information obtained will become outdated within a period of time (see 2.2.2.2.C).[71]

In the hypothetical case introduced above (Figure 13), the general creditor will benefit from the treatment of publicity as a condition of the transfer of ownership: the object can be distributed to this general creditor. This is at odds with the fact that he has no reliance on publicity. Moreover, the benefit he obtains is at the sacrifice of the first buyer's interests. In contrast, under the consensual principle, the first buyer can acquire the object in the absence of publicity. This outcome causes no injustice to the general creditor. The general creditor does not suffer any unfair loss because the first buyer has to pay the purchase price to the insolvency administrator.[72] In other words, the first buyer's failure to acquire the object because of publicity implies that the general creditor will obtain double benefits (i.e. the sum paid by the first buyer and the object), which is obviously unfair.[73]

D The Subsequent Acquirer

Now let us turn to the value of publicity for subsequent acquirers. In the preceding hypothetical case, there is a conflict between the two buyers. This conflict can be regulated in two different ways: (1) the translative system; and (2) the consensual system plus the rule of *bona fide* acquisition. In the following discussion, we argue that the latter is more in line with the rationale of publicity.

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69 Bridge, Gullifer, McMeel and Worthington 2013, p. 266; Winfield and Jolowicz 2010, p. 823.

70 Possession, an abstract means of publicity, notification to debtors (see 4.1.1.2.C) and securities (see 4.2.2.6.B and 4.2.3.6) cannot address this problem.

71 Von Wilmowsky 1996, p. 162; Hamwijk 2011, p. 619.

72 Even if the purchase price has not been paid, the general creditor will not suffer any loss unfairly. This because the insolvency administrator is entitled to cancel the contract and refuse delivery of the object. Therefore, different parties cannot be treated fairly only according to publicity in the event of the debtor's bankruptcy.

73 Wood 2019, no. 9-008.

Under the first approach, publicity is a prerequisite of acquisition, and the first buyer cannot acquire the object until the condition of publicity is fulfilled. This leads to two important consequences for the second buyer. The first consequence is that the seller still has the authority of disposal, which implies that the second buyer can acquire the object. The second consequence is that the time when the two buyers fulfill the requirement of publicity is decisive. As a result, if the second buyer completes publicity earlier, he can acquire the object, even though he does not act in good faith.[74]

Under the second approach, the second buyer has an opportunity to acquire the object at the cost of the first buyer's ownership only when he acts in good faith. In general, the rule of *bona fide* acquisition is justifiable in determining which of the two buyers will prevail. This is because publicity is important for subsequent acquirers. If the first buyer does not complete publicity, making his ownership visible to third parties, then he has to bear the risk of losing the right of ownership to a subsequent acquirer. Under the consensual system plus the rule of *bona fide* acquisition, the parties' autonomy is well balanced with the protection of subsequent acquirers acting in good faith. The function of publicity, namely providing reliable information to third parties, is implemented by the rule.

From the introduction above, we find that there is a crucial difference between the two approaches. Under the translative system, the second buyer bears no duty of investigation, and good faith is not relevant. In contrast, under the rule of *bona fide* acquisition, the second buyer has to investigate the transferor's authority of disposal, and good faith is an indispensable condition. Therefore, the translative system grants stronger protection to the second buyer than the rule of *bona fide* acquisition. However, this stronger protection is open to doubt.

Firstly, why can the second buyer enjoy this protection even when he does not act in good faith? If the second buyer has known that the seller no longer has ownership, and the first buyer is the true owner, then he is expected to give up the transaction. In this situation, the problem of information asymmetry, that publicity seeks to address, does not exist. The second buyer knows about the first transaction. It cannot be said that the second buyer has any reliance on publicity that deserves preferential protection.

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74 If both buyers fail to accomplish publicity, each of them enjoys a personal claim against the seller. The two claims are equal, as a result of the principle of equality of personal rights. However, exception might be recognized by law. For example, according to art. 3:298 BW, the first buyer is entitled to acquisition in priority to the second buyer under certain conditions. Art. 3:298 BW: "*Vervolgen twee of meer schuldeisers ten aanzien van één goed met elkaar botsende rechten op levering, dan gaat in hun onderlinge verhouding het oudste recht op levering voor, tenzij uit de wet, uit de aard van hun rechten, of uit de eisen van redelijkheid en billijkheid anders voortvloeit.*" English translation: Art. 3:298 BW: "*Where two or more creditors enjoy conflicting claims for the delivery of the same thing, the oldest claim has priority in their mutual relation, unless the law, the nature of their claims, or the requirement of reasonableness and fairness requires otherwise.*"

There is no sufficient reason to sacrifice the first buyer's ownership. If the object is fungible, the second buyer can choose another thing of the same kind. If the object is not fungible, the second buyer can negotiate with the first buyer, trying to obtain the object from the true owner.[75]

Secondly, the target of easing the burden of investigation of the second buyer can also be realized by adjusting the criterion of good faith. In general, the requirement of good faith implies a burden of investigation to the second buyer. This might affect the smooth operation of transactions. However, if it is really desirable to reduce the burden of investigation, then we can lower the standard of good faith, for example, by recognizing that the second buyer acts in good faith unless he has acted with gross negligence.[76]

In sum, the translative system goes too far in protecting subsequent acquirers.[77] The drafters of the DCFR realize this.[78] As a result, even though the DCFR accepts the *traditio* rule as the default rule in the transfer of corporeal movables,[79] it rejects the acquisition by subsequent acquirers not acting in good faith in the situation of multiple transfers.

> Art. VIII.-2:301 DCFR: "(1) *Where there are several purported transfers of the same goods by the transferor, ownership is acquired by the transferee who first fulfils all the requirements of Section 1 and, in the case of a later transferee, who neither knew nor could reasonably be expected to know of the earlier entitlement of the other transferee.* (2) *A later transferee who first fulfils all the requirements of Section 1 but is not in good faith in the sense of paragraph (1) must restore the goods to the transferor. The transferor's entitlement to recovery of the goods from that transferee may also be exercised by the first transferee.*"

According to this provision, if the later transferee obtains possession earlier but acts in bad faith, he or she cannot acquire ownership in priority to the earlier transferee.[80] Therefore, this model rule diverges from the translative system (the *traditio* rule), the starting point of the transfer of corporeal movables in the DCFR, by treating the element of good faith as relevant to the regulation of double transfers.[81]

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75 Carlson 1986, p. 223.

76 Füller 2006, p. 128.

77 It is possible that the second buyer acting in bad faith bears an obligation of compensation to the first buyer under tort law or the law of unjust enrichment. However, this obligation law solution is a "detour" in relation to the property law solution, namely disallowing the second buyer to obtain ownership by including the requirement of good faith. See DCFR 2009, p. 4117; Acquisition and Loss of Ownership of Goods 2011, p. 793.

78 DCFR 2009, p. 4117.

79 Art. VIII.-2:101 (1) DCFR: "*The transfer of ownership of goods under this Chapter requires that: […] (e) there is an agreement as to the time ownership is to pass and the conditions of this agreement are met, or, in the absence of such agreement, delivery or an equivalent to delivery.*"

80 The PEL follows the same approach. See Acquisition and Loss of Ownership of Goods 2011, p. 793.

81 DCFR 2009, p. 4115; Acquisition and Loss of Ownership of Goods 2011, p. 793.

E Conclusion: Publicity, Declaratory Effect, and Public Reliance

The preceding discussion indicates that to reconcile parties' autonomy and the protection of third parties, the formality of publicity should only yield declaratory effect, the legal effect against third parties acting in good faith. In general, the reasons can be summarized as follows.

Firstly, the declaratory effect is more in line with the rationale of publicity. Publicity is to address the problem of information asymmetry. However, this problem does not exist between the transacting parties, thus publicity should not be treated as relevant to the acquisition *inter partes*. Publicity is only important for third parties. In the absence of publicity, the alteration of property rights between the transacting parties cannot bind third parties (specifically speaking, subsequent acquirers only). If a third party has known the alteration, acting in bad faith, this party deserves no preferential protection. This is because the problem of information asymmetry does not exist to the third party acting in bad faith.

Secondly, the declaratory effect is required by the principle of proportionality. For strange interferers, who has ownership is not important. Publicity is of little importance for general creditors who are mainly concerned about the debtor's overall financial health. Therefore, failing to complete publicity should not be treated as a sufficient reason to restrict the acquirer's right against these two types of third party. If acquisition of property rights is denied because of the absence of publicity under the translative system, the acquirer cannot sue the interferer, nor can he or she reclaim the object from the transferor's bankruptcy assets. The basic function of publicity is to guarantee that property rights are visible to third parties. However, the transacting parties are not third parties, third parties acting in bad faith have known about the property right, and both strange interferers and general creditors do not have interest in the publicity of property rights. Therefore, the consequence of publicity should be confined to the legal effect against third parties acting in good faith. Under this restrictive approach, it can be said that publicity is proportional to the purpose it serves.

Thirdly, the constitutive effect of publicity or the translative system causes a problem of unfairness, which has to be addressed by other measures. For example, some jurisdictions provide for an obligation law solution: the first buyer is entitled to recover the object or obtain compensation from the second buyer acting in bad faith, provided that certain conditions are fulfilled.[82] To some extent, this obligation law solution addresses the problem of unfairness. Nevertheless, the first buyer still suffers the risk that the second buyer becomes bankrupt.[83] Moreover, "*solving the conflicts within*

82 Lurger 2012, p. 54; Faber 2012, p. 336.

83 DCFR 2009, p. 4119; Acquisition and Loss of Ownership of Goods 2011, p. 793.

property law itself may, as such, be considered advantageous as compared to making a 'detour' to the rules on noncontractual liability for damage", as pointed out by the DCFR.[84]

In sum, publicity has its merits as well as detriments. Law should carefully make a balance and confine the legal effect of publicity when necessary. If an acquirer fails to complete publicity, then he should bear the corresponding risk, namely the possibility of *bona fide* acquisition by a subsequent acquirer acting in good faith. In general, this is in line with the "principle of ascription (*toedoenbeginsel* or *Veranlassungsprinzip*)": where an acquirer tolerates the divergence between the actual state of property rights and the outward appearance, he has to bear the associated risk.[85] However, failure to complete publicity does not prevent the property right acquired from being effective against other types of third parties. By defining the legal effect of publicity in this way we can say that the restriction on parties' autonomy is necessary and reasonable.

5.1.4.2 Publicity and the Causation/Abstraction Principle

Publicity is also relevant in the situation where the underlying contract of a proprietary transaction is defective. For this situation, there is a distinction between the causation principle and the abstraction principle. Under the causation principle, a defect in the underlying legal relationship will affect the acquisition of property rights. In contrast, the abstraction principle means that the acquisition of property rights is independent of the underlying relationship, thus any defect of the relationship does not affect the acquisition *per se*. In the literature, it is often held that the abstraction principle makes the system of publicity, such as the land register, more reliable than the causation principle.

> "*Der Unterschied zwischen dem Kausal- und dem Abstraktionsprinzip beschränkt sich auf die in Betracht kommende Rechtsgrundlage. Zweifelsohne wird unter der Geltung des Abstraktionsprinzips das Grundbuch in mehr Fallen formal richtig sein, als bei einem Kausalprinzip.*"[86]

The excerpt above concerns the law of immovable property, and similar viewpoints can also be found in the law of corporeal movables: the abstraction principle allows property rights of corporeal movables to be held by the possessor even in the situation where the underlying contract is defective.

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84 DCFR 2009, p. 4117; Acquisition and Loss of Ownership of Goods 2011, p. 793.

85 Nieskens-Isphording and Van der Putt-Lauwers 2002, p. 3-4; Wieling 2006, p. 368.

86 Füller 2006, p. 240. English translation: "*The distinction between the causation principle and the abstraction principle is limited to the legal rationale. Undoubtedly, the abstraction principle can make the land register correct in more situations, compared with the causation principle.*"

> "*Since, under an abstraction principle, avoidance of a contract only creates an obligation to re-transfer but the transferee for the time being (usually until delivery) remains the owner, this approach obviously fits better to the idea of publicity than a causal approach, under which ownership retroactively reverts to the transferor. This may speak in favour of the abstract transfer approach.*"[87]

In this part, we argue that the causation principle plus the rule of *bona fide* acquisition is more justifiable, and the abstraction principle is not a necessary condition for granting protection to third parties having reliance on publicity.

The following discussion starts with a hypothetical case (Figure 14). In this case, a *seller* sells and transfers an object to another party, the *buyer*, but the sale contract is made due to the buyer's duress. After the completion of the transaction, an *interferer* illegally damages the object, and the buyer becomes bankrupt. There is a *general creditor*. Moreover, the buyer further transfers the object to a third party, a successive buyer.

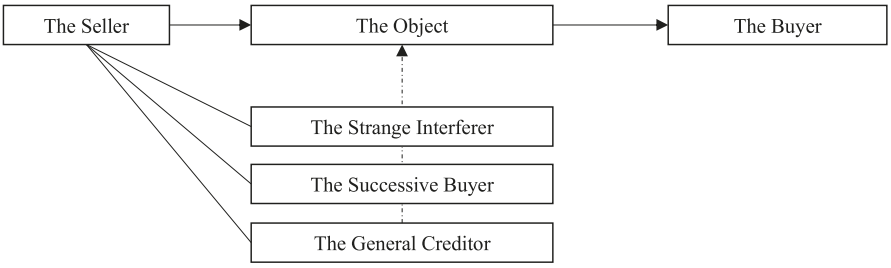

Figure 14

In this case, should the seller be entitled to sue the interferer and to separate the object from the buyer's insolvency assets? The following discussion will not touch upon the doctrinal debate on whether there is a distinction between the obligational act and the proprietary act or whether the latter should be independent of the former. Instead, what we are mainly concerned with is how the correlative relationship between these parties should be arranged from the perspective of publicity.

A The Transacting Parties

Even though the buyer has completed publicity, obtaining the outward mark of the right of ownership, there is no reason to deny an automatic recovery of ownership to the seller. This is because, according to the rationale of publicity, the problem of information asymmetry often does not exist for the transacting parties. It can be imagined that the buyer is, from the outset, aware of the duress and that the seller does not truly have the will

87 Acquisition and Loss of Ownership of Goods 2011, p. 454.

to transfer.[88] Even if the buyer does not know about the duress at the beginning, he will be made aware of the defect when the seller requests to rescind the transaction. In general, whether the buyer knows about the defect has nothing to do with publicity. The completion of publicity is an outcome of performing the defective underlying contract. Publicity *per se* cannot inform the buyer that the underlying contract is voidable on the basis of the duress.

Between the transacting parties, publicity is not relevant to determining the legal consequences of a defect in the underlying legal relationship.[89] In the situation where there is a defect in the underlying contract, the main task is how to rectify the defect and determine the legal consequences between the transacting parties. Truly, in the hypothetical case, the buyer has completed publicity and obtained the outward mark of ownership. However, this should not be taken into consideration in determining the legal consequences *inter partes*. Publicity cannot be a reason to deny automatic recovery of the object to the seller.

In some jurisdictions, such as German law, an abstraction principle is implemented, but under various exceptions.[90] According to this principle, only a personal claim of recovery is granted to the seller on the basis of the rule of unjust enrichment. The hypothetical case of duress falls under the "identity of defect (*Fehleridentität*)", a cause of exception to the abstraction principle.[91] Therefore, the object is also automatically restored to the seller under German law. Sometimes, it is held that the abstraction principle "*fits better to the idea of publicity than a causal approach*".[92] This view is problematic. Indeed, the buyer has completed publicity and obtained the outward mark of ownership. As has just been argued, however, the buyer knows or will know about the defect, and the main task is how to determine the legal consequences between the seller and the buyer properly. Thus, publicity is completely irrelevant.

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88 Even if it is a third party who compels the transferor to transfer the object, it is conceivable that the buyer might also know about the coercion. If the buyer neither knows nor should know about the coercion by this third party, the seller's right of revocation might be restricted. This is accepted by the DCFR. Art. II.-7:208 DCFR: "(1) *Where a third person for whose acts a party is responsible or who with a party's assent is involved in the making of a contract:* (a) *causes a mistake, or knows of or could reasonably be expected to know of a mistake; or* (b) *is guilty of fraud, coercion, threats or unfair exploitation, remedies under this Section are available as if the behaviour or knowledge had been that of the party.* (2) *Where a third person for whose acts a party is not responsible and who does not have the party's assent to be involved in the making of a contract is guilty of fraud, coercion, threats or unfair exploitation, remedies under this Section are available if the party knew or could reasonably be expected to have known of the relevant facts, or at the time of avoidance has not acted in reliance on the contract.*"

89 Acquisition and Loss of Ownership of Goods 2011, p. 454.

90 Baur and Stürner 2009, p. 59-61.

91 Füller 2006, p. 134.

92 Acquisition and Loss of Ownership of Goods 2011, p. 454.

B The Strange Interferer

We have argued that automatic recovery of ownership should be available to the seller where the contract of sale is declared invalid. Following this, one question is whether automatic recovery can be effective against the interferer. Our answer to this question is in the positive.

The reason is simple. The imposition of liabilities on the interferer is not relevant to the following question: who (the seller or the buyer) is the owner in law and can sue the interferer by virtue of ownership? The specific identity of the owner is an immaterial question to strange interferers, as has been argued above (see 2.2.2.2.A). This type of third parties only desires to know the boundaries of their free acts, and an abstract indication conveyed by (actual) possession suffices for them. It makes no difference which party will claim remedies on the basis of ownership. Moreover, the fact that the owner is not in actual possession of the object does not affect his or her right to sue the interferer, which has been demonstrated above (see 3.3.3). Therefore, automatic recovery of ownership and the associated remedies against the strange interferer should not be denied to the seller just for the reason that the seller has no possession.

C The General Creditor

General creditors are a type of third party who is not concerned about publicity, which has been shown above (see 2.2.2.2.C and 5.1.4.2.C). General creditors have no reliance on publicity. In the hypothetical case, though the buyer has obtained the outward appearance of ownership, the general creditor will not be misled by it. Therefore, the buyer's general creditor should not be entitled to include the object in the bankruptcy assets just for the reason that the buyer preserves the outward appearance of ownership. Otherwise, the seller's interest would be threatened, especially when the purchase price is not paid by the buyer. Under the abstraction principle, the seller only has a general claim for the purchase price, which is subject to the principle of equality of obligations (*paritas creditorum*) and might give rise to an unfair outcome. This outcome is that both the sum to be paid by the buyer and the object are available to the general creditor.[93]

> "*Since avoidance cases are rooted in special defects affecting the validity of the contract, the appropriate policy is considered to be that the transferee's creditors should step into their debtor's shoes. This policy is considered to be a causal approach.*"[94]

In sum, publicity is not a decisive factor in determining whether a thing belongs to the bankruptcy assets. As has been mentioned above, although possession once acted as a criterion to determine the scope of the bank-

93 McGuire 2008, p. 114.

94 Acquisition and Loss of Ownership of Goods 2011, p. 454.

ruptcy asset by the English Bankruptcy Act, this approach has been given up (see 3.5.2.2).[95]

D The Subsequent Acquirer

If the buyer disposes of the object to another third party, a subsequent acquirer, then the question of who holds the outward mark of ownership becomes relevant. In the hypothetical case, the successive (subsequent) acquirer is a third party who not only has a specific interest in the buyer's authority of disposal, but also reliance on the publicity. If the successive acquirer acts in good faith with respect to the defect of the earlier sale, then there is a reason to protect him from the defect.

Under the causation principle, the buyer does not obtain ownership from the outset. Therefore, the buyer lacks authority to dispose in the successive transfer. However, based on the rule of *bona fide* acquisition, the successive acquirer is able to acquire the object, and the security of the successive transaction can be guaranteed.[96] To successfully apply the rule, certain requirements, such as the acquirer's acting in good faith, must be satisfied. In this way, the divergence between the actual state of and the outward appearance of ownership, which the causation principle gives rise to, does not cause any unfair disadvantage to the successive acquirer acting in good faith.

In contrast to the causation principle, the abstraction principle allows the buyer to obtain ownership without being affected by the duress. As a result, the successive acquirer is able to obtain the object from the buyer independently of the defect. In this way, the security of the successive transaction is safeguarded. However, a problem caused by the abstraction principle is that the successive acquirer can obtain the object even when he acts in bad faith. In general, this outcome collides with our sense of fairness. As a way of facilitating the security of transactions, the abstraction principle goes too far.[97] Moreover, the problem of information asymmetry, which publicity is intended to address, does not exist since the successive acquirer knows about the defect in the previous sale. Therefore, it can be said that the abstraction principle, under which protection is available to *mala fide* successive acquirers, is not in line with the rationale of publicity.

Obviously, there is a slight difference between the rule of *bona fide* acquisition and the abstraction principle in terms of the duty of investigation. In general, the principle imposes no duty of investigation on the successive acquirer and thus facilitates the security of transactions to a larger degree. The factor of good faith is not relevant in applying this principle. In contrast, the rule of *bona fide* acquisition includes a requirement of good faith, which implies that the successive acquirer bears a duty of investigation.

95 Beale, Bridge, Gullifer and Lomnicka 2018, no. 9.05.
96 Faber 2012, p. 328.
97 Van Vliet 2000, p. 34; Faber 2012, p. 328.

However, this difference in protecting the security of transactions can be moderated by adjusting the standard of good faith. For example, the law can lower the standard of good faith by denying *bona fide* acquisition only when the successive acquirer acts with gross negligence. In this way, the burden of investigation can be alleviated, and the transaction can operate more smoothly.[98]

E Conclusion: Publicity, the Causation Principle and Public Reliance

From the preceding analysis of the hypothetical case introduced above (Figure 14), it can be concluded that the causation principle plus the rule of *bona fide* acquisition is more in line with the rationale of publicity. From the perspective of publicity, at least, it is not justifiable to deny the automatic recovery of ownership in the situation of a defective transaction. In general, publicity is completely irrelevant in answering the following question: should the original owner be protected against strange interferers and general creditors by recognizing the automatic recovery of ownership? These two types of third party have no reliance on publicity. Thus, there is no sufficient reason to deny protection of the original owner before he or she re-obtains the outward appearance. Otherwise, the principle of proportionality would be breached.[99]

Along this line of reasoning, a subsequent acquirer who knows about the defect in the underlying legal relationship should not be entitled to acquire ownership either. Where the subsequent acquirer has been aware of the defect, the problem of information asymmetry does not arise for him or her. Individuals bear a general duty to respect others' property right. Protecting a person who acts in bad faith in priority is at odds with our sense of fairness. If the object is fungible, this person can choose another thing of the same kind. If the object is not fungible, and the person does need the object, he can negotiate with the actual owner.

Truly, unlike the causation principle, the abstraction principle allows publicity to remain consistent with the state of property rights by excluding the influence of defects in the underlying contract on the proprietary acquisition. Under the causation principle, a defect in the underlying contract may reverse the acquisition automatically, which will cause a temporary discrepancy between the actual state of property rights and publicity, provided that the publicity has been completed.[100] As a result, the subsequent acquirer might be misled. However, this should never be treated as an adequate reason to deny the causation principle. In general, the subsequent acquirer can be protected via the rule of *bona fide* acquisition.[101] In terms of facilitating the security of transactions, the abstraction principle does

98 Füller 2006, p. 128.
99 About this principle, see 5.2.2.
100 Dubarry 2016, p. 625.
101 Füller 2006, p. 241.

not differ significantly from the causation principle plus a rule *bona fide* acquisition.[102]

It could be said that publicity under the causation principle is not as reliable as that under the abstraction principle. According to the causation principle, a defect in the underlying legal relationship will affect the correctness of publicity. It is expected that the subsequent acquirer is aware of this, and *bona fide* acquisition should be denied. However, this view is problematic. In general, the abstraction principle is not a premise of the protection of the subsequent acquirer from the defect in the previous transaction. In the hypothetical case, who should be protected in priority between the seller and the successive acquirer? This question is, in essence, an issue concerning legal policy.[103] Both the seller and the third party are blameless.[104]

5.1.4.3 The Phenomenon of Relativity of Property Rights

The consensual principle implies that ownership acquired in the absence of publicity is, in essence, relative. In light of the discussion above, the ownership acquired should be effective against the strange interferer, the general creditor, and the subsequent acquirer acting in bad faith, despite the lack of publicity. However, the ownership is unenforceable against the subsequent acquirer acting in good faith. In this sense, we can say that the ownership acquired in the absence of publicity is not fully absolute: it is restricted by the rule of *bona fide* acquisition.

A similar observation can also be found from the discussion of the causation principle. Where the underlying legal relationship is defective, ownership should be restored to the transferor automatically. In general, the ownership recovered should be enforceable against every type of third party, except the subsequent acquirer acting in good faith.

Therefore, there is a phenomenon of the relativity of property rights under both the consensual principle and the causation principle. This phenomenon is a result of protecting the reliance of third parties on publicity. In reality, the phenomenon is common because there is a great variety of reasons why publicity fails to show the relationship of property rights correctly. As Ulph says, we are in a world where ownership is "*relative rather*

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102 Intangible things, such as claims, may lack a means of publicity. As has been argued above, notification to debtors cannot serve as a method of publicity for claims. Consequently, *bona fide* acquisition of claims lacks a proper basis. For this type of intangible property, the abstraction principle can block the influence of the defective previous transaction on subsequent transactions. See Hästad 2006, p. 43.

103 In fact, the abstraction principle is also often explained by legal policy, namely facilitating the security of transactions. See Acquisition and Loss of Ownership of Goods 2011, p. 453.

104 In this aspect, the seller in this case and the first buyer in the situation of double sale are different. Where the same object is transferred twice, and the first buyer fails to complete the publicity, allowing ownership and publicity to diverge from each other, he or she is "blameable" in the sense that the divergence can be ascribed to him or her.

than absolute".[105] For example, where the owner is not in actual possession of the object, his or her ownership will become relative in the sense that there is a possibility of *bona fide* acquisition by a third party. This implies that the phenomenon of relativity of property rights may also exist under a translative system. If a party obtains ownership of a bicycle in the way of *traditio per constitutum possessorium*, this person runs the risk of *bona fide* acquisition when the transferor disposes of the bicycle to a third party.

> "*Eigendom van een roerende zaak is echter in zoverre 'relatief' dat het onder omstandigheden 'gevolg' mist […]. Wie een roerende zaak kwijtraakt, kan zijn eigendomsrecht soms niet vervolgen onder een derde die de zaak te goeder trouw verkreeg (zie art. 3:86).*"[106]

In German law, this is known as the "relative proprietary right (*Relative dingliche Rechte*)", a term used to describe those property rights that can be enforced against everyone except the party who enjoys a better position.[107] In Dutch legal theory, the rule of *bona fide* acquisition is also deemed to be a cause of the "relativization of property rights (*relativering van goederenrechtelijke rechten*)".[108]

This phenomenon is not difficult to explain. The starting point of property rights is that they are exclusive against everyone. However, the effect of exclusivity might be restricted for other purposes, especially protecting subsequent acquirers acting in good faith. Notably, the phenomenon does not mean that a property right without an outward appearance will deteriorate to be purely personal. To know the precise extent to which this property right will be restricted for the protection of third parties, it is necessary to know the function of publicity. As we have argued above, publicity is mainly important for subsequent acquirers, allowing this type of third party to obtain proprietary information safely and easily. In principle, general creditors and strange interferers do not rely on publicity. For this reason, the effect of an invisible property right should not be restricted in relation to these two types of third party.

5.2 Meeting the Requirement of Publicity by Registration

5.2.1 Ubiquitous Existence of Hidden Property Rights

From Chapter 3 and Chapter 4, we can conclude, somewhat disappointingly, that hidden property rights are common in the law of corporeal movables and claims. Possession is, at most, an abstract means of publicity for

105 Ulph 1998, p. 405.

106 Nieuwenhuis 2015, p. 9. English translation: "*The ownership of movables is 'relative' in the sense that it might miss the effect of 'following' […]. The person who acquires a movable thing cannot follow the object to the place of a third party who succeeds in good faith acquisition (see art. 3:86).*"

107 Wieling 2006, p. 670.

108 Snijders and Rank-Berenschot 2017, p. 55.

corporeal movables and can only communicate an ambiguous indication. The direct possessor's right is made visible to third parties through actual control ambiguously (see 3.2.1). The right enjoyed by indirect possessors is entirely invisible to third parties, and indirect possession does not qualify as a means of publicity (see 3.2.2). As a result, possession cannot be treated as an eligible means of publicity for corporeal movables. In evaluating the importance of delivery for the transfer of ownership of corporeal movables, the drafters of the DCFR acknowledge that "*the value of this aspect of publicity is heavily eroded*".[109]

Securities to goods can, more or less, address the problem of publicity (see 4.2.2.5). Securities to goods have the effect of *traditio*, implying that they can publicize the relationship of (indirect) possession. The holder of a document to goods can show his or her indirect possession to third parties. In this sense, it can be said that the document "tangiblizes" indirect possession. Moreover, securities to goods are able to show the legal identity of the holder, who might be an owner, a pledgee or an agent, provided that they are made to order. In showing the holder's legal identity, bearer securities to goods convey less information than order securities.

Notification to debtors does not qualify as a method of publicity for claims. "Ownership" of and the possible encumbrance over a claim cannot be made visible to third parties through notifying the debtor involved (see 4.1.1.2). This implies a higher possibility of multiple assignments and the conflict between different security interests. Similar to corporeal movables, the answer to the question of how to avoid conflicts and facilitate the transactional certainty is also a problem for claims, an important type of asset in modern transactions.[110] At present, *bona fide* acquisition is not generally applicable to claims, because of the lack of an appropriate means of publicity. As a result, it is the *nemo dat* rule that will apply when conflicts arise. This implies that third parties often run a risk of uncertainty, even though they act in good faith (see 4.1.3 and 4.1.4).

In general, no problem of publicity will arise for claims embodied within a document. The right embodied mainly includes two types: one is the claim of recovery embodied within securities to goods (see 4.2.2.5), and the other is the claim of payment embodied within securities to payment (see 4.2.3.5). From the document, third parties can obtain certain proprietary information concerning the claim embodied, especially when the document is made payable to order. Moreover, protection is granted to third parties acting in good faith at the sacrifice of the actual creditor. As a result, securities are a reliable means of publicity for third parties. Because of the general protection of third parties, claims embodied within securities have higher negotiability than ordinary claims.

109 Acquisition and Loss of Ownership of Goods 2011, p. 432.
110 The Scottish Law Commission 2011, p. 93.

In modern society, the importance of immovable property has somewhat declined, while movable assets have become increasingly important.[111] Nevertheless, nearly every jurisdiction has a strong principle of publicity for immovable property, while a different attitude is taken with respect to the publicity of corporeal movables and claims.[112] The ubiquitous existence of hidden property rights has given rise to a severe hindrance to transactions concerning movable assets, especially in financial practice.

Property rights have binding force against third parties. Hidden property rights bring about a heavy burden of information to third parties.

> "*Property rights thus face a trade-off with positive and negative effects […]. Their survival after conveyance of the asset or any other transformation of rights requires costly institutions and resources in order to organize the process of searching, bargaining and contracting for consent. In particular, the possibility of hidden property rights increases the information asymmetry between the conveying parties: the seller knows better than the acquirer about hidden property rights.*"[113]

Due to the lack of a reliable means of publicity for corporeal movables and claims, it is difficult for third parties, especially subsequent acquirers, to obtain reliable proprietary information. This gives rise to two undesirable outcomes, which has been pointed out above (see 5.2.1). The first outcome is that third parties have to make use of "informal" methods to collect proprietary information, which might be more costly. The second outcome is that the information collected by third parties via costly informal methods might be proven to be incorrect or incomplete, which gives rise to conflicts between different parties, especially the actual proprietor and third parties. Because of these two undesirable outcomes, the smooth circulation of property will be influenced.

At present, there is a sophisticated system of rules developed to address the conflicts that have arisen in the law of corporeal movables and claims. Among these rules, a typical one is the *bona fide* acquisition of corporeal movables. However, this rule is, in essence, an *ex-post* approach. The rule inevitably faces the following dilemma: a choice has to be made between the actual owner and the third party acting in good faith.[114] If the actual owner is entitled to preferential protection, then the third party acting in good faith cannot acquire the corporeal movable. If the third party is protected in priority, the actual owner will lose his or her right of ownership. As we have argued above, the rule of *bona fide* acquisition of corporeal movables cannot be justified by the publicity effect of possession (see 3.4.3.4). Possession is an ambiguous means of publicity, and the reliance of the third party on possession lacks a sufficient ground. The frequent occurrence of

111 Gilmore 1999, p. 25; Huijgen 1995, p. 5.
112 Mincke 1997, p. 205; The Scottish Law Commission 2011, p. 94.
113 Arruñada 2011, p. 237.
114 Karner 2006, p. 57.

bona fide acquisition implies that possession cannot avert conflicts concerning corporeal movables. The rule is to resolve, rather than to prevent, the conflict between the actual owner and the third party acting in good faith.

5.2.2 Meeting the Requirement of Publicity by Registration

To facilitate smooth transactions concerning corporeal movables and claims, it is desirable to adopt an *ex-ante* approach by having a reliable method of publicity. With a reliable method of publicity, individuals can obtain the proprietary information they want easily. They do not have to resort to informal resources of information. More importantly, a reliable method of publicity enables third parties to make decisions with security on the basis of the information obtained. For the actual proprietor, it is possible to show his or her property rights through publicity, without having to worry about the loss of the right to any third party.

In general, (public) registration is an appropriate method of publicity that can be used to prevent conflicts in the law of corporeal movables and claims. This method has been demonstrated to be effective in the field of immovable property. Nowadays, registration has been extended to patents, trademarks, and some special corporeal movables, such as ships and aircraft. In many jurisdictions, it is also introduced in the field of secured transactions concerning corporeal movables and claims (see 5.4). Moreover, registration, as a means of publicity, plays an important role in the transactions concerning some new types of property, such as emission rights and agricultural products quota.[115] Apart from registration, there seems to be no other proper means of publicity that can be used to address the problem of publicity in the law of corporeal movables and claims: possession is ambiguous, notification to debtors has no effect of publicity, and securities have a very limited field of application. Thus, we will shift our attention to how to build a system of registration for corporeal movables and claims.

5.3 The Introduction of Registration: A General Discussion

From the preceding discussion, it can be concluded that registration has merits and drawbacks, not only as a formality (see 5.1.1) but also as a special method of publicity (see 5.1.2). The question which then follows this conclusion is whether and to what extent registration should also be employed to address the problem of information asymmetry in transactions concerning corporeal movables and claims. This question is discussed in 5.3. The subsequent discussion seeks to provide some general guidelines

115 Cole 2016, p. 10; Snijders and Rank-Berenschot 2017, p. 44; Cardwell 2000, p. 168.

concerning the way of constructing a system of registration, the scope of application of this system, and the legal effect of registration.

The subsequent discussion takes the system of registration for secured transactions concerning movable property as an important model. In general, there are two reasons to do so. One reason is that registration has been introduced in the field of secured transactions in many jurisdictions and proposed at the international level, such as the UNCITRAL Model Law on Secured Transactions. The other reason, also the most important reason, is that a register for corporeal movables and claims is mainly needed in the practice of secured transactions. Only a few transactions, such as the outright assignment of claims, actual lease, and the trust for management (*fiducia cum amico*), fall outside the secured transaction. Thus, the system of registration for the secured transaction qualifies as representative. The system can be taken as a basis on which a "general" register for corporeal movables and claims will be constructed. Here the term "general" means that the register proposed in this research is not only applicable to secured transactions, but also to those transactions having no function of security.

To make this research more concrete and useful for practice, we provide some proposals after the discussion of each aspect of the system of registration. Compared with the recommendations provided by the UNCITRAL Legislative Guide on Secured Transactions, the proposals made in this research are less comprehensive. Some issues, which are necessarily involved in constructing a system of registration, are not included in this research. For example, rules concerning the modification and cancellation of registration are indispensable for a register to operate well. However, this issue falls outside the scope of this research.

5.3.1 The Construction of the System

5.3.1.1 A Subject-Based System

To construct a system of registration, it is necessary to find an index according to which the system can be established. Compared with immovable property, it is more difficult to find a proper index for corporeal movables and claims. Because of the cadastral survey, land has been partitioned off with a unique identifier, leading to the "*invisible line*", which lays a foundation for the present system of land registration.[116] In contrast, most corporeal movables are either infungible (such as new refrigerators of a certain brand and crude oil of a certain quality) or difficult to distinguish by referring to a unique feature (such as a particular used refrigerator). Nevertheless, it is still possible to construct a system of registration. Before understanding this possibility, it is necessary to have a general view of the format of registers.

116 Dekker 2003, p. 177.

In general, there are two types of registers according to the criterion of format: the object-based system (*Realfolium*) and the subject-based system (*Personalfolium*).[117] The former is constructed on the basis of the identity of the object of property rights, and the latter is built according to the identity of the parties involved. For example, the German land register (*Grundbuch*) is an object-based system, and a particular folio is attributed to every specific parcel of land.[118] Traditionally, the French land register was established according to the name of the landowner. In 1955, a land-based system of registration was introduced.[119] The format of a system is important for searchers to find the right folio. Every system of registration must have a unique criterion according to which searchers can distinguish the targeted folio from the other folios. As it is usually either impossible or difficult to find a unique identifier for corporeal movables, an object-based register is, practically speaking, not possible.

> "*Another problem is that, in the case of tangible things, registration cannot work unless each individual thing is easily distinguishable from every other like thing. This means that registration is ruled out for all types of tangible property except those where each individual item is unique (such as pieces of land, or works of art, or racehorses) or can be made so by fixing on an identification mark or name plate (so, for example, it would be feasible to set up a system for registration of car ownership, although we have not yet done so in this country).*"[120]

Claims, a type of movable property, are often unique: they arise between specific creditors and debtors and have different content, and the date of creation is often different. Nevertheless, it is not easy to identify claims and have an object-based system. If an individual folio is attributed to a claim, then this claim has to be described with sufficient accuracy by indicating the parties, the date of creation and even the content. The description is burdensome. More importantly, the folio of the claim can only be found by entering the information recorded, which is costly and might lead to mistakes. Moreover, the relationship of the claim might change for various reasons, which means that the description has to be updated to maintain its accuracy. As a consequence, it is unrealistic to have a system of registration organized by reference to claims.

In general, it is only possible to have a subject-based system for corporeal movables and claims. The system would have to be constructed according to the index of the identity of the parties. Correspondingly, third parties can search the system by entering the information concerning the party's identity. How can the party be identified, and what is the party's identifier? In general, the party's name is an identifier. However, only the

117 Schmid, Hertel and Wicke 2005, p. 32.
118 Hinteregger and Van Vliet 2012, p. 857.
119 Hinteregger and Van Vliet 2012, p. 892.
120 Clarke and Kohler 2005, p. 388.

name is sometimes insufficient since different parties perhaps have the same name, especially when the party is a natural person. For this reason, additional information about the party, such as the date of birth, is needed. After finding the right folio according to the party's identifier, how can third parties know about the content of the transaction and the object involved? It is necessary to describe the type of the transaction and the object involved in the transaction and to have the description recorded in the system. About these three aspects, namely the party's identifier, the type of the transaction, and the object involved, further discussion is offered later.

In the end, it should be noted that not all corporeal movables cannot be uniquely identified. For example, a motor vehicle has a unique identifier, the VIN (vehicle identification number).[121] This creates a possibility of having a central and object-based register. It is interesting that Canadian law and Australian law incorporate this register in the system of registration constructed for secured transactions by enabling "*finance statements relating to security interests in motor vehicles to be registered and searched by reference to the vehicle identification number*".[122] The entire system of registration is constructed generally according to the party's identity, but the secured transaction concerning motor vehicles can be searched with reference to the VIN. In doing so, the system also has an object-based dimension. In this research, we probe into the possibility of constructing a specialized and object-based system of registration for motor vehicles (see 5.6). This system is presumed to be comprehensive: it not only serves for secured transactions, but also for transfer of ownership of and creation of proprietary rights of use on motor vehicles.

A The Party's Identifier

As mentioned above, the index of a subject-based system is the party's identity. Undoubtedly, the party's name is the most important identifier. If the party is a legal person, the registered name appearing in relevant official documents, such as the operating license, is the identifier.[123] However, the name entered by the legal person might be misspelled, inaccurate or later modified. In order to avoid errors and guarantee that searchers can find the right folio, it is advised that the legal person be required to provide additional information, such as the enterprise code (i.e. business number) and the address.[124]

121 In addition to motor vehicles, aircraft, vessels and intellectual property also have a unique identifier. In general, these three types of property have already owned a specialized system of registration. Therefore, there is no need to include them in the system of registration for corporeal movables and claims.

122 Walsh 2016, p. 77; Whittaker and Partner 2015, p. 183.

123 UNCITRAL Guide on the Implementation of a Security Rights Registry, p. 72; White and Summers 2012, p. 1225; Whittaker and Partner 2015, p. 193.

124 Whittaker and Partner 2015, p. 193.

If the party is a natural person, his or her full name appearing on official documents is the identifier. Here official documents include the identity certificate, driver's license, and birth certificate. As different natural persons might have the same name, adding extra personal information would be needed. In general, the date of birth should be required to be entered in the system.[125] The natural person's address might also be relevant but should not be considered as very reliable, because the address may change later. As there are multiple sources from which the information concerning the natural person can be collected, the law can, for the sake of certainty, determine the order of these sources.[126]

Partnerships, whether including partners bearing limited liabilities or not, are not a legal person. Nevertheless, they are often viewed as an entity, having a (registered) name and being provided with an enterprise code. Therefore, it is also possible to have a unique identifier for partnerships in most situations. However, some partnerships do not have a (registered) name or a business number. For these partnerships, one solution is requiring them to provide relevant details of the partners, such as the name, the business number in the situation of a legal person partner, and the date of birth in the situation of a natural person partner.[127]

Proposal 1:
The register should be constructed as a subject-based system according to the party's identifier. The identifiers of legal persons include the name, the enterprise code, the address of the legal person and so on. For organizations without legal capacity, the information provided includes the name, the enterprise code (if possible), and the organization's address. The identifiers of natural persons should be the name, date of birth, address and other relevant information included in the identity certificate, driver's license, and birth certificate.

B The Description of the Object

Finding the right folio according to the party's identifier is the first step for third parties to collect proprietary information. As stated above, proprietary information concerns three aspects: the parties of the property right, the object of the property right, and the content of the property right. Usually, the information concerning the parties, at least one of them, was obtained by the searcher. Otherwise, the searcher would not be able to conduct any

125 UNCITRAL Guide on the Implementation of a Security Rights Registry, p. 67; Whittaker and Partner 2015, p. 189.

126 For example, the UCC relies on the driver's license primarily, the Canadian and New Zealand PPSAs take the person's birth certificate in priority, while the Australian PPSAs first rely on the data collected as a result of the operation of the Anti-Money Laundering and Counter-Terrorist Financing Act (2006).

127 Whittaker and Partner 2015, p. 201.

inspection of the register. Therefore, the other two aspects are what the searcher is mainly concerned about. The following discussion centers on how to describe the object of and the content of property rights.

Property rights are subject to the principle of specificity (see 2.1.3.1). Under this principle, only specific things may be validly disposed of. In the field of immovable property, the principle does not trigger any difficulty in constructing the land register because this system is object-based. Because of land survey and delimitation, every individual parcel of land is earmarked and can be identified easily.[128] Differently, the principle, when being understood strictly, might form a hindrance to the construction of a system of registration for corporeal movables and claims. Firstly, most corporeal movables and claims do not have any unique identifier, and this is the main reason why an object-based system is impossible. Secondly, a transaction perhaps involves a bulk of movable assets, such as all the inventories stored at a certain place, and it is often too costly to describe them one by one in detail. Thirdly, it is possible that parties include in the transaction future movables, namely movables that are not acquired or produced yet, and this also makes it difficult to describe the object involved.

However, this difficulty is not insurmountable. The practice in secured transactions of movables, regardless of whether registration has played a role, has offered an inspiration. It suffices that the objects involved are described with adequate accuracy first in the security agreement and then in the register. It is not necessary to describe each of the objects involved individually, nor to provide all details of every object in the register. For example, § 9-504 UCC requires, by reference to § 9-108, that the description of collateral in the financing statement "*reasonably identifies what is described*". A specific listing of each collateral involved is never necessary.[129] This approach is followed by the PPSAs in Canada and the new pledge register (*pandregister*) in Belgium.[130] The UNCITRAL also recommends that "*a description of the encumbered assets should be considered sufficient, for the purposes of both an effective security agreement and an effective registration, if it reasonably allows identification of the encumbered assets*".[131] Under the German law concerning the security transfer of corporeal movables and claims, where registration plays no rule, it suffices that the collateral is able to be clearly distinguished from other property of the security provider by virtue of the agreement.[132] Therefore, if a system of registration is introduced in Germany one day, it seems desirable to require the parties to have the

128 Dekker 2003, p. 171.
129 White and Summers 2012, p. 1228.
130 MacDougall 2014, p. 253-254; Bontinck 2017, p. 211-212.
131 UNCITRAL Guide on the Implementation of a Security Rights Registry, p. 77.
132 Bülow 2012, Rn. 1283, 1381.

description in the agreement of security transfer recorded in this system. This also, more or less, applies to Dutch law.[133]

It should be recognized that a general but sufficiently accurate description can satisfy the requirement of specificity. As a result, the system of registration may fail to inform third parties of each of the specific objects involved. However, with this description, third parties are able to ascertain what objects are involved. The possibility of a general but sufficiently accurate description creates three practical benefits. Firstly, parties do not have to make a specific list by describing each object involved, which guarantees that the system can operate smoothly and cheaply. For some assets, such as inventory, specific description of each item may be impractical. Secondly, a general description caters to the demand for disposing of future corporeal movables and claims. If a specific list has to be provided, then the disposal of future property would become impossible because parties may be unable to describe a thing they do not own. Thirdly, a general description also makes it possible to further dispose of the object without having to alter the registration. If there is a specific list, and one of the objects in this list is transferred later free from the existing property right, then this list needs to be updated to maintain its accuracy. Undoubtedly, this will affect the smooth operation of the system as well as the transaction. In a nutshell, the general description is flexible and can thus accommodate dynamic transactions of corporeal movables and claims.

What description can be deemed as sufficiently accurate? What level of generality of the description can be accepted? For example, is "*all corporeal movables owned by X*" or "*all corporeal movables stored at the place of Steenschuur 25 Leiden*" sufficiently accurate? How about "*all receivables against the debtors whose name starts with X*" and "*50% of all receivables*"? Will "*all present and future assets*" be recognized by law? In general, these are not only a question concerning interpretation, but also an issue depending on legal policy. The "*all present and future assets*" clause is sufficiently accurate itself. However, it is recognized in some jurisdictions but not allowed in other jurisdictions for policy reasons.[134] The "*50% of all receivables*" clause is not sufficiently accurate because it is impossible to identify which specific receivables are involved on the basis of this clause.[135]

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133 Under Dutch law, it is generally possible to pledge a bulk of corporeal movables and claims, whether future or not, by describing the collateral pledged with sufficient accuracy in the deed of pledge. See Snijders and Rank-Berenschot 2017, p. 470, 483. At present, there is not any public register for general corporeal movables and claims in the Netherlands. It is conceivable that such description would be made visible to third parties if Dutch legislators were to introduce a system of public registration for general corporeal movables and claims one day.

134 This difference is a result of two policy concerns about the disposal of future property: one is the protection of the person who intends to dispose of future property, and the other is protection of unsecured creditors' interest in obtaining satisfaction of their claims. See UNCITRAL Legislative Guide on Secured Transactions, p. 78; Schuijling 2016, p. 53-62.

135 Rakob 2009, p. 98.

It is possible that the law stipulates the classes of movable property and requires parties to indicate the class to which the object involved belongs.[136] Within the framework of this research, corporeal movables and claims are two classes of property, and they might be further classified. For example, the class of corporeal movables might be divided into livestock, crops, inventory, equipment, and others. In addition to indicating the class of property to which the object belongs, the parties also need to describe the object to guarantee that the object can be reasonably identified.[137] The requirement of specifying the class of property serves two purposes: one is to facilitate the accuracy of the description of the object, and the other is to reduce the number of registrations a searcher needs to examine.[138] For example, if a third party wants to know about whether the inventory is encumbered with any security interest, this party does not have to pay attention to registrations concerning, for example, receivables.

Proposal 2:
The description of the object should be sufficiently accurate and third parties should be able to identify the object. The register should provide a classification of corporeal movables and claims, which includes, for example, inventory, equipment, livestock, crops, and receivables. There should also be a free text area so that the object can be further described in a general clause by indicating the name, type, location and other relevant features.

C The Description of the Transaction

In general, the legal relationship of property rights includes three elements: the subject (parties) of the right, the object of the right, and the content of the right. To make the legal relationship visible to third parties, it is necessary that the content of the right be shown by the subject-based register. Otherwise, the purpose of publicity will not be realized to a large extent.

For some registers for secured transactions of movables, description of the transaction or the content of the property right created is unnecessary. This is because the register is, under the functional approach, only

136 According to s. 2.3 (1) of Schedule 1 of Australian Personal Property Securities Regulations (2010), movable collateral has nine classes: "*(a) agriculture; (b) aircraft; (c) all present and after-acquired property; (d) all present and after-acquired property, except: (e) financial property; (f) intangible property; (g) motor vehicles; (h) other goods; and (i) watercraft.*" It should be noted that the classification is made for the purpose of registration of secured transactions concerning movables. In New Zealand, s. 8 (1) of Schedule 1 of Personal Property Securities Regulations (2001) divides movables into 13 types: "*(a) goods: motor vehicles; (b) goods: aircraft; (c) goods: livestock; (d) goods: crops; (e) goods: other; (f) documents of title; (g) chattel paper; (h) investment securities; (i) negotiable instruments; (j) money; (k) intangibles; (l) all present and after-acquired property; (m) all present and after-acquired property, except.*"

137 Under Australian law and New Zealand law, a further description of the collateral may have to be provided in the "*free text field*" to guarantee that the collateral can be ascertained. See Whittaker and Partner 2015, p. 168.

138 Whittaker and Partner 2015, p. 172.

established to show one interest: the security interest.[139] Security interest is defined broadly, including both limited property rights of security and title-based security device, such as reservation of ownership. In the aspect of publicity, Canadian law goes even further by treating long-term leases and outright assignment of claims as security interests, despite the fact that these two transactions do not perform any function of security.[140] Under Australian law, these two transactions are known as "*deemed security interests*" and can be entered in the register.[141] As the register is established only to publicize security interests, it is supposed that every registration concerns a transaction giving rise to a security interest. The registration does not show the details of the transaction, nor does it indicate whether the transaction will lead to a "deemed" security interest. The register only indicates that there is a certain proprietary right created on certain movables. The secured creditor might be a pledgee, a transferor who reserves ownership, a transferee who acquires ownership for security purposes, or even an owner who gives up possession to the lessee. Thus, unlike land registers, it does not indicate the content of the property right in detail. Searchers have to conduct further inquiries to know about the details.[142] In this sense, it can be said that the register is, like possession, an "abstract" means of publicity (see 3.2.1.2).[143]

In this research, we advocate that a brief description of the transaction be provided by the register so that searchers are able to have general knowledge about the transaction. This description can be brief to the degree that it is only described by several words. For example, if it is a transfer under a clause that the seller does not lose ownership until the price is paid off, then a simple indication of "*reservation of ownership*" suffices; in the situation where the transferor alienates and leases back the object, a mark of "*sale and leaseback*" is adequate. As has been shown above, it is possible that the law classifies the assets and requires the parties to indicate the class to which the object belongs. Likewise, the law can provide a list of transaction types and require parties to indicate the type of the transaction. For example, the list may include the following types of transactions: non-possessory pledge, reservation of ownership, transfer under other suspensive conditions, security transfer of ownership, lease (including financial lease, sale and

139 Whittaker and Partner 2015, p. 42-43; White and Summers 2012, p. 1153.
140 Walsh 2016, p. 81-84.
141 Brown 2016, p. 153-155.
142 See § 9-210 UCC, s. 275 Australian PPSA (2009), and s. 177 New Zealand PPSA (1999).
143 The UCC financing statement allows the filer to replace the "creditor/debtor" with one of the following alternative designations: "Lessee/Lessor", "Consignee/Consignor", "Seller/Buyer", "Bailee/Bailor" and "Licensee/Licensor" (see UCC Financing Statement 1). In this way, the parties are entitled to show the type of their transaction in the situation of lease, consigment, sale, bailment and license.

leaseback, and operating lease), trust, assignment, and other transactions.[144] With a simple mark, third parties would be able to have a rough understanding of the content of the transaction.[145]

The preceding list is just an example. In reality, legislators have to determine the transaction types according to property law. In general, property law implements the principle of *numerus clausus*, a principle giving rise to a closed list of property rights (see 2.1.1.1). As a result, the list of transaction types would need to be determined without violating the principle of *numerus clausus*. For example, security transfer of ownership is prohibited by Dutch law (art. 3:84 (3) BW), thus any future register introduced in the Netherlands will not include this type of transaction; non-possessory pledge cannot be found in German law, thus it is conceivable that this form of pledge would not be included if German legislators decide to introduce a register one day.[146]

In general, the requirement of indicating the transaction type briefly guarantees that searchers are able to have a general understanding of the transaction from the register. The indication lowers the possibility that the parties of the transaction provide incorrect information to the searcher. Moreover, the indication also helps the searcher determine whether to further inquire with the parties about the transaction. The indication makes the system of registration more than an "abstract" and ambiguous means of publicity. On the other hand, the requirement will increase the costs of operation of the system. In general, the costs additionally involved would not be high, because the requirement only involves a simple indication instead of a detailed description of the transaction. The benefits for third parties can outweigh the costs incurred.

Proposal 3:
The register should include a brief description of the transaction type, so that searchers are able to have a preliminary rough understanding of the transaction. A list of the transaction types should be provided under the principle of *numerus clausus* of the national law, such as by embodying reservation of title, financial lease, security transfer, sale and leaseback, non-possessory pledge, and operational lease. There should be a free text area in which further information concerning the transaction type can be provided.

144 Undoubtedly, where a transaction falls in the category of "other transactions", the parties have to describe this transaction briefly.

145 This reminds us of the pledge of order securities, such as bills of exchange payable to order. Where an order document is pledged, a mark of pledge can be recorded on the surface of the document so that subsequent acquirers can be aware of this encumbrance (see 4.2.3.5.B).

146 Moreover, for parties who create a "property right" in violation of the principle of *numerus clausus* and have this right registered, the right cannot bind third parties. The system of registration has to be subject to the principle.

5.3.1.2 A Digital System

After showing that it is possible to establish a subject-based system of registration for corporeal movables and claims, we now turn to the issue of how to construct this system. In general, the system is expected to be cheap, efficient, and user-friendly. To realize these purposes, the system should be digital (see 5.3.1.2), self-service (see 5.3.1.3), notice-based (see 5.3.1.4), and fully open (see 5.3.1.5).

The system should be digital rather than paper-based. Undoubtedly, digital systems are cheaper and more efficient than paper-based systems. For example, the storage of information in a digital database requires less space, and digital information is easier to search.[147] Moreover, the registry with a digital register can maintain a backup storage of the data so that the system can be reconstructed in the event of malfunction or physical destruction of the system. In general, reconstruction of a paper-based system seems much more difficult in the situation where the physical documents are damaged or destroyed.[148] Because of the achievements made in the area of information technology, it is easy and cheap to construct a digital register nowadays. In general, it can be said that digitalization has become an intrinsic feature of modern registers.

For example, Article 9 UCC and various PPSAs build a digital register for secured transactions of movable assets. The UNCITRAL recommends that member states take advantage of modern technology to construct an electronic register for the secured transaction of movables.[149] In the harmonization of the European law concerning secured transactions of movable assets, an electronic register is proposed.[150] In the field of immovable property, where registration is traditionally treated as a means of publicity, original paper-based land registers have been or are intended to be replaced by a digital system.[151] This indicates that making use of new information technology is commonly accepted in the construction of registers in property law.

Proposal 4:
The system should be digital and computerized by taking advantage of new information technologies.

147 UNCITRAL Legislative Guide on Secured Transactions, p. 158; Proprietary Security in Movable Assets 2014, p. 436.
148 UNCITRAL Legislative Guide on Secured Transactions, p. 163.
149 UNCITRAL Guide on the Implementation of a Security Rights Registry, p. 31-32.
150 See art. IX.-3:302 DCFR; Proprietary Security in Movable Assets 2014, p. 436.
151 The Law Commission 2001, p. 4; Wilhelm 2010, p. 250.

5.3.1.3 A Self-Service System

A digital system also allows individuals to register the transaction themselves, without having to rely on a registrar. In this research, we propose that the digital register for corporeal movables and claims should be self-service or direct-entry: parties can accomplish registration directly online, and there is no need to involve any registrar. In the viewpoint of Belgian legislators, this is an essential aspect of a modern register for secured transactions of movable property.[152]

Traditionally, entries in a register, such as the land register, are made by registrars. Parties who intend to have their transaction registered have to submit an application to the registrar. The registrar will verify whether the application satisfies the statutory requirements. The scope of verification varies, and the registrar's authority differs in different jurisdictions. For example, the registrar might play a quasi-judicial role, checking the validity of the transaction.[153] On the other hand, the registrar may only play a passive role and verify whether the document submitted satisfies formal requirements. The validity of the transaction falls outside of the scope of the verification.[154] In general, the registrar's check is not without costs. Even verifying the satisfaction of formal requirements takes time. Moreover, the registrar's verification also leads to a time gap between the application and the actual entry in the system. This time gap often means that a property right created cannot be shown by the system immediately and further affects the reliability of the system. In addition, the verification causes a risk of errors for which the registry needs to bear corresponding liabilities. A self-service system averts these problems because registration can be completed without the involvement of any registrar. Only a small number of technical workers are required to maintain the regular operation of the digital system. In sum, the self-service register is cheaper and more efficient and averts the problem of the time gap and the registrar making mistakes.[155]

A self-service system not only allows direct registration but also direct search. The latter means that third parties can inspect the system themselves, without having to involve any registrar. After becoming a client of the system, third parties can collect the information they want from the system independently. Therefore, the self-service system can reduce the costs of search.

In establishing a register for the secured transaction of movables, the self-service model is recommended by the UNCITRAL,[156] incorporated in

152 Bontinck 2017, p. 205.
153 Dekker 2003, p. 151-152.
154 Dekker 2003, p. 152-153.
155 UNCITRAL Legislative Guide on Secured Transactions, p. 158; Proprietary Security in Movable Assets 2014, p. 435.
156 UNCITRAL Legislative Guide on Secured Transactions, p. 151.

the DCFR,[157] and accepted by Belgian law.[158] The English Law Commission also proposes to restrict the involvement of registrars: "*the Registrar should no longer check the accuracy of the particulars or issue a conclusive certificate of registration*".[159] However, the registrar has to check the application under other systems of registration for secured transactions of movables, such as the Australian personal property security register. According to s. 150 (3) Australian PPSA, the registrar can reject the financing statement that is "*frivolous, vexatious or offensive, or contrary to the public interest*". In this research, we hold that such verification and rejection are not necessary. It suffices that the statement be treated as invalid. Moreover, it is always difficult for the registrar to judge whether a statement is "*frivolous, vexatious or offensive, or contrary to the public interest*". Thus, conflicts might arise between the applicant and the registry.

Proposal 5:
The register should be a self-service system, allowing users to complete registration and conduct investigations without involving any registrar. It suffices that the entire system is maintained by a group of technicians.

5.3.1.4 A Notice-Filing System

In the area of movable property, there are three types of registration. The first is the land-register-like system for some special movable assets, such as aircraft and vessels. These corporeal movables have remarkable similarities with land: they can be easily identified according to a unique index and have high value. Due to these similarities, a comprehensive system of registration is created. In the BW, an individual concept, i.e. "registerable property (*registergoederen*)", is raised to cover certain vessels, aircraft and immovable property. These assets all take registration as the means of publicity and are subject to the same rules of derivative acquisition.[160]

The other two types of registration are the notice-filing system and the transaction-filing system. These two systems mainly exist in the practice of secured transactions concerning movables. They differ in whether the details of the secured transaction have to be recorded in the system.[161] Different from the transaction-filing system which contains detailed information concerning the transaction, the notice-filing system provides third parties with only a simple notice, a warning that a security interest

157 Art. IX.-3:305 (1) DCFR: "*Entries in the register can be made directly by the secured creditor.*"
158 Bontinck 2017, p. 205-206.
159 The Law Commission 2005, p. 50.
160 Art. 3:10 BW: "*Registergoederen zijn goederen voor welke overdracht of vestiging inschrijving in daartoe bestemde openbare registers noodzakelijk is.*" English Translation: Art. 3:10 BW: "*Registerable property is things for which registration in an open register book is necessary for transfer thereof or creation of limited rights thereon.*"
161 Van den Heuvel 2004, p. 91.

might exist on the assets involved.[162] The contract on the basis of which the security interest is created does not have to be registered. At present, English law still has a transaction-filing system, while many other common law jurisdictions have established a notice-filing system, such as Article 9 UCC and the PPSAs.[163] The DCFR also proposes to construct a notice-filing system for security interests in movable assets.[164] The notice-filing model is also accepted by the Cape Town Convention on International Interests in Mobile Equipment which aims to create an object-based register.[165]

The fact that the notice-filing system only provides a simple notice or warning does not mean that third parties are unable to know about the details of the property right involved. The system is necessarily associated with a duty of disclosure.[166] The parties of the property right need to provide information concerning the right when inquired with by searchers.[167] The duty of disclosure guarantees that third parties are able to obtain further detailed information after inspecting the notice-filing system.[168] As the disclosure is central to the functioning of the system, legislators should regulate the time, the way, the language, and the legal effect of the disclosure, instead of leaving these matters to parties. Here it is worthwhile mentioning that the inquirer's reliance on the information disclosed needs to be protected. For example, if the inquirer is told that the object is not encumbered with any property right, but the reality proves to be the opposite, then the inquirer should not be bound by the existing rights; if the inquirer is misled that the object has been encumbered with a property right and thus gives up the transaction, damages should be available to the inquirer (see 5.3.3.5.B).[169]

In general, it is held in this research that a notice-filing system is better than the transaction-filing system. Firstly, the entry of a brief notice guarantees that the notice-filing system can operate smoothly.[170] This alleviates the fear that the burden of registration will unduly affect rapid transactions. This advantage of the notice-filing system has been demonstrated by the problem the present English transaction-filing system is confronted with. Under current English law, "*the weight of documentation*" causes a heavy

162 McCormack 2004, p. 130-131.
163 LoPucki, Abraham and Delahaye 2012, p. 21-24.
164 DCFR 2009, p. 4560; Proprietary Security in Movable Assets 2014, p. 435.
165 Van Erp 2004, p. 97.
166 See § 9-210 UCC, s. 275 Australian PPSA (2009), and s. 177 New Zealand PPSA (1999).
167 UNCITRAL Legislative Guide on Secured Transactions, p. 153; Proprietary Security in Movable Assets 2014, p. 512.
168 In this aspect, the notice-filing system is different from notification, a formality involved in the transaction of claims. In the latter situation, even the debtor is notified and knows about the disposal made by the creditor, the debtor bears no duty to disclose the disposal to inquirers (third parties). This is a reason why notification is not qualified as a means of publicity (see 4.1.1.2.C).
169 Proprietary Security in Movable Assets 2014, p. 524.
170 Van Erp 2004, p. 98.

burden to secured transactions.[171] For this reason, the English Law Commission intends to reform the present system by introducing a notice-filing system.[172] Moreover, the filing of simple notices allows the system to operate smoothly and averts the problem of overload of information. As a result, the system is easy to search for third parties.

However, the transaction-filing system also has its merits. In particular, it can provide more detailed information to third parties by allowing them to access the contract of creation.[173] As to this advantage, it should be mentioned that the notice-filing system also allows third parties to obtain detailed information by inquiring with relevant parties, such as the secured creditor. Under the system, the secured creditor has a duty to provide correct information concerning the security interest, as just presented. Moreover, even under a transaction-filing system, inquiries are often inevitable: "*no matter how perfect the information on the register it would be unrealistic to expect any register to render obsolete inquiries being made of the debtor or of the third party*".[174] Even where the contract creating the security interest is recorded, searchers cannot know exactly what assets are subject to the interest.[175]

Secondly, the notice-filing system alleviates the worry that the information registered might be misused, and the parties' privacy might be interfered with. In the practice of secured transactions of movables, there is always the concern that information collected from the open register might be used for illegal purposes, and debtors often do not want their secured debts to be known by others, especially their competitors.[176] In general, the worry seems justifiable under a transaction-filing system, because this system provides detailed information, for example, by recording the contract based on which the property is created.[177] However, the worry has no firm ground under a notice-filing system. As has been shown above, the notice-filing system only provides a simple notice, and searchers cannot know about details of the transaction from the system. It is unnecessary to fear that the simple notice will be misused. For searchers, the notice provided is just a clue for collecting detailed proprietary information further: the secured creditor bears a duty of disclosing detailed information.

Only at the stage of inquiry and disclosure, is there cause to worry about the misuse of information. This is because the information disclosed will concern details of the property right. For example, the contract creating the property right might be shown to the inquirer. To prevent unlawful use of the detailed information, one solution is to grant a right of approval to the

171 Bridge 2008, p. 188.
172 The Law Commission 2005, p. 4.
173 McCormack 2004, p. 140.
174 McCormack 2004, p. 140.
175 Whittaker and Partner 2015, p. 231.
176 Lwowski 2008, p. 178.
177 Whittaker and Partner 2015, p. 231.

debtor. For example, the DCFR provides that further information will only be provided to the inquirer when the debtor agrees.[178] The main purpose of this restriction is "*to avoid the secured creditor being approached for information concerning its proprietary security by persons who do not have any legitimate interest in this information*".[179] A similar mechanism is implemented under the Australian PPSA.[180] In general, the restriction will not affect the right of searchers to collect detailed information. If the debtor refuses to give its approval, then prospective counterparties can simply refrain from entering transactions with the debtor.[181]

Proposal 6:
The register should be a notice-filing system without requiring individuals to record the contract or another "title" on the basis of which the property right is transferred or created. Advance registration, registration in the absence of any underlying contract created, should be recognized. However, the requirement of describing the transaction type must be fulfilled.

Proposal 7:
Upon the request of searchers, the parties of the transaction need to provide further information concerning the transaction in the prescribed manner. The disclosure of further information by one party might be restricted by granting the other party a right of approval.

5.3.1.5 A Fully Open System

As to the degree to which the system should be fully open to third parties, different rules exist. Some registers are open to third parties who have a legitimate reason to search the register, while other registers might be open to the public with no requirement of the searcher's qualification.[182] In the law of immovable property, this difference also exists. For example, under the German Land Register Ordiance (*Grundbuchordnung*), only those who have a legitimate interest can access the land register.[183] However, the Dutch land register (*Kadaster*) is, in general, fully open to the public with no restrictions.[184] In the common law, most registers for secured transactions

178 Art. IX.-3:319 (1) DCFR: "*Any registered secured creditor has a duty to answer requests for information by inquirers concerning the security right covered by the entry and the encumbered assets if these requests are made with the security provider's approval*."
179 Proprietary Security in Movable Assets 2014, p. 513.
180 According to s. 275 (6)(a) PPSA, the secured creditor can refuse to provide additional information by claiming that a confidentiality agreement exists between the creditor and the debtor. Therefore, the debtor can prevent the disclosure of details through a confidentiality agreement with the secured creditor. For sure, the creditor needs to provide further information when the debtor authorizes him or her to do so. See Duggan 2011, p. 887.
181 Proprietary Security in Movable Assets 2014, p. 513.
182 UNCITRAL Legislative Guide on Secured Transactions, p. 155.
183 Berlee 2018, p. 297.
184 Berlee 2018, p. 213.

concerning movables are open to the public without limitations: the notice-filing system under Article 9 UCC, the notice-filing system proposed by Book IX DCFR,[185] the PPSAs in Australia and New Zealand.[186] The register under the Belgian Law of Pledge (*Pandwet*) is also fully open to third parties (art. 34).[187] The English Law Commission recommends the construction of a notice-filing system which is fully open to "*any person*".[188] Thus, in the field of secured transactions concerning movables, a common feature of modern registers is that they are open to everyone.[189]

In this research, it is proposed that everyone should be entitled to access the system. This can be seen as an implication of the self-service or direct-entry notion (see 5.3.1.3): third parties should be allowed to search the system on their own. This notion means that no registrar is involved to check whether the searcher has a legitimate reason to inspect the system. The proposal of a fully open system may meet resistance regarding privacy, especially in the field of secured transactions concerning movable assets. In the following discussion, we take the register for the secured transaction concerning movable assets as an example, arguing that a fully open system does not form a threat to privacy.

It is often argued that a completely open system of registration might be undesirable for the business debtor who provides proprietary security: the debtor is often unwilling to let its competitors or clients know about the proprietary security from the register.[190] The information about the proprietary security is commercial information that might form a part of the debtor's business privacy. Moreover, the publicity of proprietary security may give rise to a problem of "*false poverty*": "*everyone is told to assume that the assets in the debtor's possession are not held free of encumbrances*".[191] As a result, potential creditors would become more conservative in granting credits.[192] In the situation of natural-person debtors, a potential problem of registration is that their personal information is exposed to the public, which cause a concern about the protection of personal privacy.

In general, the privacy concern has no sufficient ground and should not be overstated under a notice-filing system. The protection of personal privacy of natural persons is not a sufficient reason to restrict the access to the register by third parties. This is demonstrated below in detail (see 5.3.2.2). Here we give further attention only to the situation where the secu-

185 Art. IX.-3:317 DCFR: "*Access to the register for searching purposes is open to anyone, subject to the payment of fees; it does not depend upon a consent by the security provider or the secured creditor.*"

186 See s. 169 Australian PPSA and s. 171 New Zealand PPSA.

187 Baeck and Heytens 2019, p. 22.

188 The Law Commission 2005, p. 54.

189 See art. IX.-3:317 DCFR, Recommendation 54 (g) UNCITRAL Legislative Guide on Secured Transactions, and s. 170 Australian PPSA (2009).

190 Lwowski 2008, p. 178; Snijders 1970, p. 29.

191 Sigman 2008, p. 158-159.

192 Vriesendorp and Barendrecht 1993, p. 29.

rity provider is a company or business entity. For the following reasons, our conclusion is that the concern about business privacy is not a sufficient reason to restrict the accessibility of the system.

Firstly, subsequent acquirers, whether existing or potential, have a justified ground to know about the information concerning the secured transaction.[193] As a principle, subsequent acquirers will be bound by the proprietary security interest. By granting proprietary security, the debtor gives rise to an information asymmetry to its existing and potential creditors because of the third-party effect of the property right of security. Thus, proprietary security should be made transparent to the public. Otherwise, third parties would be misled. In fact, the statutory requirement of publishing financial reports also indicates that every enterprise should run in financial transparency: the enterprise should disclose its financial condition to the public. Like the financial report, a fully open system helps existing and potential general creditors to know about the overall financial health of the debtor. Unlike the financial report, a fully open system also allows subsequent acquirers to know about the proprietary condition of specific assets.

Secondly, the system of registration proposed is notice-based, which means that the document filed is merely a summary of the secured transaction. There seems to be no need to fear that the disclosure of such summary will be misused to the extent that the debtor's business is influenced. In this aspect, a notice-filing system is different from the transaction-filing system (see 5.3.1.4).

> "*Permitting full public access does not compromise the confidentiality of the relationship between a grantor and a secured creditor. Confidentiality is protected because only limited information about the parties' affairs appears in the registered notice.*"[194]

Truly, the notice-filing system is associated with the duty of disclosure, and the information disclosed by the creditor is more detailed than the summary filed in the register. There might be a concern that the detailed information disclosed might be misused illegally. However, it is possible to dispel this worry by allowing the debtor to decide whether details can be offered by the secured creditor (see 5.3.1.4). As has been pointed out in 5.3.1.4, the DCFR grants a right of approval to the debtor who is entitled to request the creditor not to disclose the details of the proprietary security to third parties (art. IX.-3:319 (1)). Therefore, if the debtor thinks that detailed information might be misused by a third party, he or she can require the creditor not to provide any detailed information to this third party. In a word, the fear of the misuse of information should not be treated as an adequate reason to refuse a fully open system of registration.

Thirdly, the concern of false poverty mentioned above is not a convincing counter-argument against a fully open system. The reason is simple. By

193 Vriesendorp and Barendrecht 1993, p. 29.
194 UNCITRAL Legislative Guide on Secured Transactions, p. 155.

virtue of commercial knowledge and experience, prudent businesspeople are often aware that there is a high possibility that the asset possessed by the debtor is encumbered with a security interest (see 3.5.2.2.B). Therefore, if there is the problem of false poverty, it already existed before introducing the system of registration.[195] Moreover, the rule of the "ordinary course of business" allows the collateral to be disposed of without being affected by the security interest registered, provided that the disposal arises in the ordinary course of the debtor's business (see 5.3.3.3.B).[196] The rule can address the problem of false poverty in relation to third parties to some extent. For third parties to a transaction arising in the ordinary course of the debtor's business, registration does not constitute a constructive notice. Under the rule, third parties are entitled to acquisition free from the proprietary security. This means that they can carry out the transaction without having to search the register. The debtor's ordinary business will not be influenced, though the register is fully open and allows every third party to know about the proprietary security provided by the debtor. In other words, the problem of false poverty does not arise in the ordinary course of the debtor's business.

Proposal 8:
The register should be fully open to the public.

5.3.1.6 Summary

On the basis of the preceding discussion, we can conclude that the system constructed for corporeal movables and claims is a subject-based register, a register indexed according to the party's identifier. The system only provides a simple notice to third parties who can further inquire with relevant parties to collect more detailed information. The system is digital, fully open, and able to be accessed by users directly without involving any registrar. By constructing the register in this way, the costs of operation would not be high. This has been proven by contemporary systems of registration for the secured transaction of movables.

> "*Experience in the United States […], Canada and New Zealand has demonstrated repeatedly that the costs of creation and installation of an electronic notice filing system are low and quickly recouped, that costs of current operation of such a system are low and are covered by minimal filing fees, and that the business world adapts to the system easily and without great cost or dislocation.*"[197]

On the basis of the preceding discussion, we provide a basic sample of the registration below (Figure 15). This sample is just an example and is open to modifications when necessary.

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195 Secured Transactions Law Reform Project 2013, p. 4.
196 UNCITRAL Legislative Guide on Secured Transactions, p. 202-204.
197 Sigman 2008, p. 158.

Statement				
	01	Registration Time		_ _ (dd) _ _ (mm) _ _ _ _ (yyyy) _ _ (hh) _ _ (mm)[198]
	02	Registration Number		_ _ _ _ _ _ _ _
	03	Registration Duration		☐ 6 Months ☐ 1 Year ☐ 2 Years ☐ 3 Years ☐ 4 Years ☐ Maximum ☐ Specified Duration _____[199]
PARTY 1	04	Natural Person	Name	_____ (First Given Name) _____(Second Given Name) _____(Family Name)
	05		Date of Birth	_ _ (dd) _ _ (mm) _ _ (yyyy)
	06	Legal Person and Others	Name	
	07		Operation Number	
	08	Address		_____ (House Number and Avenue) _____ (City) _____ (Province) _ _ _ _ _ _ (Postcode)
PARTY 2	09	Natural Person	Name	_____ (First Given Name) _____(Second Given Name) _____(Family Name)
	10		Date of Birth	_ _ (dd) _ _ (mm) _ _ _ _ (yyyy)
	11	Legal Person and Others	Name	
	12		Operation Number	
	13	Address		_____ (House Number and Avenue) _____ (City) _____ (Province) _ _ _ _ _ _ (Postcode)
OBJECT & TRANSACTION	14	Object 1	Object Description	☐ Equipment ☐ Inventory ☐ Livestock ☐ Crops ☐ Other Corporeal Movables ☐ Receivables ☐ Other Claims[200]
	15			Additional Description:[201]
	16		Transaction Description	☐ Pledge ☐ Reservation of Title ☐ Financial Lease ☐ Security Transfer of Title ☐ Sale and Leaseback ☐ Operating Lease ☐ Others[202]
	17			Additional Description:
	18	Object 2	Object Description	☐ Equipment ☐ Inventory ☐ Livestock ☐ Crops ☐ Other Corporeal Movables ☐ Receivables ☐ Other Claims
	19			Additional Description:
	20		Transaction Description	☐ Pledge ☐ Reservation of Title ☐ Financial Lease ☐ Sale and Leaseback ☐ Security Transfer of Title ☐ Operating Lease ☐ Others
	21			Additional Description:
OTHER INFORMATION	22			

Figure 15

198 The date of registration is not determined by the filer him- or herself. The filer does not need to fill in the date. Instead, the date on which registration is completed is fixed by the system automatically.

199 About the duration of the validity of registration, see 5.3.3.6.

200 There are various classifications of the object, and this sample only provides an example here. For instance, it is also useful to consider the criterion of whether the object is future property.

201 The description by ticking the box is often not sufficiently precise or incorrect. Therefore, it might be necessary for parties to insert an additional description here.

202 There are various ways to classify transactions, and this sample only provides a simple example here. As we have argued above, the classification of transactions is subject to the principle of *numerus clausus* (see 5.3.1.1.C).

5.3.2 The Scope of Registration

After introducing how to establish a notice-filing system for corporeal movables and claims, we turn to the issue concerning the scope of registration. It should be noted first that not all transactions concerning corporeal movables or claims should be required to be entered in the system. In general, there are multiple reasons to exempt a transaction from the formality of registration, and we discuss these reasons here.

5.3.2.1 The Aspect of Object

Registration is used to address the problem of information asymmetry by providing proprietary information to third parties (see 2.2.3.2). Therefore, registration becomes superfluous when the problem does not exist or has been addressed in other ways.

A Impersonal Transactions

Arruñada demonstrates that asymmetry of information mainly arises in the situation of "impersonal transactions", a kind of dealing which does not rely on local knowledge in relation to parties' reputation and characters.[203] "*Personal transactions*", as opposed to impersonal transactions, usually take place in a close-knit community where members know each other quite well and are encouraged to be honest and cooperative.[204] In a tight community, transactions between members are often not asymmetric in information.

> "*When parties know each other well, they suffer less information asymmetry about the value of each other's promises; thus, conflicts are less likely. Moreover, they also know which safeguards will be activated if a conflict eventually arises. This knowledge facilitates economic exchange […].*"[205]

Possession, as a source of "*cruder signals*", suffices in a close-knit community but is inadequate in a complex society.[206] This is partly because "*close-knit groups have a variety of advantages including low-cost communication, homogeneity of knowledge, opportunity to monitor, and so on*".[207] It seems that history supports this observation: ancient people lived in an acquaintance society and did not have a formal system of registration. It is possession that acted as a basic role in transactions in ancient society.[208] At that time, people were satisfied with possession, though it was an ambiguous means of publicity.

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203 Arruñada 2012, p. 15-16.
204 Ellickson 1991, p. 167.
205 Arruñada 2012, p. 15-16.
206 Lipson 2005, p. 507.
207 Smith 2003, p. 1122.
208 In general, the importance of possession is indicated by *traditio* under Roman law, *Gewere* in Germanic law, and *livery of seisin* in the history of English law.

Contemporary society is obviously different: transactions take place between strangers frequently. Under the influence of electronic business, the transactions between strangers become more common. Where two strangers plan to enter into a transaction, there is usually a problem of information asymmetry. This is because they do not know each other's personality or characteristics well. In Arruñada's words, the transaction is "*impersonal*". To address the problem of information, it might be desirable to have a formal system of publicity.

However, not all contemporary transactions are carried out on an impersonal basis. For example, Bernstein conducted research into the diamond industry and found that participants of this industry often make use of local information in the course of business.

> "*Smaller dealers, brokers, and foreigners do most of their trading in the club. For them, club membership provides a secure trading place at a modest cost with additional informational benefits.*"[209]

Therefore, the possibility exists that individuals in a certain industry still rely on informal methods to address the problem of information. Under this circumstance, there is no need to introduce any formal method of publicity.

> "*Community can be a proxy for more formal methods of gathering and disseminating information, such as notice filing systems. Notice filing may not matter to diamond merchants inter se because they know-or believe they know-all that is important to know about one another in order to trade internally.*"[210]

The preceding discussion explains why the desire for a system of registration is not strong in the diamond industry, despite the high value of the object. It can also, more or less, apply to expensive works of art, jewelry and precious animals. Usually, the transaction of these special movables is under the assistance of professionals and involves certain authoritative documents, such as the certificate of title. This largely diminishes the information asymmetry between transacting parties.

The preceding observation is important for constructing a system of registration for corporeal movables and claims. Since whether information asymmetry exists in a type of transaction is not always clear for legislators, registration should not be mandatory. For those who do not face any information asymmetry in a certain community or industry, mandatory registration is not only unnecessary but also unfair. It prevents them from acquiring property rights without involving registration. For this reason, registration should not be treated as a constitutive condition (see 5.3.3.1), and good faith

209 Bernstein 1992, p. 120.
210 Lipson 2005, p. 506.

should be a condition for the acquisition free from an existing property right (see 5.3.3.4). In general, this allows parties in a certain industry to conduct "*personal transactions*" with security, even though registration is not completed. Third parties in the same industry can be assumed to know about the transaction and thus cannot declare the transaction ineffective against them.

B Securities

As a matter of course, where there is a method that has addressed the problem of information asymmetry, registration will be of little use.[211] Registration is not the only means of publicity of property rights. If there already is an appropriate method of publicity, it will be superfluous to replace this method with registration.

A typical example is monetary securities, such as bills of exchange. As has been shown above, this type of document embodies a claim of payment and can serve as a conclusive source of information (see 4.2.3.5.A and 4.2.3.5.B). Third parties are able to be aware of the legal relationship by glancing at the document, and thus there is no need to introduce registration for the claim embodied.[212] In addition, it is undesirable to include monetary securities *per se* in the system of registration, despite the fact that they have a defect of invisibility (see 4.2.3.5.C). Monetary securities position negotiability as a primary goal, and a formality of registration would make this function impossible.

> "*Negotiability necessitates that subsequent acquirers be able to rely fully on a person's possession as indicative of ownership without having to conduct further inquiries. Requiring them to search and file would be inconsistent with that goal.*"[213]

The preceding discussion also applies to another type of document, securities to goods (see 4.2.2.5). Truly, securities to goods are a document embodying a claim of recovery of the goods involved (namely the relationship of indirect possession). However, this type of document can also show some proprietary relationships of the goods, such as the right of pledge. Therefore, the asymmetry of information can be alleviated to a large extent. Moreover, the principal function of securities to goods is, like monetary securities, to streamline transactions. This function will be completely ruined if the law introduces registration into this field. In the process of harmonizing European private law, the DCFR also takes a humble attitude by excluding registration from "*negotiable documents of title*" including securities to goods.[214]

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211 Baird and Jackson 1983, p. 190.
212 Walsh 2016, p. 87; Gullifer 2012, p. 467.
213 Walsh 2016, p. 87.
214 See art. IX.-3:202 DCFR and IX.-3:203 DCFR.

However, we have to acknowledge that securities cannot provide all necessary information to third parties, which has been shown above (see 4.2). Under contemporary laws, only the property right of pledge is recordable on the document, which seems to be inadequate. It seems desirable that the law allows and requires individuals to show more types of property rights and transactions (such as reservation of ownership) by recording a corresponding mark, at least when the document involved is created to order. Once the document is able to record more property rights and convey more information, the demand for information by third parties can be satisfied to a larger extent.

Proposal 9:
Money, securities to goods and securities of payment should be excluded from the system of registration.

C Corporeal Movables
Nowadays, ownership of corporeal movables is often transferred under a resolutive or suspensive condition, such as security transfer of ownership and retention of ownership. Conditional transfer often implies that ownership and possession are held by different parties. For example, reservation of ownership, a type of transfer under a suspensive condition, leads the transferor to retain ownership, while the transferee obtains possession. More importantly, conditional transfer might give rise to a distribution of interests between the transferor and the transferee in the proprietary sense.[215] The distribution gives rise to relativity of ownership in the sense that the owner is subject to certain proprietary limitations.[216] In the case of reservation of ownership, both the transferor and the transferee enjoy certain proprietary interests. Undoubtedly, this makes the legal relationship of ownership complicated, and third parties cannot be expected to know about the relationship. As a result, conditional transfer of corporeal movables needs to be filed in the system of registration. The same also applies to temporary transfer or transfer subject to a suspensive or resolutive term.[217]

215 Under Dutch law, both parties obtain "conditional ownership (*voorwaardelijke eigendomsrecht*)". According to German law, conditional transfer may allow one of the parties to obtain a proprietary "right of expectation (*Anwartschaftsrecht*)". See Sagaert and Gruyaert 2017, p. 423-426.

216 Rank-Berenschot 1992, p. 225-230.

217 According to art. 3:85 BW, the obligation aiming at transferring ownership under a term is automatically converted to an obligation of creating a right of usufruct. The fundamental rationale behind this statutory conversion is that ownership is perpetual and "temporary ownership", which in essence amounts to a right of usufruct, is unknown in Dutch law. See Snijders and Rank-Berenschot 2017, p. 151. In German law, the rules applicable to conditional transfer can also apply to temporary transfer. As a result, a right of expectation can follow from a transfer of ownership subject to a term. See Wolf and Neuner 2012, p. 654; Bork 2016, Rn. 1286.

In general, conditional transfer forms a contrast to the outright transfer. The latter is usually accompanied by actual delivery: both ownership and actual control pass from the transferor to the transferee concurrently. Outright transfer may occur in commercial transactions and non-commercial situations, such as our daily shopping in supermarkets. More importantly, no distribution of proprietary interests occurs between the transferor and the transferee, and no new property rights are created. The transferee obtains the right of ownership completely. For third parties, the outright transfer is complete: the transferee obtains both ownership and the abstract appearance, i.e. actual possession. Ownership and actual possession are held by the same person. Before the transfer, the transferor is able to dispose of the object. The transferee obtains no property right that can bind third parties and does not have any chance to mislead third parties. After the transfer, the transferee is able to dispose of the object. The transferor no longer has any right that can bind third parties and does not have any chance to mislead third parties.

Truly, outright transfer is not made completely visible by actual delivery. However, the transfer *per se* does not cause any additional information asymmetry to third parties. Registration will only create useless burden to the transacting parties. In this aspect, outright transfer is different from the security transfer of ownership and reservation of ownership. In the latter two situations, ownership shifts under a condition, which implies a distribution of proprietary interests between the transferor and the transferee. More importantly, the proprietary distribution is invisible and thus causes an additional burden of information on third parties. In general, it is desirable to show the distribution through registration. In sum, where ownership is transferred in a way that both the transferor and the transferee enjoy a proprietary position, there is a need for registration.

In line with the preceding discussion, the creation of a limited property right on corporeal movables (such as pledge and usufruct) should also be registered. In essence, creating limited property rights means distribution of proprietary interests between the owner and the acquirer of the right. Limited property rights constitute, in the words of Hugo Grotius, "sliced ownership (*gebreckelicke eigendom*)".[218] Here we take pledge as an example. Pledge implies a proprietary distribution between the pledgor and the pledgee. The pledgor's right of ownership is encumbered with the pledgee's right of pledge. The creation of pledge will cause additional information asymmetry that cannot be eliminated without employing a new means of publicity. Here we cannot rely on possession. Once the pledgor gives up possession of the collateral to the pledgee, the former's right of ownership becomes hidden. If the law allows the pledgor to keep possession and the pledgor does this, then the right of pledge will inevitably become invisible.

218 Smits 1996, p. 59.

To overcome this difficulty, registration seems necessary. About the issue of publicity of possessory pledge, a detailed discussion is provided later (see 5.4.3.2).

From the discussion above, we can summarize that where ownership of corporeal movables is associated with indirect possession, there is in principle a need for registration. In general, that the owner only has indirect possession is a result of granting certain proprietary interests to others. In the situation of reservation of ownership, the transferor retains ownership but only holds indirect possession, and the transferee obtains direct possession with a proprietary interest. In the situation of possessory pledge, the pledgor enjoys ownership but only has indirect possession, and the pledgee holds direct possession with a proprietary interest, namely the right of pledge. As has been shown above, both reservation of ownership and possessory pledge should be registered. Here it is worthwhile reiterating that indirect possession is hidden and cannot show ownership to third parties. In the two examples (reservation of ownership and possessory pledge), registration not only makes ownership visible, but also shows the owner's indirect possession to third parties.

If both unencumbered ownership and direct possession are held by the same person, there is no need of registration, despite the fact that direct possession is only an abstract means of publicity. This is not difficult to understand. Registration should be conducted in the situation where possession and unencumbered ownership are separated. If third parties find no registration concerning the object after searching the register with reference to the actual possessor's registration, they can safely presume that the actual possessor enjoys ownership free from any proprietary encumbrance. For this reason, we argue that the transfer of ownership with actual delivery does not need registration.

On the basis of the preceding discussion, we can further conclude that registration precludes *bona fide* acquisition of corporeal movables. Typically, *bona fide* acquisition occurs where the disponer has possession but lacks authority of disposal (e.g. transfer by a lessee) or lacks authority of disposal free from existing encumbrance (e.g. transfer by the owner of a bicycle pledged). In essence, the rule of *bona fide* acquisition is an *ex-post* regime, serving to resolve conflicts that have occurred. As a result, one of the conflicting parties will lose. A system of registration can diminish *bona fide* acquisition of corporeal movables significantly. Third parties can easily know from this system whether the possessor has actual ownership and whether the object is encumbered with any proprietary interest. For example, registration of possessory pledge makes it difficult for the pledgee to dispose of the collateral by misleading third parties, and the conflict between third parties and the pledgor is prevented. Therefore, the introduction of a system of registration will narrow the scope of application of the rule of *bona fide* acquisition, a rule centered on possession.

In sum, where full ownership and actual possession of corporeal movables shift concurrently, there is no need for registration. The transferor

gives up all proprietary interests to the transferee, and no misleading or problem of information is triggered to third parties.[219] On the contrary, if the ownership is transferred under a condition or term or encumbered with a limited property right, registration is desirable to make the conditional or temporary transfer or the limited right visible to third parties.

Proposal 10:
As a starting point, the register should be allowed to include all transactions that give rise to a divergence between ownership and actual possession of corporeal movables. Transfer of corporeal movables under a condition or term able to give rise to proprietary effect and creation of a limited property right on corporeal movables should be registerable.

D Claims
In general, claims do not have an outward appearance, and notification to the debtor involved does not qualify as a means of publicity (see 4.1.1.2).

> "*Turning to receivables, the relevance of the publicity principle is less strong. Whereas corporeal movables are at least visible to third parties, receivables are not. Their very creation is the result of a private act. They can be varied or extinguished by private act.*"[220]

Nowadays, the transaction of claims remains in a hidden state in many jurisdictions. Indeed, there are some rules granting protection to third parties, such as the notification-first rule (see 4.1.3.1) and the abstraction principle (see 4.1.3.2). However, these rules are an *ex-post* scheme that inevitably sacrifice one's interest for the protection of another's. Because of the serious information asymmetry, individuals cannot determine their priority at the commencement of the transaction.[221]

For this reason, the starting point is that registration should be introduced to the disposal of claims, regardless of whether the disposal is an outright assignment, a security assignment, or the creation of a limited property right. Registration is an appropriate solution for the problem of

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219 Transfer of ownership in the way of actual delivery might have a problem of information in an important situation: the underlying contract of transfer is defective. Under the causation principle, where the disposal is not independent from the underlying agreement, the transferee obtains no ownership because of the defect. As a result, possession and ownership fall apart: the possessor (transferee) acquires no ownership and bears a duty to return possession of the object. If the transferee disposes of the object to a third party, a conflict will arise between the transferor and this third party. This conflict cannot be prevented by registration. The defect cannot be made visible by the register. As to which side will prevail, this is an issue concerning legal policy: should the third party's interest of reliance be protected in priority to the transferor's interest of preservation of ownership (see 5.1.4.2.E).

220 The Scottish Law Commission 2011, p. 94.

221 Schwarcz 1999, p. 461.

information concerning the transaction of claims.[222] The importance of registration, especially in the situation of cross-border transactions, has been confirmed by empirical studies by the CEAL (Center for the Economic Analysis of Law).[223] By virtue of registration, the legal status of claims can be clearly shown to third parties.

There are various types of claims, and the transactions of claims are diverse. Not every disposal of every claim needs to be registered. It has been demonstrated that registration is unnecessary for the claim embodied with securities to goods and securities of payment (see 5.3.2.1.B). In this part, we further show that registration is useless in other situations where claims are acquired.

D1: Acquisition Through Novation

The first situation examined is novation of the legal relationship of obligations. In fact, novation is not a disposal of claims. Novation arises in two different situations: (1) an old obligation is replaced with a new obligation between the same parties (objective novation); and (2) a new party replaces one of the original parties (subjective novation).[224] In the latter situation, an outsider may step into the shoes of the original creditor, obtaining a claim against the original debtor. The result of this novation resembles assignment but is based on a *tripartite* agreement: the debtor has to be involved in the agreement.[225] In this very situation, the chance that the retreating party (the original creditor) will deceive third parties by disposing of the original claim is very low.[226] Therefore, there is no need to register the novation.

D2: Acquisition Through Merger, Division or Inheritance

The second situation is that the assignment of claims is a result of the merger or division of businesses.[227] In this situation, the original creditor (the enterprise merged or divided) comes to an end, which implies that there is no need to worry about deceptive disposal by the original creditor. For example, company A is merged by company B, and A's claims are obtained by B automatically; A loses its legal capacity after this merger, and thus the possibility of assigning the claims by A does not exist. By the same token, registration is of no use for the acquisition of claims on the basis of inheritance.

222 Just as in the situation of corporeal movables, registration cannot fully prevent conflicting disposal of claims either. For example, in consecutive assignments, should the original creditor (the first-hand) deceived by the second-hand be protected in priority to a third party (the third-hand) acting in good faith? This is an issue of legal policy. In general, registration cannot prevent illegal deception and the like.

223 Schwarcz 1999, p. 466.

224 Black's Law Dictionary, p. 1064.

225 Zimmermann 1990, p. 60; The Scottish Law Commission 2011, p. 29.

226 Cuming, Walsh, and Wood 2012, p. 172.

227 Beale 2016, p. 10.

D3: Giro Transfer and Bank Accounts

The third situation concerns bank accounts. Nowadays, it is common that debtors discharge their duty of payment through a bank account. In the jargon of law, the holder of bank accounts is a creditor of the service bank, enjoying a claim against the bank within the scope of the surplus of the account.[228] With an account, the holder can instruct the service bank to "transfer" a certain amount of money to another person designated. The recipient also has a bank account issued either by the same bank or by another bank. The result of the "transfer" is that the payor's account and the payee's account are debited and credited respectively by the same amount. In general, the entire process of payment not only involves the payor-payee relationship, but also a relationship between the payer and its service bank as well as a relationship between the payee and its service bank.[229] Payment through a bank account is also known as giro payment or giro transfer. This form of payment is not assignment of claim: the result is not that the payee obtains the claim enjoyed by the payor against the service bank.[230] Instead, the payee acquires a new claim against its own service bank. In general, the consequence of giro payment, i.e. debiting the payer's account and crediting the payee's account, can be immediately shown by the balance of the account. There is no chance for the payor (the original creditor) to dispose of the same sum by misleading third parties. Therefore, giro payment should not be subject to the formality of registration. Moreover, the formality will ruin this swift method of payment.

Bank accounts are not only used for the purpose of payment. Holding deposit accounts implies enjoying a pecuniary claim against the depositary bank. Therefore, the holder, as a creditor, is able to dispose of this claim to a third party.[231] For example, the holder can assign the claim in whole or in part. Naturally, similar consequences can be reached through giro transfer. However, this does not mean that the holder cannot assign the claim as an ordinary personal right. To assign the claim successfully, all requirements for assignment of ordinary claims have to be fulfilled. The claim might be used as collateral by the account holder. For example, it can be pledged by the creditor. Because of the giro payment, pledge of this collateral has a feature: "*the deposit account is indeed a floating security interest, which ebbs and flows; one day, the secured creditor might have no security (the account is overdrawn) and the next day it might be oversecured*".[232] To pledge the claim,

228 Bierens 2009, p. 28; Dubovec 2014, p. 121.

229 Van Empel and Huizink 1991, p. 7-13; Rank 1994, p. 173-174.

230 Mijnssen 2017, p. 54; Rank 1994, p. 176; Van der Lely 2008, p. 170.

231 In reality, the holder and the depositary bank may in an agreement restrict the former's right to assign the claim or to create a property right on the claim. In relation to this contractual restriction, different rules are applied: the restriction has proprietary effect in some jurisdictions but cannot bind third parties in other jurisdictions. See UNCITRAL Legislative Guide on Secured Transactions, p. 96.

232 Dubovec 2014, p. 144.

all requirements for pledge of ordinary claims need to be satisfied.[233] It has been demonstrated that, as a starting point, the disposal of claims should be made visible to third parties by a system of registration. In this research, we hold that registration is a useful means of publicity for assignment and pledge of receivables out of a bank account. There is no reason to treat the disposal of this type of claim differently from ordinary claims in the aspect of publicity.

All in all, claims have become a popular type of asset involved in various transactions, such as factoring and securitization. It is said that "*in developed countries the bulk of corporate wealth is locked up in receivables*".[234] Therefore, it is necessary to include claims in the system of registration to facilitate certainty of the transaction of claims.

Proposal 11:
Assignment of claims and the creation of proprietary rights on claims should be included in the register. Acquisition of claims through novation, merge and division of entities, inheritance, and giro transfer should be excluded from the register.

E Value of the Object

In determining the scope of registration from the perspective of the object, a relevant factor is the value of the object. An important reason why the majority of movables do not have a general system of registration is that

233 Rakob 2009, p. 93; Van der Lely 2008, p. 171. However, there is a tendency to treat the claim as a special collateral and govern security interests on this collateral by special rules. In Europe, the Financial Collateral Directive (Directive 2002/47/EC) stipulates in art. 3 that "*Member States shall not require that the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement be dependent on the performance of any formal act.*" However, this formality-free rule was amended for bank accounts in 2009. According to art. 2 (6) (a) Directive 2009/44/EC, "*Member States shall not require that the creation, validity, perfection, priority, enforceability or admissibility in evidence of such financial collateral be dependent on the performance of any formal act such as the registration or the notification of the debtor of the credit claim provided as collateral. However, Member States may require the performance of a formal act, such as registration or notification, for purposes of perfection, priority, enforceability or admissibility in evidence against the debtor or third parties.*" In the US, Article 9 UCC also provides special rules for creating security interests on bank accounts. Notably, Article 9 UCC stipulates, in addition to registration, a new method of perfection: control. In general, control can arise in three situations: (1) control is automatic if the secured creditor is the depositary bank; (2) the secured creditor substitutes for the debtor as the holder of the bank account involved; and (3) an agreement of control is created between the debtor, the creditor and the depositary bank. See White and Summers 2012, p. 1211. It is often deemed that control of accounts resembles possession of corporeal things. Nevertheless, "*control is not, like registration in a general security rights registry, a transparent method of achieving third-party effectiveness*". See UNCITRAL Legislative Guide on Secured Transactions, p. 139. In this research, we do not probe into the issue of whether control is an appropriate means of publicity for the claim out of depositary accounts.

234 Schwarcz 1999, p. 455.

their value is too low to outweigh the costs of registration.[235] On the other hand, some special movable things (such as motor vehicles, vessels, and aircraft) have high value and are thus registerable just like immovable property.[236] In the following discussion, we focus on whether the value of the object should be treated as relevant.

Before starting the discussion, it is worthwhile mentioning that in practice one transaction often involves a number of movable assets, rather than only one asset. Moreover, the assets involved are not confined to be existing, and parties may dispose of future property. The "value of the object" does not refer to the value of each single asset, but the aggregate amount of all the assets involved in one transaction. The question is, precisely speaking, whether "*small transactions*",[237] also known as "*low-value transactions*",[238] deserve registration from the perspective of efficiency.

With respect to this issue, different opinions exist. Some argue for recognition of a minimum threshold on the basis of two reasons: one is that excluding small transactions can avoid cluttering up the system,[239] and the other is that such exclusion will assist small businesses that often carry out small transactions.[240] Opponents contend that there is no need to establish any condition regarding the transactional amount under the context of the voluntary registration, since individuals themselves "*would not bother to file in respect of one-off transactions where only a small amount was concerned*".[241] Another reason is that exclusion of small transactions would "*open up opportunities for secured parties to game the system*" by splitting their transaction into several ones so that each is under the threshold.[242]

In this research, we recommend that the law should set up a minimum threshold for the value of the object. The principal reason is that registration of a low-value transaction cannot produce benefits that can outweigh the administrative costs and the adverse effect of registration on the smooth operation of transactions. Indeed, excluding low-value transactions will give rise to an invisible risk to third parties. However, the low value of the object implies that this risk will not cause significant damage to third parties.

In reality, the parties to a low-value transaction would not bother to register this transaction. For this practical reason, the law should positively affirm that these parties will not face any disadvantages because of the absence of registration. If the law requires and allows registration of low-value transactions, treating them and high-value transactions in the same way, individuals would face the following dilemma: registering the low-

235 Clarke and Kohler 2005, p. 388.
236 Mattei 2000, p. 68; Lurger 2006, p. 51.
237 The Law Commission 2002, p. 204.
238 Whittaker and Partner 2015, p. 111.
239 The Law Commission 2002, p. 204.
240 Whittaker and Partner 2015, p. 111.
241 The Law Commission 2002, p. 204.
242 Whittaker and Partner 2015, p. 111.

value transaction is not without costs, but giving up registration triggers the risk of being defeated by third parties who complete the registration on an earlier date. In other words, the inclusion of low-value transactions within the system of registration amounts to forcing parties to fulfill the requirement of registration they usually resist.

Opponents of the minimum threshold might argue that parties to "big" transactions can split the transaction into a number of "small" transactions to evade registration.[243] In general, this problem should not be exaggerated. Firstly, splitting a "big" transaction into a series of "small" transactions is costly. Secondly, the minimum threshold should be fixed at an appropriate level, so that most transactions can be included in the system. Thirdly, it should be noted that "small" transactions are still governed by the rule of possession and the rule of *bona fide* acquisition. The risk of being subordinate to subsequent acquirers acting in good faith will encourage the parties to a high-value transaction to register this transaction, instead of evading registration by splitting the transaction into low-value ones.

Proposal 12:
A minimum amount of the object should be determined as a threshold of entry in the register. A transaction concerning the assets the total value of which is below the minimum amount does not need to be registered.

5.3.2.2 The Aspect of Subject

As to the scope of registration, another relevant factor that should be considered is the identity of parties. In general, there are three types of persons: legal persons having an independent legal position (in particular companies), natural persons running a business (whether a partnership or a single tradesman), and natural persons acting as a consumer.[244] The first two types of persons should be entitled to enter the system to register their transactions and search the system. In fact, the principal value of the system is to cater to the demand for information in commercial transactions. However, should a register folio be available to natural persons acting as a consumer, so that the consumer dealing can be made visible to third parties? For example, if a bicycle is transferred to a natural person under a clause of retention of ownership, should registration be a prerequisite for the effectiveness of this clause against third parties? In 5.3.1.1.A, we have dealt with how to determine natural parties' identifier. The following discussion focuses on whether property rights arising from consumer transactions should be included in the system of registration.[245]

243 Whittaker and Partner 2015, p. 111.
244 Gullifer 2017, p. 10.
245 A preliminary issue is ascertaining whether a natural person can be treated as a consumer. However, how to identify consumers is a difficult and controversial task and falls outside the scope of this research.

For the purpose of simplicity, we take secured transactions of consumer goods as an example. In this situation, the consumer purchases the goods on credit, and the seller retains ownership or creates a property right of security on the goods. In practice, the most popular form of transaction seems to be hire purchase under reservation of ownership and financial lease. In general, different laws take different approaches to the secured transaction of consumer goods in the aspect of publicity.

Under Article 9 UCC and Book IX DCFR, where an individual person obtains the object for personal, family or household use, thus a consumer, the formality of registration will be irrelevant.[246] In the words of US lawyers, the security interest created on the consumer goods is automatically perfected upon attachment, and publicity is completely irrelevant.[247] It should be noted that the security interest perfected automatically must be created for the very purpose of securing payment of the purchase price. Usually, the transaction takes the form of hire purchase or financial lease, allowing the seller to retain ownership of the goods.[248] In general, the formality of registration is not required for two reasons: one is to keep the register from being overloaded, and the other is that consumer goods often have low value and depreciate quickly.[249]

> *"In the typical case of a purchase money security interest in consumer goods, the value of the collateral would be low, second security interests in such property would be uncommon, and both the cost of filing and the cost of searching the files would be high relative to the value of the property."*[250]

However, PPSAs in Canada, Australia and New Zealand take a different approach.[251] According to the Australian PPSA, a security right granted on "*consumer property*" is registerable but subject to two restrictions for privacy concerns: (1) the maximum period of registration is seven years; and (2) the consumer's identity may not be shown on the register if the consumer property is serial-numbered (such as motor vehicles).[252] The two reasons for refusing registration shown above are not considered to be important

246 Art. IX.-3:107 (4) DCFR: "*Where a credit for assets supplied to a consumer is secured by an acquisition finance device, this proprietary security is effective without registration. This exception does not apply to security rights in proceeds and other assets different from the supplied asset*." § 9-309 (1) UCC: "*A purchase-money security interest in consumer goods, except as otherwise provided in Section 9-311(b) with respect to consumer goods that are subject to a statute or treaty described in Section 9-311 (a).*"

247 White and Summers 2012, p. 1195.

248 Proprietary Security in Movable Assets 2014, p. 411-412; White and Summers 2012, p. 1197-1198.

249 White and Summers 2012, p. 1196-1197.

250 Baird and Jackson 1983, p. 192.

251 Walsh 2016, p. 78-79; Duggan 2011, p. 884; Gabriel 2000, p. 1127.

252 Whittaker and Partner 2015, p. 159.

by Australian legislators. Even the hire purchase of a wide-screen television is registerable.[253] The Canadian PPSAs also allow registration of security interests on consumer goods. However, the two Australian restrictions, as a result of privacy concerns, are not found in Canadian law.[254] The New Zealand PPSA takes the Canadian approach.[255] Therefore, under Canadian and New Zealand PPSAs, the use to which the collateral is going to be put is irrelevant to the period of registration and the disclosure of personal information.

From the preceding introduction on the practice of secured transactions of consumer goods, it can be found that two factors are relevant here: efficiency and privacy. In the following discussion, we examine these two factors in sequence.

Every natural person is a potential consumer, generally speaking. Excluding the secured transaction of consumer goods from the system of registration helps to keep the system from being cluttered up. In addition to this reason, the consumer goods involved might be of low value, which implies that the costs of registration cannot be outweighed by the benefits produced. In general, these two reasons concerning the factor of efficiency are not convincing. The first reason should be re-examined under the context that the technology of registration has gone through significant development. Filing and search can be carried out online directly, without having to go to the registry or involving any registrar. This is why recent PPSAs include the secured transaction of consumer goods in the register.[256] The second reason is not convincing either, because not all consumer goods have low value. The price or value of consumer goods varies.[257] If the value of consumer goods does matter, a minimum threshold suffices.[258] For example, the UNCITRAL Model Law on Secured Transactions takes the acquisition price into account in determining whether registration is necessary for consumer goods.[259] Setting up a threshold is in line with our argument that the system of registration ought not to be clogged by "*low-value transactions*" (see 5.3.2.1.E). In the end, it should be noted that the efficiency aim might be frustrated by the difficulty in differentiating between consumer property and non-consumer property, where the transaction of consumer property needs to be excluded from the system of registration.[260]

253 Duggan 2011, p. 894.
254 Duggan 2014, p. 71.
255 Whittaker and Partner 2015, p. 160.
256 Walsh 2016, p. 78.
257 UNCITRAL Legislative Guide on Secured Transactions, p. 319.
258 Walsh 2016, p. 79.
259 Art. 24 UNCITRAL Model Law on Secured Transactions: "*An acquisition security right in consumer goods with an acquisition price below [an amount to be specified by the enacting State] is effective against third parties upon its creation without any further act.*"
260 Whittaker and Partner 2015, p. 160.

The factor of privacy relates to an issue of legal policy, namely a balance between the consumer's right of privacy and the searcher's right of information.[261] In general, privacy was never thought as relevant when making the New Zealand and Canadian PPSAs. The granting of automatic perfection to the secured transaction of consumer goods by Article 9 UCC is a result of the efficiency consideration and has nothing to do with privacy. Though Australian legislators hold that protection of privacy is relevant, the solution adopted is imposing two restrictions, rather than excluding consumer property from the system. Moreover, even if the protection of consumers' privacy is important, there is no reason to treat individual consumers and individual businessmen differently.[262] The latter's interest in privacy does not become less protective merely because the object is not intended to be put to personal, family or household use.

In sum, the identity of the transacting parties should not be considered when determining the scope of registration. The purpose of the transaction, i.e. whether the object is intended to be put to personal, family or household use, is in principle of no relevance. This is a feature of the contemporary system of registration.[263]

Proposal 13:
A folio should be available to natural persons so that consumer transactions can also be included in the register. The identifier of natural persons should be determined according to *Proposal 1*.

5.3.2.3 The Aspect of Transaction

After discussing the scope of registration from the angle of the object and the subject, we turn to another aspect, namely the feature of the transaction. Some transactions should be excluded from the system of registration because of a certain feature of the transaction. In the subsequent discussion, we focus on two features: transactional frequency and duration of the hidden state.

A Transactional Frequency
In general, where a kind of property is transacted with a very high frequency, registration cannot be a suitable method of publicity.

> *"However, registration also has a dark side: It certainly hampers the velocity of transfers and is therefore difficult to apply when transfers use to occur very frequently […]. Recordable property should be relatively valuable and should not be transferred often."*[264]

261 Duggan 2014, p. 72.
262 Whittaker and Partner 2015, p. 161.
263 Gullifer 2017, p. 10.
264 Lurger 2006, p. 50.

The formality of registration leads to, at least, two additional requirements: (1) the parties to the transaction have to complete registration, and (2) the register has to be updated to show the transaction. Higher transactional frequency not only implies more costs caused by the operation of the system, but also lower transaction fluency. Therefore, registration does not suit property that takes negotiability as its central function, such as money and securities (see 5.3.2.1.B).

> "*In some situations a filing requirement would be inconsistent with the notion of negotiability that is the essential virtue of certain kinds of property, such as money or bearer instruments.*"[265]

Money is paper currency and coins used as circulating medium of exchange and the legal means of payment. The fundamental function of money is negotiability. As a means of payment, money is always in fast circulation from one hand to another, which makes possession a proper means of publicity for money.[266] If registration is required for paper currency and coins, the problem would arise that "*they change hands faster than the registry can record changes in title*".[267] Nowadays, money has been replaced, to a large extent, with the claim enjoyed by the holder of deposit accounts against the service bank. Though the claim is neither currency nor the legal means of payment, the debtor often discharges its monetary duty through giro transfer. This is why the claim is known as "transferable money (*giraal geld*)".[268] For the sake of swift payment, giro transfer should not be bothered with the formality of registration either.[269] About giro transfer and registration, we have provided a discussion above (see 5.3.2.1.D).

Moreover, a very low transactional frequency also means no need for registration. The system of registration is created to facilitate the certainty of transactions and prevent the occurrence of conflicts. If a type of asset is rarely put into transactions, conflicts with respect to this asset will occur rarely. Thus, the value of a system of registration would be very low. For example, jewelry, such as wedding rings, is often kept by the buyer for personal use and bequeathed to heirs. In general, most movable property does not have a very low transactional frequency, and excluding registration because of low transactional frequency seems unusual.

B Duration of the Hidden State

The duration of the hidden state of proprietary rights should be considered. For a property right which is hidden for a short period, there is no need

265 Baird and Jackson 1983, p. 192.
266 Baird and Jackson 1984, p. 306.
267 Clarke and Kohler 2005, p. 388.
268 De Jong, Krans and Wissink 2014, p. 80.
269 Another reason why the transfer of credits through the bank account needs no registration is that information asymmetry does not arise here (see 5.3.2.1.D).

to register this right.[270] This is not difficult to understand. Short duration of the property right means that registration has to be canceled within a short time after entry in the register. The relevance of the duration of hidden property rights to the problem of registerability has been illustrated by land lease. There is often a distinction between long-term lease and short-term lease. In principle, only the former is registerable. For example, only the land lease with a term of more than seven years can be registered in an independent folio under English law, and the minimum period of registerable lease is 12 years in French law.[271] The rationale behind the distinction is that the register should not be cluttered by transient, though hidden, property rights.

> "*[…] there are some transient interests, too trivial or fleeting or too numerous, that should not be put on the register, either because it would be a waste of resources or because it would impose too heavy an administrative burden on the Land Registry.*"[272]

In the field of corporeal movables, where many transactions are expected to be completed within a short period, the duration of the hidden state should also be considered. For example, in the situation of reservation of ownership, the seller who retains ownership often agrees with the buyer that the purchase price will be paid in a short period, such as 20 days.[273] Upon the buyer's discharging the price debt within this period, ownership will pass to the buyer, and the transaction will be completed. Under this circumstance, registration of the clause of retention of ownership seems undesirable.

Here Article 9 UCC provides an example: § 9-317(e) grants a 20-days grace period to the "*purchase-money security interest*".[274] According to this paragraph, a seller retaining ownership is entitled to keep his or her super priority within the 20 days after delivery of the object. The DCFR takes a similar approach to reservation of ownership by stipulating a grace period of 35 days.[275] In general, the grace period for reservation of ownership can be accounted for by the fact that the purchase price is usually paid within this period.

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270 Baird and Jackson 1983, p. 191.

271 See s. 27(2)(b) Land Registration Act (2002) and art. 28 (1)(b) Decree no. 55-22 respectively.

272 Clarke and Kohler 2005, p. 555.

273 Veneziano 2008, p. 92; Faber 2014, p. 35.

274 § 9-317 (e): "*Except as otherwise provided in Sections 9-320 and 9-321, if a person files a financing statement with respect to a purchase-money security interest before or within 20 days after the debtor receives delivery of the collateral, the security interest takes priority over the rights of a buyer, lessee, or lien creditor which arise between the time the security interest attaches and the time of filing.*"

275 Art. IX.-3:107 DCFR: "*(1) An acquisition finance device is effective only if registered. (2) If registration is effected within 35 days after delivery of the supplied asset, the acquisition finance device is effective from the date of creation.*"

> *"Why has the grace period been fixed at 35 days? This is not an arbitrary decision but takes into account a wide-spread commercial practice. Buyers are very often given a period of 30 days to effect payment […]."*[276]

In other words, reservation of ownership usually remains hidden only for a short period: the buyer is expected to obtain the right of ownership in this period by paying the purchase price. In general, a shorter hidden state means a lower possibility of conflicts. In the situation of reservation of ownership, it can be expected that the buyer (possessor) will not dispose of the object during the short grace period by breaching the reservation clause. Secondly, since the grace period is short, third parties are able to take protective measures when the hidden interest is registered upon expiry of the period and made visible to third parties.[277] Thirdly, where the hidden proprietary interest has a short term, registering this interest implies that the registration has to be canceled upon the expiry of this term. Undoubtedly, most parties do not bother to conduct registration. For these three reasons, a grace period should be granted to reservation of ownership.

In the situation of the lease of corporeal movables, the length of the leasing term is relevant. Lease with a short term also does not deserve registration for the three reasons stated above. As to the dividing line between short lease and long lease, a specific term has to be fixed. According to the Canadian PPSAs, only the lease with a term of more than one year is registerable.[278] Austrian PPSA and New Zealand PPSA also follow this approach, because the benefits of registration of short-term lease cannot outweigh the administrative costs triggered.[279]

Proposal 14:
The duration of the hidden state should be taken into consideration in defining the scope of registration. Short-term transactions should not be required to be entered in the register. A grace period should be granted to reservation of ownership. The specific length of this grace period should be determined according to the period within which the purchase price will usually be paid. Short-term lease should not be entered in the register. It is up to the legislature to determine what term of lease is short.

5.3.3 The Legal Effect of Registration

5.3.3.1 Declaratory Effect or Constitutive Effect

In general, registration can yield two different legal effects to the acquisition of property rights: the constitutive effect and declaratory effect. In the

276 Proprietary Security in Movable Assets 2014, p. 410.
277 UNCITRAL Legislative Guide on Insolvency Law (2005), p. 133.
278 Walsh 2016, p. 83.
279 Whittaker and Partner 2015, p. 81; Gedye 2016, p. 126.

former, registration is a prerequisite for acquiring the property right, and the lack of registration means that only a legal relationship comes into existence *inter partes*. In the latter, registration has nothing to do with the acquisition of the property right, but registration may affect the legal effectiveness against third parties. The two effects have been discussed in Section 5.1.4.1. In that Section, we have argued that publicity should have declaratory effect, so that it will only restrict parties' autonomy within the necessary scope.

Under the system of declaratory effect, individuals are entitled to decide whether to have their proprietary right shown to third parties. In general, individuals should have an option to balance the benefits of registration and the risks arising from the lack of registration. Under certain circumstances, registration might not be worthwhile in the view of the transacting parties. The option guarantees that the side effects of registration, especially the costs triggered, are not imposed on the transacting parties directly. Moreover, the declaratory effect is also a consequence of the requirement that legislators should be lenient towards private transactions. It is impossible for the legislature to be omniscient and able to regulate every aspect of our private life. As we have mentioned above, the problem of information asymmetry does not exist or has been addressed in some fields (see 5.3.2.1.A), a property right might be expected to exist only for a short period (see 5.3.2.3.B), and the value of a transaction may be, though exceeding the minimum threshold, too low to deserve registration in the view of the transacting parties (see 5.3.2.1.E). In these situations, declaratory registration allows individuals to do what they think suitable: they can acquire the property right even without registering the right. The irrelevance of registration to the acquisition allows the property right to be obtained simply and efficiently.[280]

Under the system of declaratory effect, registration is not useless. It benefits the acquirer. For example, the property right obtained can be effective towards third parties acting in good faith (see 5.1.4.1.D). This benefit encourages individuals to register their property right. In general, declaratory effect of registration is commonly accepted in the field of secured transactions concerning movables: security interests come into existence upon the effect of the security agreement, and registration is only a requirement for the benefit of priority over third parties.[281] In general, the benefit of priority is usually adequate to motivate individuals to register the security interest created.[282] Therefore, the register will include most property rights even when registration only yields declaratory effect.

280 Bazinas 2013, p. 142.
281 Wood 2019, no. 7-001-7-002; Jansen 2017, p. 70; Gedye 2016, p. 130; Brown 2016, p. 156.
282 Gedye 2016, p. 131; White 1993, p. 826.

Proposal 15:
Registration has declaratory effect and should not be treated as a prerequisite of valid transfer or creation of property rights in the law of corporeal movables and claims.

5.3.3.2 The Scope of Third-Party Effect

It has been argued that registration should be irrelevant to the acquisition *per se*, but this means of publicity is a prerequisite of the legal effect against third parties. The question discussed next is what specific third-party effects can be yielded by registration. The following discussion is based on the categorization of third parties in this research: strange interferers, subsequent acquirers, and general creditors.

On the basis of the preceding discussion (see 5.1.3), we can draw a secure conclusion first: registration has nothing to do with strange interferers but is extremely important for subsequent acquirers. The lack of registration is not a sufficient reason to deprive proprietors of the right to remedies against third parties committing illegal interference. In contrast, registration is very important for subsequent acquirers.[283] Failure to register will cause the following risk: the unregistered right may be unable to bind a subsequent acquirer who obtains a property right on the same object and completes registration earlier. As a result of this priority rule, the acquirer would need to register the right obtained as early as possible.

A controversial issue here is whether an unregistered property right can be effective against general creditors in the event of the debtor's insolvency. As has been pointed out above (see 5.1.3.2), general creditors usually have no interest in knowing about the status of the debtor's assets and encumbrances over these assets. Thus, registration is, in general, useless for this type of third parties. In line with this reasoning, unregistered property rights can be enforced against the insolvency administrator. This is accepted by the New Zealand PPSA on the ground that "*unsecured creditors could not claim to be detrimentally affected by non-registration*".[284] However, different from New Zealand PPSA, both Australian and Canadian PPSAs provide that registration is a way to make the security interest become effective against the insolvency administrator and to exclude the collateral involved from the distribution among general creditors.[285] The latter approach is also adopted by Article 9 UCC, English law, and the DCFR.[286] Thus, we can say that connecting registration with the legal effect against general creditors (or the insolvency administrator) is common practice.

283 For example, under the Canadian PPSAs, registration can yield a legal effect against not only secured creditors with a competing security interest, but also buyers and lessees of the collateral involved. See Walsh 2016, p. 59.
284 Gedye 2015, p. 131.
285 Brown 2016, p. 174-175.
286 Sigman 2008, p. 147; Beale, Bridge, Gullifer and Lomnicka 2018, no. 1.17; Proprietary Security in Movable Assets 2014, p. 399.

The rationale behind this common practice is that registration is useful to the insolvency administrator and unsecured creditors for the following reasons. The first is that the insolvency administrator can "*benefit from having a list of all interests in the debtor's assets that is accurate and which enables priorities to be ascertained easily*".[287] Registration can be used to make a "*prima facie determination*" of the assets encumbered.[288] The second reason is that unsecured creditors have an interest in knowing the extent to which the assets are encumbered with security interests.[289] The third reason is that registration prevents fabrication and antedating of transactions, thereby functioning as a protective regime for unsecured creditors.[290] For this reason, Dutch law requires notarization or private registration for the undisclosed pledge.[291]

In addition to these three reasons, another two reasons are raised to explain why unregistered property rights cannot be enforced against general creditors. The fourth reason relates to the right of disposal, as pointed out by the DCFR.

> "*Once an insolvency administrator is appointed, the security provider loses the power to dispose of the assets and security rights are effective against the insolvency administrator only if they fulfil the requirements of this Chapter.*"[292]

The fifth reason concerns the connection between the law of secured transactions and the law of bankruptcy in the field of secured transactions concerning movables. Before the occurrence of bankruptcy, an unregistered security interest is subordinate to general creditors who apply for execution and become an execution creditor. The law of bankruptcy deprives general creditors of their right to claim judicial execution by merging this right in the bankruptcy proceedings.[293] Therefore, making unregistered security interests ineffective against general creditors is to compensate execution creditors for the loss of their priority.[294] As the Canadian judgement in the landmark case *Re Giffen* contends, the purpose is "*to permit the unsecured creditors to maintain, through the person of the trustee, the same status vis-à-vis secured creditors which they enjoyed prior to the bankruptcy of the debtor*".[295] In other words, if a general creditor can get free from the unregistered security interest by applying for judicial execution before bankruptcy, this creditor should be allowed to be free from the interest after bankruptcy.

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287 Gullifer 2017, p. 3.
288 Walsh 2016, p. 60.
289 Gullifer 2017, p. 16.
290 Gullifer 2017, p. 4.
291 Heilbron 2011, p. 44. It should be noted that the two kinds of formality cannot provide any useful information to subsequent acquirers, since notarization fails to make the contract visible, and private registration is not open to the public. Moreover, the formality of notarization and that of private registration are, as a formality, also costly.
292 DCFR 2009, p. 4536; Proprietary Security in Movable Assets 2014, p. 399.
293 Duggan 2008, p. 114-115.
294 Duggan 2008, p. 115.
295 See *Re Giffen*, [1998] 1 SCR 91.

In general, the five reasons mentioned above are not fully convincing. In this research, we argue that the absence of registration should not be treated as a sufficient ground to deny the legal effect against unsecured creditors or the bankruptcy administrator in the event of bankruptcy.

Firstly, the insolvency administrator is an agent of the insolvent company. There is no reason why this person can qualify as a third party who can undo the transaction made by the insolvent company with another person, namely the acquirer of the unregistered property right. This viewpoint can be found in judicial practice and theoretical discussion in New Zealand, where registration is irrelevant to insolvency issues.[296] Truly, it may not be fully convincing to say that the administrator is merely an agent of the debtor, because the administrator also has to consider the interest of all creditors.[297] Perhaps, it is more proper to deem the administrator as a "*neutral person*" who has to take all interests concerned into account.[298] Nevertheless, from the system of insolvency law, a proprietor should not be divested of its unregistered property right for the benefit of general creditors.

A property right is by its nature proprietary, regardless of whether this right is obtained with registration. Under the declaratory effect, a property right obtained in the absence of registration is still a property right. This allows the right to form an exception to the principle of equality of creditors (*paritas creditorum*). If the right is not effective against unsecured creditors, let alone subsequent acquirers with a competing interest, how can we say that it is a property right?

> "*The undisputed starting point is that security rights created in accordance with the provisions of substantive law are respected in insolvency. If one follows the insolvency-based approach as to the explanations of priority, this notion is a matter of course: If a right is not respected in insolvency it does not qualify as a security right.*"[299]

Even though we concede that an unregistered right is personal, the insolvency administrator has to step into the shoes of the insolvent debtor in the following sense: pursuant to the criterion of maximizing the insolvent property, the administrator is entitled to either perform the contract to obtain the counter performance or breach the contract with bearing a liability of compensation.[300] Regardless of the option made by the administrator, the consequence is by no means that the proprietor loses its unregistered property right straightforwardly and gains nothing.

296 See *Re King Robb Ltd, Sleepyhead Manufacturing Co Ltd v. Dunphy 50* ((2006) 9 NZCLC 264,000); Gibbons 2006, p. 42-43; Gedye 2011, p. 718.
297 Vriesendorp 2013, p. 180-182.
298 MacBryde and Flessner 2003, p. 31.
299 Brinkmann 2008, p. 262.
300 UNCITRAL Legislative Guide on Insolvency Law (2005), p. 120.

Under the distinction between property rights and personal rights, it is difficult to say that a right, which is created validly but cannot bind general creditors, is a proprietary right. The effect of preference over unsecured creditors in the event of bankruptcy is a basic element of property rights.[301] Inevitably, a right lacking the effect is usually doomed to be personal, being subject to the *paritas creditorum* principle. As indicated by the UNCITRAL Legislative Guide on Secured Transactions, proprietary rights only exist *inter partes* and are conceptually problematic.[302]

Secondly, unsecured creditors do not have an interest in the register or concern about whether there are secured creditors.[303] The reason, as has been argued before (see 5.1.3.2), is simple: unsecured creditors are only concerned about the overall financial health of the debtor and can counterbalance the risk of underpayment by other measures, such as adjusting the interest rate or the selling price. The register does not indicate the overall financial health precisely. Moreover, it cannot show how many assets are encumbered with a limited property right or how many assets are owned by the debtor. In reality, unsecured creditors seldom make use of the register.[304] Since unsecured creditors do not rely on the register, protection should not be granted to them to the detriment unregistered property rights.[305] The Canadian PPSAs accept registration as a condition of the effectiveness against the bankruptcy administrator.[306] However, this is contested because "*unsecured creditors do not rely on the public registry in making lending decisions since nothing prevents the debtor from granting a security interest after the credit has been advanced*".[307] Since general creditors do not rely on the register, failure to register does not cause any disadvantage to them.

> "*Thus invalidation of unperfected security interests by the bankruptcy trustee takes from innocent secured parties to give to unsecured creditors who are not prejudiced by the failure to perfect.*"[308]

Under the PPSAs, certain non-security transactions are included in the register, which is created initially for secured transactions of movables, for the purpose of publicity.[309] For example, outright assignment of claims and operational lease can be entered in the system. However, failure to register these non-security transactions has nothing to do with the issue of the legal effectiveness against general creditors. In other words, though security

301 Clarke and Kohler 2005, p. 163.
302 UNCITRAL Legislative Guide on Secured Transactions, p. 105; Bazinas 2013, p. 145.
303 Wood 2019, no. 9-007.
304 McCoid 1985, p. 190; Cuming 1994 (1), p. 27.
305 Beale 2016, p. 11.
306 McCoid 1985, p. 190.
307 Walsh 2016, p. 59.
308 McCoid 1985, p. 190.
309 Whittaker and Partner 2015, p. 55; Bridge, Macdonald, Simmonds and Walsh 1999, p. 599.

interests and non-security transactions are governed by the same rules of publicity and priority, they are treated differently in the aspect of enforcement in the event of insolvency.[310]

> "*Not all security interests will vest in the grantor in this way. Broadly, it was decided that this consequence would be too draconian for 'deemed' security interests such as non-finance leases and consignments, or non-security account transfers. Nevertheless, if they do not perfect, these types of secured parties may lose priority to other security interests.*"[311]

There is no reason to treat secured transactions and non-security transactions differently in this aspect. If an unregistered non-security right can survive in the event of insolvency, why is an unregistered security right unable to be enforced against general creditors? The two rights do not differ in terms of publicity.

Thirdly, the problem of antedating should not be exaggerated, and recognizing the link between registration and the effect against general creditors cannot fully address this problem. As has been mentioned above (see 5.3.3.1), the benefit of priority over subsequent acquirers out of registration can motivate individuals to register their transactions as early as they can. The date of registration is, in principle, decisive in solving the conflict between two subsequent acquirers. As a result, parties often have a sufficiently strong incentive to accomplish the registration.[312] The legal practice in New Zealand has proven this conclusion.[313]

More importantly, registration cannot completely eliminate the risk of antedating because of the fact that "*under a notice registration regime there is no necessary connection between the date of registration and the existence or date of a particular security interest agreement*".[314] In New Zealand law, where registration is not a prerequisite of the effectiveness against general creditors, the dispute concerning the antedating of transactions does arise. However, the real issue relates to "*whether the security agreement had been executed prior to the appointment of a liquidator*".[315] In practice, the secured creditor usually has completed registration in advance.

Fourthly, the argumentation from the aspect of the authority of disposal is not sufficiently convincing. Truly, the power to manage and dispose of the insolvency property shifts to the administrator upon declaration of insolvency.[316] However, the requirements of valid disposal, including the quali-

310 Bridge 2008, p. 191.
311 Brown 2016, p. 175.
312 McCoid 1985, p. 189.
313 Gedye 2016, p. 131.
314 Gedye 2016, p. 132.
315 *The Healy Holmberg Trading Partnership v. Grant and Khov* [2012] NZCA 451; cited from Gedye 2016, p. 132.
316 Brinkmann 2008, p. 250.

fied authority of disposal, have been fulfilled at the moment of creating the property right. From the doctrine of property law, it is impossible that a property right can be created validly when the grantor lacks valid authority of disposal. Where a property right has been created validly, the grantor must have the authority to dispose of the object. Therefore, in answering whether unregistered property rights can be enforced against general creditors, the authority of disposal should not be considered as a relevant factor.

Now let us examine the last reason presented above. According to this reason, making unregistered property rights subordinate to general creditors is to compensate general creditors who lose the right to apply for judicial execution after the commencement of the bankruptcy. Before bankruptcy, general creditors can realize their claim free from the unregistered property right in the way of judicial execution. This status in relation to unregistered property rights should be preserved in the proceedings of bankruptcy. The way of preservation is conferring general creditors a superior position over unregistered property rights directly.

In general, the preceding reasoning is not persuasive. If the purpose is to preserve the status of general creditors *vis-à-vis* unregistered secured creditors, the logical outcome is that the latter prevails. This is because, as we have shown above, the secured creditor enjoys a property right, despite the absence of registration of this right.[317] Indeed, general creditors can apply for judicial execution and then obtains a superior interest over the unregistered property right. However, the proprietor is able to counter this risk by registering the property right earlier. Therefore, making unregistered property rights subordinate to general creditors is not to preserve the status prior to the bankruptcy, but to reverse the priority in bankruptcy between unregistered property rights and unsecured claims.[318]

It is often held that the commencement of bankruptcy creates a "common pledge (*gage commun*)" or leads to a "'*collective' seizure*" for the benefit of general creditors.[319] Upon declaration of bankruptcy, "*the position of each creditor in relation to all others in the collective proceedings is 'fixed'*", and any attempt to "*strengthen the position of a particular creditor*" cannot bind the other creditors.[320] In other words, if there is any race between unregistered secured creditors and general creditors before the occurrence of bankruptcy, bankruptcy stops the race.[321] In principle, the commencement of bankruptcy should not affect the legal positions owned by the proprietor involved before the bankruptcy.[322] Therefore, the real question here is whether an unregistered proprietary security right can prevail over

317 White 1993, p. 827.
318 White 1993, p. 827; McCoid 1985, p. 192.
319 Dirix 2006, p. 71-72.
320 Dirix 2006, p. 72.
321 McCoid 1985, p. 191.
322 Jackson 1982, p. 860.

unsecured claims before the beginning of bankruptcy. The priority between different interests needs to be determined according to the legal facts which arose before bankruptcy. As we have argued above, the logical outcome is that the secured creditor should prevail over general creditors, because the former has obtained a proprietary right, while the latter enjoys no right with respect to any specific property.[323]

In sum, registration is a condition of the legal effect against subsequent acquirers but has nothing to do with the legal effect against strange interferers, and the absence of registration is not a sufficient reason to deny the legal effect against general creditors.

Proposal 16:
Registration can make the property right acquired effective against subsequent acquirers. The absence of registration does not affect the acquisition against illegal interference and the bankruptcy of the debtor from whom the property right is acquired.

5.3.3.3 The Issue of Constructive Notice

In general, third parties, mainly referring to subsequent acquirers, are assumed to be aware of the property right registered, regardless of whether they actually inspect the register. This is the rule of constructive notice.[324] The rule of constructive notice is only relevant in a priority regime that permits a third party without actual knowledge of a property right to take the object free of that right.[325] Under this regime, registration of a property right can preclude the third party from acquisition free of this right.[326] Where actual knowledge or good faith is irrelevant in determining the priority, there is no need to have a rule of constructive notice. In this case, *bona fide* acquisition is not recognized, and the date of registration plays a decisive role: the person who completes registration first will prevail.[327] Nevertheless, we argue that the doctrine of constructive notice is useful for justifying the "first registration, first right" regime.[328] A basis of this regime is that the person who finishes registration later is assumed to be aware of the property right registered earlier. Therefore, it is necessary to discuss the issue of constructive notice. Moreover, as we will demonstrate later, good faith should be relevant in determining the priority between competing property rights (see 5.3.3.4). This also requires us to devote attention to this issue.

323 White and Summers 2012, p. 1279.
324 Gullifer 2015, p. 437; Proprietary Security in Movable Assets 2014, p. 510.
325 UNCITRAL Legislative Guide on Secured Transactions, p. 150.
326 Proprietary Security in Movable Assets 2014, p. 434.
327 Sigman 2010, p. 514.
328 Whittaker and Partner 2015, p. 243.

Registration is deemed to have an effect of constructive notice in this research. As in the situation of land registration, third parties are also assumed to know about the property right registered in the situation of corporeal movables.[329] However, is it fair and reasonable to assume that every third party has knowledge about the registered right in the latter situation? Can the registration give rise to constructive notice to third parties?[330] For example, should a consumer buyer be expected to search the register to ascertain whether the seller has qualified authority to dispose and whether the object is encumbered with any limited property right? If so, will the smooth transaction of corporeal movables be hampered? In general, all of these questions relate to the extent of constructive notice by registration. In the field of corporeal movables, different jurisdictions take different approaches.[331]

A The Distinction Between Professionals and Non-Professionals

With respect to the extent of constructive notice, Belgian law distinguishes between professional transactors and non-professional transactors in art. 25 "*Pandwet* (Law of Pledge)",[332] while such distinction cannot be found in the French law of non-possessory pledge (art. 2337 CC).[333] Under Belgian law, only professional transactors are assumed to know about the property right registered. For a transactor acting as a non-professional, registration does not constitute constructive notice.[334] According to the Belgian legislature, non-professional third parties cannot be expected to consult the register.[335] However, this does not mean *mala fide* third parties are entitled to acquisition: good faith is also a requirement for applying the rule of *bona fide* acquisition of corporeal movables under Belgian law.[336] Thus, art. 25 *Pandwet* only means that registration *per se* does not amount to the negation of good faith.

329 Proprietary Security in Movable Assets 2014, p. 434; Snijders and Rank-Berenschot 2017, p. 86-87.

330 Beale, Bridge, Gullifer and Lomnicka 2018, no. 12.04.

331 Proprietary Security in Movable Assets 2014, p. 459.

332 Art. 25 Pandwet: "*De registratie in het pandregister sluit de toepassing van artikel 2279 uit ten aanzien van rechtverkrijgers onder bijzondere titel van de pandgever die handelen in het raam van hun bedrijf of beroep.*" English translation: Art. 25 Law of Pledge: "*The entry in the register of pledge excludes the application of article 2279 with respect to acquirers who have a particular title with the pledgor but act in the field of their business or profession.*"

333 Art. 2337 CC: "*Lorsque le gage a été régulièrement publié, les ayants cause à titre particulier du constituant ne peuvent se prévaloir de l'article 2276.*" English translation: Art. 2337 CC: "*Where the pledge has been properly registered, the particular successors of the pledgor may not apply article 2276.*"

334 Jansen 2017, p. 83.

335 Jansen 2017, p. 83; Baeck and Heytens 2019, p. 21-20.

336 Jansen 2017, p. 83; Dirix and Sagaert 2014, p. 250.

It is worthwhile noting here that the Belgian legislature created a rule of the "ordinary course of business" in art. 21 Pandwet, which will be discussed in detail later.[337] According to this provision, the pledgor is free to dispose of the collateral in the ordinary course of its business, unless there is an express contrary agreement with the pledgee. The rule is to answer the question of whether the pledgor has valid authority of disposal, instead of whether the third party can acquire the collateral free of the pledge registered. If the pledgor disposes of the collateral to a professional third party in violation of an agreement to the contrary with the pledgee, and this agreement is registered, then this professional party will not be able to acquire the collateral free of the pledge because of art. 25 Pandwet.[338]

In French law, the general rule is that registration excludes the possibility of acquiring the object by a third party free of a registered non-possessory pledge.[339] In other words, all third parties, whether or not acting as a professional, are expected to consult the register under French law. Registration forms a constructive notice of a non-possessory pledge. According to French law, after a non-possessory pledge is created, the pledgor who retains possession is no longer able to dispose of the collateral free of the encumbrance, unless the security agreement stipulates otherwise.[340] Unlike Belgian law, an "ordinary course of business" rule cannot be found in French law.

B The "Ordinary Course of Business" Rule

B1: Introduction of the Rule

In most jurisdictions, the law concerning the secured transaction of movable property includes a rule of the "ordinary course of business", as we will see below. Under this rule, a third party is entitled to acquisition free of the security interest registered when the transaction takes place in the ordinary course of the security provider. The rule primarily applies to inventory collateral.[341] In general, the rule confers priority on the third party in the ordinary course of the security provider, facilitating the ordinary transaction with the security provider.[342] The rule implies that the registration

337 Art. 21 Pandwet: "*Behoudens anders overeengekomen, kan de pandgever vrij over de bezwaarde goederen beschikken binnen een normale bedrijfsvoering.*" English translation: Art. 21 Law of Pledge: "*Unless agreed otherwise, the pledgor is entitled to dispose of the encumbered property in the ordinary course of business.*"

338 The Belgian register is a "transaction-filing" system: "*all the basic elements of the pledge agreement need to be reported in the register, the consequence is that the instrument creating the security interest itself has to be presented to the register along with the filed particulars*". Therefore, more information is communicated by the Belgian system than the notice-filing system. See Dirix and Sagaert 2014, p. 247; Baeck and Heytens 2019, p. 10. As a result, the contrary agreement can be filed in the register.

339 Riffard 2016, p. 377-378.

340 Riffard 2016, p. 378.

341 Gedye 2013, p. 2.

342 Proprietary Security in Movable Assets 2014, p. 689.

does not constitute any constructive notice, in particular to the buyer of the inventory collateral.[343]

It should be noted here that the secured creditor will not challenge the vast majority of the ordinary transactions because the proceeds out of the transactions can be used to discharge the debt.[344] Usually, the secured creditor is not willing to hamper the ordinary operation of the debtor. The debtor often has implied authority of disposal, and no conflict will arise between the secured creditor and the third party. For example, where there is no express agreement prohibiting the debtor from selling the inventory collateral or requiring the debtor to obtain the creditor's approval, it can be assumed that the debtor is entitled to sell the inventory.[345] Therefore, attention only needs to be given to the situation where the secured creditor does not approve the ordinary transaction of the collateral.

In the English law of secured transactions concerning corporeal movables, the question of to whom the registration of charge forms constructive notice is not answered directly by statutory law.[346] Instead, this question is left to the courts, and conflicting opinions exist.[347] In theory, there are two views with respect to the question: one is that registration is constructive notice to the entire world, and the other is that registration only forms constructive notice to those who would be reasonably expected to search the register.[348] Regardless of these controversies, it is clear that a buyer in the ordinary course of the seller's business is able to obtain the object free of floating charge. A similar rule can also be found in the UNCITRAL Model Law on Secured Transactions (art. 34),[349] the UCC (§ 9-320),[350] the DCFR

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343 It is necessary to note that the rule of the "ordinary course of business" discussed here is different from the Belgian rule of the "ordinary course of business" in several aspects. In general, the former rule allows acquisition free of the proprietary encumbrance, while the Belgian rule only concerns the authority of disposal. As to the question of whether a third party is able to acquire the collateral under Belgian law, art. 25 *Pandwet* which includes a provision that makes a distinction between the professional and non-professional, is also relevant. This has been just discussed. Under the rule discussed here, such distinction is irrelevant. Thus, the role applies to consumer buyers and trade buyers without any differences. See Gengaharen 2013, p. 368. Therefore, unlike the Belgian rule, the rule discussed here imposes no duty of inspecting the register on the third party, regardless of whether the party is professional or not.

344 Phillips 1979 (1), p. 9; Gedye 2013, p. 10.

345 Beale, Bridge, Gullifer and Lomnicka 2018, no. 12.05; Gengaharen 2013, p. 369.

346 Gullifer 2015, p. 437-438; Beale, Bridge, Gullifer and Lomnicka 2018, no. 12.04.

347 Beale, Bridge, Gullifer and Lomnicka 2018, no. 12.06-12.12; McCormack 2004, p. 106-107.

348 Beale, Bridge, Gullifer and Lomnicka 2018, no. 12.05.

349 Art. 34 (4) UNCITRAL Model Law on Secured Transactions: "*A buyer of a tangible encumbered asset sold in the ordinary course of the seller's business acquires its rights free of the security right, provided that, at the time of the conclusion of the sale agreement, the buyer does not have knowledge that the sale violates the rights of the secured creditor under the security agreement*."

350 § 9-320 (a) UCC: "*Except as otherwise provided in subsection (e), a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest created by the buyer's seller, even if the security interest is perfected and the buyer knows of its existence*."

(IX.-6:102),[351] and the Australian PPSA (s. 46).[352] The Canadian PPSAs and New Zealand PPSA also establish an "ordinary course of business" rule.[353]

In brief, this rule allows the encumbered assets, in particular inventory, to be sold in the ordinary course of the seller's business without being affected by the proprietary encumbrance.[354] For example, the sale of equipment by an equipment dealer is a transaction in the ordinary course of the dealer's business. However, the sale of equipment by a manufacturer, for whom the equipment is not inventory, cannot constitute a transaction in the ordinary course of this manufacturer.[355] In addition to sale, lease of corporeal movables is also, *mutatis mutandis*, governed by the rule.[356] In general, whether a sale or lease is qualified as a transaction in the ordinary course of business is a question that should be answered in two stages: (1) what is the ordinary course of the business?; and (2) is this sale (lease) carried out in the ordinary course of business?[357] To answer this question, all of the circumstances of the transaction have to be taken in consideration, such as the place where the contract is made, the identity of the buyer (lessee), the quantity of the assets sold (leased), and the price (rent).[358] Thus, uncertainty exists in the application of the rule.

In general, the rule of the "ordinary course of business" constitutes an exception to the *nemo dat* rule or the *prior tempore* rule.[359] This is because, briefly speaking, it makes the proprietary security right registered inferior to the subsequent acquisition in the ordinary course of business. Thus, there must be strong reasons to recognize the exception. Before turning to the possible reasons, it should be noted that the rule requires that the purchaser (lessee) must have no knowledge that the sale (lease) is in violation of the proprietary security right.[360] As has been mentioned above, the security agreement might include a clause that restricts further disposal of the collateral even in the ordinary course of business. In this situation, a requirement

351 Art. IX.-6:102 (2) DCFR: "*For the purposes of VIII.- 3:102 (Good faith acquisition of ownership free of limited proprietary rights) paragraph (1)(d) sentence 1, a transferee is regarded as knowing that the transferor has no right or authority to transfer ownership free from the security right if this right is registered under Chapter 3, Section 3 unless: (a) the transferor acts in the ordinary course of its business; or (b) the entry is filed against a security provider different from the transferor.*"

352 S. 46 (1) Australian PPSA: "*A buyer or lessee of personal property takes the personal property free of a security interest given by the seller or lessor, or that arises under section 32 (proceeds-attachment), if the personal property was sold or leased in the ordinary course of the seller's or lessor's business of selling or leasing personal property of that kind.*"

353 Whittaker and Partner 2015, p. 289.

354 UNCITRAL Legislative Guide on Secured Transactions, p. 202.

355 UNCITRAL Legislative Guide on Secured Transactions, p. 202-203.

356 UNCITRAL Legislative Guide on Secured Transactions, p. 204; Gedye 2013, p. 6.

357 Gedye 2013, p. 20.

358 Gedye 2013, p. 24; Gengaharen 2013, p. 372.

359 Gedye 2013, p. 3; Gengaharen 2013, p. 367.

360 UNCITRAL Legislative Guide on Secured Transactions, p. 202; White and Summers 2012, p. 1307-1308.

of applying the rule is that the purchaser (lessee) does not know that the seller (lessor) lacks valid authority to dispose. About this requirement of good faith, a further discussion is provided later (see 5.3.3.4).

B2: Rationale of the Rule

In general, the rule of the "ordinary course of business" can be justified from three perspectives, even when the rule is applied where the authority of disposal is defective. The first is that the rule can facilitate transactions by guaranteeing that the transaction in the ordinary course of business will not be affected by the property right registered.[361] It amounts to stipulating that the third party has no duty to search the register in the ordinary course of business, eliminating the impact of the formality of registration on the smooth operation of the transaction. In the absence of the rule, buyers would have to check the seller's authority of disposal by inspecting the register before entering into the transaction.[362] Moreover, the rule is consistent with the commercial expectation that the security provider will sell the inventory collateral without being affected by the existing encumbrance.[363] As we have demonstrated above, the security provider is usually entitled to sell the inventory collateral in the ordinary course of its business and discharge the secured debt with the proceeds obtained. Otherwise, the debtor's earning ability would be hampered.

The second perspective concerns the assumption of risks. In general, it is expected that the security provider will sell the inventory collateral and then use the proceeds out of the sale to repay the secured debt. In practice, most debts, whether secured or not, are discharged on the basis of the debtor's cash-flow in the ordinary course of the debtor's business. However, there is always a risk that the debtor fails to discharge the secured debt with the proceeds obtained. In this particular situation, who must bear the risk: the secured creditor or the buyer as a third party? In general, it is held that the former "*is in a much better position than the buyer to weigh the risks*".[364] For example, the secured creditor can avert the risk "*by taking insurance against credit risks, and by raising the costs of borrowing*".[365] It is unfair to expect the buyer to assume the risk of the seller's default.[366] Thus, the secured creditor loses the right to follow (*droit de suite*), and the property right can no longer exist on the collateral.

The third perspective relates to the rationale of publicity. As the drafter of the DCFR points out, "*the third person […] cannot be expected to care about any possible entries in the register for proprietary security*" when the transac-

361 UNCITRAL Legislative Guide on Secured Transactions, p. 204; Gengaharen 2013, p. 369.
362 UNCITRAL Legislative Guide on Secured Transactions, p. 202; Gedye 2013, p. 9.
363 UNCITRAL Legislative Guide on Secured Transactions, p. 202.
364 *Fairline Boats Ltd v. Leger* (1980) 1 PPSAC 218 at 220-221.
365 Gengaharen 2013, p. 369.
366 Gengaharen 2013, p. 369.

tion is in the ordinary course of the debtor's business.[367] In other words, registration does not give rise to constructive notice to third parties in the ordinary course of the debtor's business, because they cannot be reasonably expected to search the register.[368] Thus, the third party is able to acquire the collateral free of the proprietary security registered, even though the acquisition is in violation of the proprietary security. For such acquisition, it is necessary that the third party acts in good faith with respect to the violation.

C Conclusion

From the preceding introduction, it can be concluded that there are three approaches with respect to the extent of constructive notice of registration in the field of corporeal movables. The first approach is adopted by French law: all third parties are treated as knowing about the property right registered, regardless of whether the third party is professional or not, and whether the transaction with the third party is in the ordinary course of business. The second approach is followed by Belgian law, which makes a distinction between professional third parties and non-professional third parties. Under Belgian law, registration of pledge only forms constructive notice to the professional third parties. The third approach is associated with the rule of the "ordinary course of business". Under this rule, registration does not form constructive notice for third parties in the transaction arising in the ordinary course of business of the security provider.

The preceding introduction also demonstrates the rationale behind the restriction of constructive notice. In general, three reasons are relevant. The first reason concerns fairness. Under the Belgian law, it seems unfair to require a non-professional to search the register. Under the rule of the "ordinary course of business", requiring the third party, instead of the secured creditor, to assume the risk of the debtor's default is unfair. The second reason lies in the concern about smooth commerce. The restriction not only implies a limitation of the duty of searching the register, but also means that certain third parties are entitled to acquisition without being bound by the property right registered. In this way, the smooth operation of transactions, in particular those carried out in the ordinary course of business, is facilitated. The third reason relates to reasonableness. In general, it is unreasonable to expect non-professional third parties or third parties in the ordinary course of their counterparty's business to search the register.

In this research, we hold that the effect of constructive notice of registration should be restricted for the purpose of the smooth operation of transactions in the ordinary course of business. In the field of corporeal movables, it is desirable that the system of registration be associated with a rule of the "ordinary course of business". As we have shown above, most

367 Beale, Bridge, Gullifer and Lomnicka 2018, no. 12.05; Proprietary Security in Movable Assets 2014, p. 511.

368 Beale, Bridge, Gullifer and Lomnicka 2018, no. 12.16.

jurisdictions have established this rule in the law of secured transactions of movable property. At the European and international level, the rule is also commonly accepted.[369]

Apart from the three reasons presented above, the restriction of constructive notice under the rule of the "ordinary course of business" also has its practical basis. This basis is that most transactions in the ordinary course of business are carried out with valid authority. The seller (lessor) is usually entitled to dispose of the object free of the property right registered in the ordinary course of its business. Thus, there is no need to require third parties to search the register in most situations. Truly, the seller (lessor) is not allowed to dispose of the object free of the property right registered in exceptional situations. However, it does not seem worthwhile to impose a general duty on the third party because of such exceptional situations.

It has been shown that Belgian law stipulates that registration is not constructive notice to non-professional third parties. This rule overlaps with the rule of the "ordinary course of business". In general, the transaction with non-professional third parties, in particular consumers, falls within the ordinary course of business. Therefore, the principal difference between the Belgian rule and the rule of the "ordinary course of business" is whether registration forms a constructive notice to trade buyers (in the jargon of Belgian law professional buyers). In this research, we argue that a general duty of inspecting the register should not be imposed on trade buyers for the reasons presented above.

Proposal 17:
Registration should not affect transactions in the ordinary course of the debtor's business. Third parties in the ordinary course of the debtor's business cannot be reasonably expected to search the register and thus cannot be assumed to be aware of the property right registered.

5.3.3.4 The Issue of Good Faith

It has been demonstrated that registration is a condition of the legal effect against subsequent acquirers. With respect to this conclusion, an important issue is whether good faith is necessary for subsequent acquisition free of an existing but unregistered property right. In other words, should a third party who has actual knowledge of an unregistered property right be bound by this right? Should the date of registration be a decisive factor? Is knowledge also relevant in determining the priority between different competing property rights?

369 See art. IX.-5:204 DCFR and IX.-6:102 DCFR, and Recommendation 81 UNCITRAL Legislative Guide on Secured Transactions.

A Notice and Race

With respect to this issue, there are three different approaches: one is the "*notice*" system, another is the "*race notice*" system, and the third is the "*pure race*" system.[370] Under the first system, the subsequent acquirer who has neither actual knowledge nor constructive knowledge will prevail, regardless of whether the acquirer has completed registration. Therefore, if a property right is not registered, which implies that the effect of constructive knowledge is not triggered, then this right is subordinate to subsequent acquisition by a third party acting in good faith. This system has a dilemma: since the subsequent acquirer acting in good faith and the unregistered proprietor do not differ in the aspect of registration, there is no reason to protect the former in priority.[371]

Under the second system, the subsequent acquirer obtains priority only when completing registration earlier in good faith. Registration has the effect of constructive knowledge, implying that subsequent acquisitions cannot arise free of registered property rights. The race notice system grants a secure position to registered proprietors. For subsequent acquisition free of unregistered property rights, it is necessary that the subsequent acquirer acts in good faith at the moment of registration. This implies that the information outside of the register is also relevant. Thus, registration is not decisive in solving the conflict between "older" unregistered property rights and "younger" registered property rights.

Different from the two systems above, the pure race system focuses only on the date of registration: the person who completes registration earlier obtains a higher ranking. In general, it is irrelevant whether the person is aware of other property rights created earlier. For example, A purchases a bulk of bicycles from B who inserts a clause of reservation of ownership; soon A mortgages these bicycles to C, and C knows about B's reservation of ownership. Under a pure race system, C will win when he registers the mortgage earlier, provided that both transactions are registerable. In this case, C's knowledge obtained outside of the register is of no relevance.

The pure race system is commonplace nowadays, at least in the field of secured transactions of movables. The system can be found in Article 9 UCC,[372] the Canadian PPSAs,[373] the New Zealand PPSA,[374] and the Australian PPSA.[375] The principal reason for choosing to construct a pure race system of registration is that this system facilitates the "*certainty*" of

370 Baird and Jackson 1984, p. 313.

371 This reminds us of the dilemma in the English landmark case of double sale and lease-back (*Michael Gerson (Leasing) Ltd v. Wilkinson and State Securities Ltd*, 31 July 2000 [2001] Q. B. 514.). If both of the two competing buyers (here acquirers) do not have possession (here registration), falling in the same situation, then why can the second buyer win (see 3.4.3.1.D).

372 See § 9-322 (a) (1) UCC; LoPucki, Abraham and Delahaye 2012, p. 1795.

373 See s. 30 (1) Ontario PPSA; Bennett 1999, p. 57.

374 See s. 66 (b) New Zealand PPSA; Gedye 2011, p. 705.

375 See s. 55 (4) and (5) Australian PPSA; Whittaker and Partner 2015, p. 308.

transactions.[376] Under this system, there is no need to investigate the question of whether the subsequent acquirer acted in good faith at the moment of registration.[377]

Unlike the legislation mentioned above, Book IX DCFR constructs a notice system of registration by combining the *nemo dat* rule and the rule of *bona fide* acquisition.[378] According to art. IX.-2:105 DCFR, a requirement of granting security rights is that the grantor has qualified authority to do so. As an exception to this requirement, the DCFR provides the possibility of acquisition from an unauthorized grantor (art. IX.-2:108) and the acquisition free of earlier limited property rights (art. IX.-2:109).[379] In accordance with these two provisions of *bona fide* acquisition, the subsequent acquirer has to act in good faith,[380] and the completion of registration by the acquirer is irrelevant.[381] Thus, the system proposed is not a race notice system: whether the subsequent acquirer registers the property right earlier is irrelevant. In the viewpoint of the drafters, "*the mere fact that a secured creditor has filed an entry in the register of security rights does not entitle this secured creditor to have confidence in the security provider's entitlement to dispose of the assets concerned*".[382] However, as has been pointed out at the beginning of this part, a problem of this system is that it is difficult to explain that the subsequent acquirer acting in good faith is protected in priority to the unregistered proprietor. Both parties are in the same position in the aspect of publicity.

B Efficiency and Morality

The controversial issue of good faith relates to two aspects: one is clarity and certainty of property rights, and the other is morality associated with property rights. These two aspects have been pointed out by English scholars in discussing whether the conventional doctrine of notice should be abolished in reforming the system of land registration.

> "*Moreover, the displacement of the traditional equitable doctrine of notice achieves a certain kind of efficiency, albeit at the expense of some moral exactitude. Unlike the 'bona fide purchaser' principle, the registration rule obviates any general inquiry into the state of mind or moral standing of the individual disponee in each transaction.*"[383]

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376 White and Summers 2012, p. 1281.

377 Baird and Jackson 1984, p. 314.

378 See art. IX.-2:105 DCFR and art. IX.-2:108-109 DCFR.

379 Pursuant to art. IX.-401 (5) DCFR, where a security right is obtained in the way of *bona fide* acquisition (art. IX.-2:108 and IX.-2:109), this security right has priority to the earlier security right or the device of reservation of ownership.

380 DCFR 2009, p. 4488 and 4493.

381 DCFR 2009, p. 4489 and 4492.

382 DCFR 2009, p. 4487. In fact, this reasoning is also found in explaining why delivery is not a requirement of *bona fide* acquisition of security rights on corporeal movables. See DCFR 2009, p. 4487.

383 Gray 2009, p. 1093.

Indeed, good faith concerns the state of third parties' minds, which are difficult to probe. Where good faith is stipulated as a requirement for subsequent acquisition by third parties, the real proprietor might make use of this requirement as a means of defense. As a result, whether the third party is innocent will often become a dispute that courts have to adjudicate. This brings two negative consequences: one is that the activity of adjudication *per se* is costly, and the other is that whether third parties can acquire property rights will become uncertain.

Carol M. Rose observes a distinction of "*mud*" and "*crystals*" in the rules of property law.[384] The feature of the crystal rules (or hard-hedged rules) is that "*they signal to all of us, in a clear and distinct language, precisely what our obligations are and how we may take care of our interests*", while mud rules are so "*fuzzy and ambiguous*" that individuals "*don't know quite what their rights and obligations really are*".[385] Property law should include ambiguous terms (such as fairness and reasonableness) as few as possible, because the legal relationship of property rights should be clear and certain for third parties.[386] This view is also in line with the economic rationale that clear delimitation of property rights is a precondition for efficient utilization.[387] In essence, the requirement of good faith forms a mud rule. It is a difficult question whether the subsequent acquirer knows or should be regarded as knowing the existence of an earlier but unregistered right.[388]

Nevertheless, we argue in the following discussion that certainty of property rights is not a sufficient reason to dispense with the requirement of good faith.

Firstly, a pure race system, under which actual knowledge is completely irrelevant, is not in line with the purpose of registration.

> "*After all, the purpose of notice filing is to make the prior right known. If this prior right happens to be already known to the second-in-time lender, then to continue to make filing the sole determining factor defeats the purpose that such filing intended to serve in the first place.*"[389]

As we have stated above, the purpose of registration is to address the problem of information asymmetry by providing a reliable channel through which outsiders can obtain proprietary information (see 2.2.3 and 5.1.1.2). Once a third party has been aware of the actual legal state, this party is expected to act according to what he knows. Otherwise, the registration system would become a tool taken advantage of by third parties to override the *nemo dat* rule, a cornerstone of the entire legal system of property.[390]

384 Rose 1988, p. 577.
385 Rose 1988, p. 577-579.
386 Snijders and Rank-Berenschot 2017, p. 69.
387 Lueck and Miceli 2007, p. 189.
388 Rose 1988, p. 588.
389 Hamwijk 2014, p. 357.
390 Rusch 1995, p. 567.

Secondly, the pure race system causes a moral difficulty. Human beings live in communities and are expected to behave in a way that takes others in consideration. There is not a general rule requiring people to benefit others positively. But the negative duty of not harming others exists on the shoulder of every person. In general, *bona fide* acquisition by a third party is recognized at the cost of earlier property rights, and law must attempt to strike a balance carefully. Allowing subsequent acquisition by *mala fide* persons amounts to encouraging immoral or unfair competition.[391] Indeed, market competition is important. However, this does not mean that a person can overlook others' legal position in the course of pursuing his or her own interests. The pure race system runs counter to "*fairness feelings*".[392]

In the system of private law, good faith is always a condition of conferring priority benefits on a third party, when it is inevitable that the interest of another party will be sacrificed (in particular the original owner in the situation of *bona fide* acquisition and the principal in the situation of apparent agency).[393] In the absence of good faith, the protection of third parties' reliance becomes groundless. In fact, even under Article 9 UCC which aims for a pure notice system, good faith is treated as relevant in judicial practice. For example, the case *In re Davidoff* states that "*it was not good faith to impose a security interest on assets which a debtor had already said were secured to two named banks*".[394] Moreover, in situations where "*something more than knowledge of the subsequent acquirer is involved*" the registration-based priority rules have also been modified by judges.[395] Perhaps, one reason for the "*judicial subversion*" is that the "*race priority itself was probably an accident*", and "*the drafters had no clear intent in this regard*".[396]

Thirdly, the requirement of good faith has both downsides and merits. In the viewpoint of Joseph William Singer, good faith is a "*standard*" (as opposed to a "*rule*").[397] Compared with rules, standards are less predictable because judges have to apply them by considering all relevant factors and circumstances. On the other hand, this comprehensive consideration allows judges to avert unfairness and inefficiency which might be caused by clear and rigid rules.[398]

> "*Rules grant the luxury of indifference. They invite self-interested persons to act like Holmes's 'bad man' and go forward with harmful but lawful conduct. In contrast, standards promote attentiveness to the effects of one's actions on others and may thereby promote an other-regarding altruist ethical stance […]. For this reason, Seanna Shif-*

391 Carlson 1986, p. 243.
392 Carlson 1986, p. 227-229.
393 Nieskens-Isphording and Van der Putt-Lauwers 2002, p. 17-19.
394 *In Re Davidoff*, 351 F. Supp. 440 (S.D.N.Y. 1972).
395 White and Summers 2012, p. 1321-1322.
396 Carlson 1986, p. 235, 250.
397 Singer 2013, p. 1370.
398 Singer 2013, p. 1376.

frin and Jeremy Waldron argue that standards promote moral introspection and justification."[399]

Truly, the requirement of good faith may cause vagueness and be a drain on judicial resources. However, these two downsides can be largely counterweighed by the preservation of moral justice, a value perhaps having a higher ranking than economic efficiency. In strangers community, commerce is not only a cool and hard activity, but also a means to facilitate morally social interactions.[400] Good faith is a core ingredient of social commerce because it requires practitioners to be "*attentive to the needs of others*".[401]

It is noteworthy that the standard of good faith is not always vague. In fact, it is or can be predictable in two senses. The requirement is informally predictable. Individuals commonly expect that a third party acting in bad faith should not be entitled to subsequent acquisition free of existing property rights. In general, this is a result of our commonly-shared value and social experience, which is also known as "*informal sources of justified expectations*".[402] Just as Carlson argues, "*for the public, certainty is desirable for good faith Bs, but certainty for bad faith Bs is probably undesirable*".[403] In light of this view, the pure race registration seems unpredictable: the irrelevance of good faith under this system does not match with our moral sense and thus may surprise us. Moreover, with the accumulation of judicial experience, the question whether a third party acts in good faith can be answered with predictability and certainty. Granting judicial discretion to judges does not mean that they will make judgements arbitrarily. On the contrary, they are, perhaps informally, bound by precedents and popular understandings of lawyers.

Fourthly, a system of pure race registration may fail to realize the purpose of saving costs. The earlier proprietor can resort to other rules to preserve his or her unregistered property right. For example, the earlier proprietor may claim that the third party acted in bad faith, and the third party and its counterparty jointly harmed the unregistered property right intentionally. In general, this is in defiance of good morality, which provides sufficient ground to invalidate the agreement between the third party and its counterparty.[404] In addition, the earlier proprietor might also resort to tort law, claiming that the third party had an intention to damage the earlier property right through creating a new property right. As we have mentioned above, good faith has been used as a ground to deny subsequent acquisition by *mala fide* third parties in the legal practice of Article 9 UCC. Therefore, the effect of facilitating certainty and clarity of property rights by dispensing with the requirement of good faith is not apparent as it appears.

399 Singer 2013, p. 1377.
400 Rose 1988, p. 608.
401 Rose 1988, p. 607.
402 Singer 2013, p. 1380.
403 Carlson 1986, p. 241.
404 About this rule, see § 138 (1) BGB and art. 3:40 (1) BW.

In a nutshell, the requirement of good faith matches the purpose of registration and our moral sense. Though it might be a source of uncertainty, this problem should not be overstated due to the fact that judicial discretion on the issue of good faith is only unpredictable to a limited extent. On the other hand, whether abandoning the doctrine of good faith can save costs and facilitate legal certainty is still unclear.

Proposal 18:
For acquisition by a third party free of the property right which is created but not registered, it is necessary that this third party acts in good faith.

5.3.3.5 The Issue of Public Reliability

A Doubts about Public Reliability of the Register

In theory, a register can be a conclusive or reliable means of publicity with the legal effect of public reliance (see 5.1.2.3). A third party who relies on the register should be protected, even though the register fails to show the actual status of property rights or the relevant registration is incorrect. In reality, however, whether and to what extent a register book is conclusive is a question the answer to which depends on multiple factors. For example, the land register varies in the aspect of reliability (see 5.1.2.3).

In the field of corporeal movables and claims, it is often held that the register for secured transactions has no effect of public reliance.[405] There are several reasons for this. Firstly, the permission of creating a property right in the absence of registration will undermine the reliability of the register (declaratory effect). The integrity of the register will be hampered due to the existence of property rights created but not registered.[406] Secondly, the register is doomed to be "*negative*" because it operates "*in a purely electronic manner without active intervention of the system or the registrar*".[407] The involvement of registrars, especially those who are responsible for checking the validity of the contract, will reduce errors and defective property rights, facilitating the reliability of the register. Thirdly, the registration might cover future movable property, and the registration can be completed before the property right is created (advance registration).[408] Advance registration hampers reliability of the register.[409] Fourthly, the register is notice-based, which means that only "*minimal information*" is conveyed to third parties (see 5.3.1.4). It seems difficult to say that such minimal information can provide an adequate basis for the register to be reliable.[410] In the following discussion, we examine these four reasons in sequence.

405 Sigman 2010, p. 508.
406 Dubarry 2016, p. 631.
407 Dirix and Sagaert 2014, p. 246.
408 Sigman 2010, p. 508.
409 Baeck and Heytens 2019, p. 14.
410 Sigman 2010, p. 509.

B The Possibility of Public Reliance of the Register

In 5.3.3.1 and 5.3.3.2, it has been argued that the register proposed in this research for corporeal movables and claims has an effect against subsequent acquirers. This effect can be explained by the doctrine of constructive notice: in principle, subsequent acquirers are assumed to be aware of the property right registered (see 5.3.3.3). As a result, subsequent acquirers should not be bound by a property right which cannot be found from the register, provided that they act in good faith (see 5.3.3.4). Therefore, it can be concluded that *bona fide* subsequent acquirers are protected against the incompleteness of the register. For third parties acting in good faith, property rights not registered should be assumed to be non-existent. The protection against the incompleteness of the register is an important aspect of the public reliance of the register. Typically, this protection arises in the situation of double disposals ("A-B and A-C" transaction): A disposes of the object to B and then to C. Undoubtedly, the person who registers his or her right earlier will obtain a preferential position, and the searcher should not be bound by the property right falling outside the register. Otherwise, the system of registration would be useless: individuals would not bother to register or search the register.

Now let us turn to the second reason, an argument against public reliability from the perspective of the involvement of registrars. In general, this argument relates to consecutive transactions ("A-B-C" transaction): A disposes of an object to B who further disposes of the object to C. If the A-B transaction proves to be defective, will the transaction between B and C be affected?[411] According to the argumentation, since no registrar is involved in the operation of the self-service system, mistakes and errors cannot be eliminated through formal or substantive check by registrars. Inevitably, the register cannot be treated as reliable, and the reliance of third parties such as C should not be protected.

In general, the argumentation shown above is not fully convincing. This is because whether C deserves preferential protection is a matter of legal policy, having no necessary connection to the involvement of the registrar. In the hypothetical case above, the legislature has to make a choice between static security (A's preservation of his right) and dynamic security (C's reliance on the register), provided that B's acquisition has been filed in the system.[412]

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411 About this question, it should be first noted that the principle of abstraction is not the only way to provide protection to successive acquirers (C in this case). The principle is not necessary for a means of publicity to be reliable for third parties. As we will see here, the protection of C is a matter of legal policy. Moreover, the principle of abstraction goes too far in safeguarding C and is not fully compatible with the rationale of publicity. It grants protection to C, regardless of whether C acted in good faith. As shown above, the principle of causation plus the rule of *bona fide* acquisition suffices for the protection of third parties (see 5.2.3).

412 About the distinction between dynamic security and static security, see O'Connor 2005, p. 47-49.

As has been argued above, whether a system of registration can serve as a basis of *bona fide* acquisition for third parties is an issue of legal policy (see 5.1.4.2). The role played by registrars is not necessarily relevant. Nowadays, there is not any general register for corporeal movables in many jurisdictions, which implies that no registrar is involved in the transaction of corporeal movables. However, this does not prevent third parties from *bona fide* acquisition on the basis of possession, a defective means of publicity. As we have argued above, *bona fide* acquisition of corporeal movables is in essence a result of legal policy and cannot be justified on the basis of the publicity effect of possession (see 3.4.3.4). The self-service system of registration proposed in this research might include defective filings. As in the situation of possession of corporeal movables, however, it is possible to provide *bona fide* protection on the basis of this system, provided that the legislature determines that dynamic security should prevail.

For example, where a bicycle is transferred under a clause of reservation of ownership, and this reservation has been registered; later the transferee (the second-hand) sells this bicycle to a third party (the third-hand). In this case, the latter disposal is subject to the same condition of payment under the *nemo dat* rule.[413] As a result, the third party is entitled to obtain full ownership upon the fulfillment of the suspensive condition. If the first hand (the original owner) is allowed to revoke the transaction against both the second hand and the third-hand by claiming that the first transfer was made under coercion, then the reliance of the third hand on the registration will fall short of protection. For the third hand, what can be seen from the register is that the bicycle was transferred under the suspensive condition of payment. The defect of coercion is invisible. In this case, both the first hand and the third hand are innocent and deserve protection. However, which one should prevail? This is a question of legal policy. If the legal policy is in favor of the third hand, then its reliance should be protected in priority.

In the end, we turn to the third and fourth reasons. These two reasons are co-related. The register proposed by this research is a notice-filing system (see 5.3.1.4), which allows advance registration. An important feature of this system is that it only indicates that the registered property right "may" exist. The registration might be completed before the conclusion of an underlying contract. Moreover, the system only provides minimal information and may fail to indicate, for example, the specific object involved. Therefore, the information stored in the system is not only imprecise but also perhaps incorrect. It is difficult to say that the system is, like the land register, able to serve as a reliable source of information.

Nevertheless, we contend that *bona fide* acquisition is also possible because of a supplementary scheme. This scheme is that third parties are entitled to further inquire with relevant parties to obtain the details of the property right registered (see 5.3.1.4). If the relevant party fails to answer

413 Snijders and Rank-Berenschot 2017, p. 423.

the inquirer's request, the inquirer can act as if "*the secured creditor had given the information that the assets concerned are not encumbered*", as provided for by art. IX.-3:323 DCFR. More importantly, third parties can rely on the information provided, so that they are able to make decisions with security according to the information. This protection has been pinned down by the DCFR in art. IX.-3:321, a provision concerning disclosure of correct information, and art. IX.-3:322, a provision concerning disclosure of incorrect information. Remarkably, art. IX.-3:322 (1) stipulates that where the incorrect information is that assets are not encumbered, "*the inquirer may within three months acquire a proprietary right in these assets free of any encumbrance in favour of the secured creditor on the basis of a good faith acquisition in spite of the entry in the register covering the secured creditor's rights*". In the situation where the incorrect information is that assets are encumbered, art. IX.-3:322 (2) provides two rules: (1) if the inquirer, typically, refrains from taking the transaction, then he or she is entitled to damages; and (2) if the inquirer, nevertheless, obtains a property right, the secured creditor who provides the incorrect information cannot gain any benefit from the incorrect disclosure.[414]

The supplementary regime of disclosure also implies that a third party is not entitled to acquisition in violation of what he or she knows from the disclosure of the relevant party. For example, when a third party knows from the disclosure that his or her counterparty's previous acquisition has a defective legal basis (such as an invalid or avoidable contract), *bona fide* acquisition will become impossible. This is because the third party knew about the actual state of the ownership of the object. In general, this is in line with our preceding argument that the element of good faith should not be dispensed with in introducing a system of registration (see 5.3.3.4). The DCFR confirms the relevance of good faith in art. IX.-3:321 and IX.-3:322.[415]

In a nutshell, the causation principle plus the rule of *bona fide* acquisition should be adopted in the system of registration proposed for corporeal movables and claims. Because of the general possibility of *bona fide* acquisition, the system of registration can be treated as having public reliance: third parties are allowed to transact on the basis of the information obtained from the register and the disclosure. It should be noted that the protection is in essence an outcome of legal policy of facilitating the certainty of transactions. If a contrary legal policy is adopted by conferring preferential protection over the actual owner, then the protection of reliance on the register would be negated.

Proposal 19:
The register might be a reliable means of publicity for third parties acting in good faith, so that *bona fide* acquisition is possible on the basis of the register. Inquirers, as a third party, should be allowed to rely on the information

414 Proprietary Security in Movable Assets 2014, p. 524-525.
415 Proprietary Security in Movable Assets 2014, p. 521-524.

provided by the relevant parties. If the information provided proves to be incorrect or incomplete, *bona fide* acquisition or damages should be available to the inquirer.

5.3.3.6 Duration of the Validity of Registration

In general, the duration of property rights varies significantly. For example, ownership reserved by the seller may pass to the buyer upon the payment of the purchase price, the property right of security enjoyed by the creditor is dependent on the performance of the secured obligation under the feature of "accessoriness (*afhankelijkheid* or *Akzessorietät*)" of security rights, and the property right of use comes to an end when the term of use expires. From these examples, it can be seen first that some property rights have a definite period of duration, while other property rights will change or end within an uncertain period. It is possible that the parties specify a definite period when creating the property right. For example, the secured creditor and the security provider may agree that the property right of security will exist for two years, regardless of whether the secured obligation is not performed within this period of time.

The variety of the period of duration of property rights gives rise to a problem concerning registration: how long should registration be valid? This problem involves two aspects: (1) can registration be valid for an uncertain period which depends on the duration of the registered property right; and (2) can registration be valid for a period specified by the parties without being limited by a maximum term? The first aspect concerns certainty of registration. If the validity of registration is subject to an uncertain period, searchers will not be able to ascertain from the register whether the property right registered remains existent. The second aspect concerns the smooth operation of the register. If a registration can be valid for a long period as the parties desire, the register would be cluttered with too many registrations.[416] To avert the problems presented above, it is desirable to require the parties to specify a definite period of duration of the property right registered without excessing a maximum term.

Under some PPSAs, Article 9 UCC, and Book IX DCFR, a longest period is recognized for the registration of secured transactions concerning movables, provided that no specific term is determined by the parties.[417]

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416 Whittaker and Partner 2015, p. 208.

417 Under the Australian PPSA, the longest term is 7 years for the consumer property and the property described by a serial number and 25 years for the other types of property (s. 153 (1)). The New Zealand PPSA prescribes a longest term of 5 years (s. 153). Article 9 UCC and Book IX DCFR also include a longest term of 5 years (§ 9-515 (a) UCC and art. IX.-3:325 (1) DCFR). However, the Canadian PPSAs do not prescribe a longest term in general, and a security interest can be registered for infinity. See MacDougall 2014, p. 257-258.

The UNCITRAL also recommends a maximum period of registration.[418] Therefore, where parties fail to specify a definite period of registration, the registration will expire upon the passage of the maximum period. Truly, the property right might end before the expiry of the maximum period, and the register cannot always show the true condition of the property right. However, prescribing a maximum period improves the reliability of the register to some extent: if a registered property right ends before the expiry of the maximum period, and the parties fail to undo the registration, the registration will become invalid automatically upon the expiry of the maximum period.

Is the term specified by the parties also subject to the maximum period? In other words, is the maximum period only a default rule? With respect to this question, different answers are provided by different laws. According to the Australian PPSA and Book IX DCFR, parties are able to determine a period longer than the maximum period.[419] However, the New Zealand PPSA and Article 9 UCC impose a five-year limitation on the period of registration, regardless of whether the period is determined by the parties.[420] In this research, it is proposed that the maximum term is also applicable to the period determined jointly by the parties. Otherwise, the purpose to avert the clutter of registrations will be easily frustrated by parties specifying an extremely long period or even an infinite period.

Of course, where a maximum period of registration is pinned down, parties should be allowed to terminate the registration before the expiry and renew the registration after the expiry. This is commonly accepted by the law concerning the registration of secured transactions of movables.[421] In general, the termination and the renewal form an amendment of the register to which the parties are entitled.

Proposal 20:
To guarantee the smooth operation of the register, a maximum period of the validity of registration should be prescribed. This maximum period applies not only when no definite period is determined by the parties, but also when the parties specify a definite period. Parties are entitled to undo the registration before the expiry of the maximum period and renew the registration after the expiry of the maximum period.

418 UNCITRAL Legislative Guide on Secured Transactions, p. 182; UNCITRAL Guide on the Implementation of a Security Rights Registry, p. 80.
419 See s. 153 (1) Australian PPSA and art. IX.-3:325 (1) DCFR.
420 See s. 153 New Zealand PPSA and § 9-515 (a) UCC.
421 See art. IX.-3:326 DCFR; s. 154 New Zealand PPSA; § 9-515 (d) UCC; UNCITRAL Legislative Guide on Secured Transactions, p. 182.

5.3.4 Conclusion

In the preceding discussion, we propose a general system of registration for corporeal movables and claims. The register is a subject-based system constructed according to the identifier of parties. Third parties are able to search the register with reference to the identifier. A register folio should be attributed not only to legal persons, but also to natural persons, regardless of whether they act as a consumer. The system is digital and makes use of new information technology. The system is based on the notion of self-service, which means that the transacting parties can complete registration and third parties can search the register without involving registrars. The register is a notice-filing system that provides basic information concerning the property right, and searchers are entitled to further inquire with the relevant parties to obtain details of the property right.

In general, the register should not apply in situations where the problem of information asymmetry does not exist or has been addressed through other means. For example, ships and aircraft usually have a specialist register, and there is no need to include these two corporeal movables in the system of registration proposed by this research. In general, claims lack a means of publicity, and it is desirable to include the disposal (such as assignment and pledge) of claims in the register. Due to concerns about efficiency, a threshold of the value of the object should be set up so that the register will not be cluttered by small transactions. For the object which has a high frequency of circulation, such as securities and money, the formality of registration is undesirable; for the object which has a low frequency of circulation, such as jewelry, registration is also undesirable. Moreover, the duration of the hidden state of transactions is relevant to defining the scope of registration. For the transaction which will usually be accomplished within a short term, a grace period should be recognized.

For the acquisition of property rights, the formality of registration has declaratory effect, which means that registration is not a requirement of the acquisition. In general, registration can give rise the legal effectiveness against subsequent acquirers. A property right validly obtained can be enforced against strange interferers and general creditors, despite the absence of registration. For subsequent acquirers, registration constitutes constructive notice. However, the extent of this effect is restricted for the purpose of facilitating the fluidity of commercial transactions. The effect of registration is subject to the rule of the "ordinary course of business". For third parties to obtain a property right from the unauthorized, it is necessary that they act in good faith. The requirement of good faith guarantees that a fair balance can be reached between the third party and the actual owner (or the holder of earlier property rights).

The system of registration operates without involving registrars, and the information conveyed by the notice-filing register is not fully detailed. However, it is possible that third parties can rely on the system, and their reliance on the system is protected. This is because the protection of *bona fide*

third parties is a matter concerning legal policy with respect to the means of publicity. If the legislature puts certainty of transactions in a primary position, the register can also act as a basis for *bona fide* acquisition. In addition, it should be noted that the system is associated with a supplementary scheme: the duty to provide information. Third parties are entitled to rely on the information provided by the relevant parties, which constitutes another aspect of the reliability of the system.

5.4 Registration as a Solution | Case Study I: Secured Transactions

In 5.3, we discussed the adoption of a system of registration from three general aspects: the way of constructing the system, the scope of the system, and the legal effect of the system. The general discussion takes the register for secured transactions concerning movables as an important sample but is also applicable to non-security transactions, such as the outright assignment of claims and the true lease of corporeal movables.

From this part, our attention shifts to three specific case studies. The first case study is secured transactions of corporeal movables and claims (see 5.4), a much debated topic in contemporary academic research and the reform of property law.[422] This case study is part of the preceding general discussion. Nevertheless, it is still necessary to devote further attention to this type of transaction from two aspects: the desirability of registration and the scope of registration. The reason for doing so is that there are controversies about these two aspects, as we will see later. In the following discussion, we mainly examine whether the system of registration proposed in 5.3 can alleviate and even eliminate the concerns about the adverse effect of registration on secured transactions.

The second case study is trust of corporeal movables. Trust is a regime of common law. Publicity of trusts is a traditional issue in the introduction of this regime into the civil law system. The regime has no means of publicity under common law, which runs counter to the principle of publicity in the civil property law. The recognition of trusts (*fiducie*) by French law (in 2007) and the recent plan to translate trust into Belgian law attract our attention to this traditional issue from the angle of publicity. In 5.5, we examine the possibility of including trust of corporeal movables and claims in the general system of registration proposed in this research.

The third case study concerns transactions concerning motor vehicles (see 5.6). A transaction concerning motor vehicles is governed by the traditional rules of possession in many jurisdictions. Different from aircraft and vessels, this type of corporeal movable does not occupy a place in the world of private law registration, despite the fact that an administrative system of

422 Gullifer 2016, p. 1-3.

registration has operated for a long time. The publicity of motor vehicles attracts attention in the course of reforming the law of secured transactions concerning movable property. For example, the PPSAs in Canada, Australia and New Zealand treat motor vehicles as a type of "*serial-numbered property*" which can be found with reference to the VIN.[423] As a result, the subject-based register has an object-based dimension. This induces us to devote particular attention to this special type of corporeal movable.

5.4.1 Setting the Scene

In contemporary financing practice, movable property, including corporeal movables and claims, is becoming increasingly important as collateral. The traditional security device, pledge, cannot satisfy the demand because of its intrinsic drawbacks. For example, the traditional pledge requires giving up possession or notifying the debtor in the situation of corporeal movables and claims respectively, which causes significant inconvenience to practitioners. As a result, the most popular security devices are those that do not require delivery or notification: non-possessory security device and undisclosed security device respectively. Both can be title-based (such as reservation of ownership and security transfer of ownership) or take the form of a limited property right (such as non-possessory pledge of corporeal movables and undisclosed pledge of claims). Moreover, security may be provided under the name of lease (such as financial lease and sale and leaseback).

These security devices, including the traditional possessory pledge, may differ in legal structure, but they all face the same problem of publicity. Whether and how these security devices should be made transparent is an issue under fierce debate, as we demonstrate below. Moreover, the debate on publicity is also related to other issues, in particular the question of whether a functional approach (or unitary approach) should be taken and whether non-security transactions should also be included in the same system of registration. Under the functional approach, the legal form a security device takes is treated as irrelevant to the existence of a security interest. For example, reservation of ownership can give rise to a security interest owned by the transferor under the functional approach. Non-security transactions are those that have no function to provide security, even in the economic sense. Outright assignment of claims and true lease are two typical examples of non-security transactions.

Many common law jurisdictions have initiated a legal reform of secured transactions concerning movable property, and most of them have constructed a system of registration. One inspirational approach is the notice-filing system under Article 9 UCC. According to Article 9, filing a

423 Whittaker and Partner 2015, p. 178-179.

financial statement in the system, in addition to possession and control, is a method of perfection that can make the security interest effective against certain third parties, including subsequent secured creditors, lien creditors, and general creditors in the event of bankruptcy.[424] Influenced by Article 9 UCC, both Canada and New Zealand have established a similar register, known as PPSA systems.[425] In 2012, the new Australian PPSA system came into operation and replaced the old system, a register based on the English system of registration. In these jurisdictions, a functional approach is adopted by having a general concept of "*security interest*".[426] Under the functional approach, different types of security device are characterized under the unitary concept of "*security interest*", irrespective of the legal form taken or whether they are title-based.

> "*After all, pursuant to a functionalist model, the essence of a security interest is not determined by the formal legal framework out of which it arises, but in what it seeks to accomplish. So, a transaction cast in some other form-sale, trust, lease, consignment, etc.-may nonetheless constitute a security interest if it functions to secure payment or performance of an obligation?*" [427]

In the world of common law, another example of registration for secured transactions of movable property is the companies register in English law. According to English law, registration is a way of perfection that "*can make the security effective against other secured creditors, trustees in bankruptcy and company liquidators or administrators*".[428] Different from the Article 9 system and the PPSA system, the English system is not governed under the functional approach: English law does not unify different types of security device under one concept according to their economic function, thereby following a formal approach.[429] Under this approach, there is a group of quasi-security interests, such as retention of title the hallmark of which is that it is not subject to the requirement of registration.[430] By rejecting the formality of registration, "*the associated administrative burdens and unwelcome publicity are avoided*" in the situation of quasi-security interests.[431]

The trend of having a system of registration has met with some resistance in some jurisdictions with a civil law tradition. Some countries, such as France, Belgium and Italy, have introduced a register for secured interests of movable property, especially the non-possessory pledge.[432] But they differ in some aspects. For example, reservation of ownership should be regis-

424 Hamwijk 2014, p. 189-190.
425 Ali 2002, p. 156.
426 Whittaker and Partner 2015, p. 39.
427 Bridge, Macdonald, Simmonds and Walsh 1999, p. 577-578.
428 Beale, Bridge, Gullifer and Lomnicka 2018, no. 9.01.
429 Goode 2013, p. 4-5.
430 Bridge, Gullifer, McMeel and Worthington 2013, p. 14.
431 Beale, Bridge, Gullifer and Lomnicka 2018, no. 7.06.
432 Castellano 2016, p. 542; Dirix and Sagaert 2014, p. 231; Renaudin 2013, p. 385.

tered in Italian law, but not in Belgian law or French law.[433] Other countries, such as Germany and the Netherlands, remain hesitant to introduce a general system of registration.[434] The security transfer, a security device without involving any registration, plays a dominant role in the German financing market. In the course of re-codification of the old BW, Dutch law replaced the security transfer with non-possessory pledge of corporeal movables and undisclosed pledge of claims. E.M. Meijers, the spiritual father of the new BW, proposed the construction of a system of public registration, but this proposal confronted fierce resistance and was not accepted in the end.[435] Nowadays, the non-possessory pledge and undisclosed pledge remain invisible to third parties in the Netherlands.[436] Different opinions exist with respect to the issue of whether a system of registration should be introduced.[437] In German law and Dutch law, reservation of ownership, as a common device of security, is subject to no formality of registration.

To harmonize the laws of secured transactions of movable assets at the EU level, the DCFR takes a quasi-functional approach and requires registration as a condition for "*effectiveness as against third persons*", including holders of proprietary rights in the encumbered assets, execution creditors, and insolvency administrators.[438] It is quasi-functional because the broad concept of "*security rights*" encompasses possessory pledge, non-possessory pledge, security transfer of ownership and reservation of ownership, but the reservation of ownership has a special position in enforcement.[439] In terms of publicity, it is unitary: registration is a method of perfection for both reservation of ownership and the other types of security rights.[440] In general, Book IX DCFR has much resemblance to Article 9 UCC, which is understandable when we realize that the functional approach is useful in harmonizing the current chaotic system of security interests in movables within the EU.[441]

433 Castellano 2016, p. 543; Dirix and Sagaert 2014, p. 238; Renaudin 2013, p. 389.
434 Mincke 1997, p. 204.
435 Hamwijk 2014, p. 62.
436 Heilbron 2011, p. 44.
437 Struycken 2009, p. 115; Kaptein 2012, p. 139; Van den Boezem and Goosmann 2010, p. 43.
438 Art. IX.-3:101 (1) DCFR: "*A security right created according to Chapter 2 has no effects against the following classes of third persons: (a) holders of proprietary rights, including effective security rights, in the encumbered asset; (b) a creditor who has started to bring execution against those assets and who, under the applicable law, has obtained a position providing protection against a subsequent execution; and (c) the insolvency administrator of the security provider, unless, subject to exceptions, the requirements of this Chapter are met.*"
439 Proprietary Security in Movable Assets 2014, p. 243.
440 In contrast to the DCFR, the recent Belgian reform takes a just different quasi-functional approach: reservation of ownership is characterized as a security interest in the situation of the buyer's bankruptcy, but registration is unnecessary for this security device. See Sagaert 2017, p. 33.
441 Van der Weide 2011, p. 367; De Groot 2012, p. 138.

At the global level, it is registration plus a functional approach that is commonly adopted. For example, the UNCITRAL Legislative Guide on Secured Transactions advises a "*functional, integrated and comprehensive approach*" and proposes "*to enhance certainty and transparency by providing for registration of a notice in a general security rights registry*".[442] However, the Guide recognizes that reservation of ownership, which needs to be included in the register, might be prescribed as more than a security interest. In 1994, a preliminary report on the desirability and feasibility of the preparation by UNIDROIT of a model law in the general field of secured transactions, drafted by R.C.C. Cuming, proposed a system of registration and a unitary concept of charge covering various forms of secured transactions.[443] In general, the Cape Town Convention on International Interests in Mobile Equipment, an achievement made by the UNIDROIT, adopts a functional approach by unifying different proprietary interests under the concept of "*international interests*" (art. 2 (2)) and advocates a notice-filing system (art. 16-28).[444] However, it should be noted that, like the DCFR, the Convention treats the chargee and the conditional seller or lessor differently in the aspect of the available remedies in the event of the debtor's default.[445]

The preceding brief description of the *status quo* shows that, at least, two controversial issues exist with respect to the secured transaction of movable property. One issue is whether registration should be introduced to address the problem of publicity. The other issue relates to the scope of registration, especially whether title-based security interests should be registered. Accordingly, the following discussion focuses on these two issues in sequence.

5.4.2 The Desirability of Registration

5.4.2.1 Pros and Cons

A Arguments for the Registration System

In general, the justification of registration lies in the effect of the security device against third parties. It is often held that a system of registration is useful for two types of third party: (1) the potential subsequent acquirer (including secured creditors) who has an intention to have a property right over the collateral; and (2) the general creditor who has an inferior position before proprietary security interests in the event of the debtor's insolvency.[446] Registration can solve the problem of information asymmetry and

442 UNCITRAL Legislative Guide on Secured Transactions, p. 21, 23.
443 Cuming 1994 (2), p. 3, 5.
444 Sagaert 2004, p. 81-83.
445 Sagaert 2004, p. 83-85.
446 Struycken 2009, p. 175; Van den Heuvel 2004, p. 87-88.

perform a function of communication, thereby making the security interest transparent for these third parties.[447]

> "*Een ander, hier wel mee samenhangend, argument was dat de publiciteit van zekerheidsrechten tot waarborg voor schuldeisers dient dat de paritas creditorum niet stiekem wordt doorbroken. Het beginsel van de gelijkheid van schuldeisers zou tot gevolg hebben dat iedere voorrangspositie op de een of ander wijze naar buiten moet blijken.*"[448]

The Belgian legislature believes that an effective system of security rights of personal property is a prerequisite for optimal lending, and this system necessitates a register for the sake of predictability: "*conflicts of ranking should be solved in a predictable manner*".[449] It is worthwhile noting that, as a part of the information-disseminating function, the register can also preclude fraudulence, in particular antedating of secured transactions.[450]

In addition to supplying information for third parties, registration can also provide safety for the secured creditor.[451] In the absence of a register, where a non-possessory security right is created without dispossession, actual control of the collateral is held by the debtor or a third party. As a result, the debtor or the third party has a chance to dispose of the collateral, which will trigger a risk to the non-possessory secured creditor because of the possibility of *bona fide* acquisition by a third party.[452] If there is a system of registration from which the secured creditor's interest can be seen, then the absence of dispossession will, generally speaking, no longer be a source of risk for the secured creditor.

> "*Ten eerste is er de zekerheidsgerechtigde […]: hij heeft er belang bij om zijn zekerheidsrecht zo veel mogelijk veilig te stellen ten opzichte van eventuele latere verkrijgers van rechten op het onderpand. Indien de wet een vorm van inschrijving in openbare registers mogelijk maakt, wordt de kenbaarheid van zijn recht vergoot. Hiermee wordt zijn recht […] 'versterkt' en krijgt meer 'zakelijke werking'.*"[453]

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447 Hausmann 1996, p. 432.

448 Van den Heuvel 2004, p. 88. English translation: "*Briefly speaking, another argument is that the disclosure of security rights to creditors ensures that paritas creditorum is not secretly broken. The principle of equality of creditors requires that any prior position should be revealed in a certain way.*"

449 Dirix and Sagaert 2014, p. 238.

450 Hamwijk 2014, p. 314.

451 Struycken 2009, p. 175.

452 Heilbron 2011, p. 46.

453 Struycken 2009, p. 175. English translation: "*Firstly, there is the security holder [...]: he has an interest in securing his right of security as much as possible in relation to potential subsequent acquirers of the collateral. Only when the law allows a form of entry in open registers, transparency of the right can be realized. With this, his right can be [...] 'strengthened' and obtain stronger 'proprietary effect'.*"

As has been demonstrated above, registration constitutes, though under some limitations, constructive notice to third parties and excludes the application of *bona fide* acquisition to a large extent (see 5.3.3.3).

B Doubts about the System of Registration

However, the system of registration engenders doubts from different aspects. Even in those jurisdictions that have already constructed a system of registration for secured transactions, there is the opinion that this system should be abolished.[454]

In the viewpoint of some scholars, a system of registration is useless for general creditors (see 5.3.3.2). One reason is that "*the quantity of unencumbered assets that prospective creditors can see at the time of supplying credit says nothing about whether they will still be unencumbered in the future, when they have become a creditor*".[455] Moreover, general creditors cannot tell whether a debtor is or will face financial difficulties from the system because it only records the existence of proprietary encumbrances.[456] In practice, general creditors often choose to obtain information regarding the debtor's overall financial health from the latter's financial reports, which are more comprehensive than the system of registration.[457] In addition, involuntary general creditors, such as tort victims, are unable to consult the system before the legal relationship of obligation comes into existence.[458] For these reasons, the system of registration is treated as useful principally for subsequent secured creditors who intend to acquire a security interest.

> "*In fact, benefits to secured creditors may be the primary justification for the present notice-filing system, while the direct benefits to general creditors may be small. Secured creditors benefit from a central file that indicates the existence of a claim in a particular asset belonging to the debtor, and whether that or any subsequent claim would have priority over their claim.*"[459]

In addition to its slight importance for general creditors, another doubt is that the function of publicity of the system might be overstated for subsequent acquirers. Firstly, the system might fail to show third parties the specific collateral involved because of the permission of describing the collateral "*in various levels of generality*",[460] as well as the amount or even the nature of the obligation for which the security is provided.[461] To know the details of a security interest, the searcher has to conduct further inquiries.[462]

454 Alces 1995, p. 679.
455 Hamwijk 2011, p. 619.
456 Baird 1983, p. 60.
457 Van den Boezem and Goosmann 2010, p. 46.
458 Lipson 2005, p. 487.
459 Baird 1983, p. 60.
460 Sigman 2008, p. 153.
461 Sigman 2008, p. 154.
462 Von Wilmowsky 1996, p. 160-161.

Secondly, the information obtained from both the system and the further inquiry might become outdated after a short period. This is because the debtor is entitled to continue disposing of the unencumbered property and terminate the existing security interest by discharging the secured debt.[463] Thirdly, the register for movable property is different from the land register in the aspect of public reliability. The possibility for a registered creditor to enforce his or her security interest is contingent on whether the debtor has ownership of the collateral, and completion of registration is not a sufficient basis for *bona fide* acquisition.[464] As a requirement of creating a security interest, the provider needs to have qualified authority of disposal.[465] However, the question of whether the debtor has qualified authority cannot be answered according to the register.[466] Fourthly, there is a doubt about the practical use of this system: some subsequent acquirers, in particular normal buyers, would not search the system before entering into a transaction with the debtor.[467]

Moreover, a completely open system of registration might be undesirable for debtors: debtors are often unwilling to allow their competitors or clients to know about the commercial information from the register.[468] The publication of the proprietary encumbrances may give rise to a problem of "*false poverty*", and potential creditors would become more conservative in granting credits.[469] In the situation of natural-person debtors, a potential problem of registration is that their personal information is exposed to the public. In addition to the concern about personal or business privacy, another argument against a system of registration is about the smooth operation of commercial transactions. In the view of some opponents, the formality of registration constitutes a "superfluous regulative intervention (*overbodige overheidsinmenging*)" in the secured transaction concerning movable property.[470]

In the end, the actual importance of a register for the market of financing is questionable. For example, the healthy operation of the German banking and business industry proves that a system of registration is dispensable.[471] As has been mentioned above, one striking feature of the German law of secured transactions of movables is that a publicity system is completely absent (see 5.4.1).[472]

463 Von Wilmowsky 1996, p. 162.
464 Sigman 2008, p. 156; Proprietary Security in Movable Assets 2014, p. 459.
465 Hamwijk 2014, p. 169-170.
466 Von Wilmowsky 1996, p. 161.
467 Snijders 1970, p. 34; Van den Boezem and Goosmann 2010, p. 53.
468 Lwowski 2008, p. 178; Snijders 1970, p. 29.
469 Sigman 2008, p. 158-159; Vriesendorp and Barendrecht 1993, p. 29.
470 Snijders 1970, p. 33; Vriesendorp and Barendrecht 1993, p. 27-28.
471 Lwowski 2008, p. 179.
472 Brinkmaan 2016, p. 343.

> "*German creditors and German economy survived without perfection and publicity. Creditors know that security interests mostly of banks are already charging the movables or receivables of their clients when giving credit. The lesson to be learnt is that the significance of publicity and perfection should not be overestimated.*"[473]

In a nutshell, the desirability of a system of registration for secured transactions of movable property is doubted from different aspects, including the actual usefulness of the system and the potential adverse effect on secured transactions.

5.4.2.2 Conclusion of the Discussion

In the following discussion, we examine the question concerning the desirability of including secured transactions in the system of registration proposed above (see 5.3). The question is answered in the affirmative, which in fact has been implied in the preceding discussion in 5.3. The following discussion seeks to dispel or alleviate the aforementioned doubts about a system of registration for secured transactions.

A The Importance for Subsequent Acquirers

A1: The Function of Preventing Conflicts

In general, where there is no system of registration, there is the possibility of a conflict between secured creditors and subsequent acquirers, such as the transferee of the collateral. If the collateral is a corporeal movable, the conflict needs to be resolved under an *ex-post* approach by applying the *nemo dat* rule together with the rule of *bona fide* acquisition. This approach faces a dilemma: one of the two conflicting parties has to lose. Behind the *ex-post* approach exists the conflict-resolving notion: instead of attempting to preventing the occurrence of conflicts, the approach focuses on how to resolve disputes.

Compared with the *ex-post* approach, an *ex-ante* approach based on the notion of preventive justice is more desirable. In general, "*prevention of such conflicts is better than having to resolve them*".[474] Resolving a conflict after its occurrence entails costs.[475] Moreover, the possibility of conflicts gives rise to a problem of uncertainty in transactions. This implies two possible consequences for individuals. One is that individuals are discouraged from participating in the transaction. The other consequence is that individuals have to collect information through other means to avert conflicts. Even if some information is obtained, it remains uncertain whether the information is correct and complete. In other words, what are the circumstances under

473 Stürner 2008, p. 168.
474 Hamwijk 2011, p. 626.
475 In general, the cost results from multiple aspects, including the costs borne by the litigants as well as the resources spent by the court.

which the information obtained can be treated as reliable, so that a party's reliance will be protected?

If the secured transaction concerning movable property is included in a system of registration, the undesirable consequences presented above can be averted to a large extent. Not only does the system provide information, but the information provided can also be reliable (see 5.3.3.5). Potential transactors can rely on the register. Thus, the scope of collecting information is delimited: third parties do not have to be attentive to other sources of information.

> "*Die Registerpublizität erlaubt potentiellen Kreditgebern zu erfahren, ob der Schuldner das betreffende Objekt bereits mit einem Sicherungsrecht belastet hat, so dass sie aufgrund des Wissens über Zeitpunkt, Art und Menge bereits bestellter Sicherungsrechte rational über einen Sicherungsvertrag mit dem Kreditnehmer entscheiden können; und diesen versetzt die Registerpublizität in die Lage, dem Gläubiger eine verlässliche Sicherheit anzubieten.*"[476]

A2: The Deficiencies of Informal Means

It is true that potential subsequent acquirers are able to obtain some proprietary information in informal ways, such as the debtor's personal disclosure, the debtor's annual or semi-annual financial reports, and even the local knowledge in a specific industry.[477] However, these ways have their own defects. The defect of the debtor's self-disclosure is obvious: the debtor might cheat or mislead its counterparties.[478] Under a notice-filing system proposed in this research, the secured creditor may cheat when being required to provide detailed information. However, the remedies available for the inquirer will discourage the creditor from doing so to a large extent (see 5.3.3.5.B).

The debtor's financial reports play an important role in the dissemination of information but are far from being adequate. Misrepresentations might be included in the report. Moreover, the report often fails to show what specific assets are encumbered with what security interests. Law, such as art. 2:375 BW, might require the debtor to disclose the assets that are encumbered with a security right in the annual report. However, two problems still exist: one is the access to the report, and the other concerns the timeliness of the report.

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476 Von Wilmowsky 1996, p. 163. English translation: "*The publicity of the register allows potential lenders to find out whether the debtor has encumbered the collateral with a right of security, so that they can rationally reach a security agreement with the borrower on the basis of the knowledge of the date, type and quantity of the already-created security rights; this enables the publicity of the register to provide reliable security to the creditor.*"

477 Schwartz 1989, p. 219-210.

478 Vriesendorp and Barendrecht 1993, p. 4.

> "*Unfortunately not every party is in the position to ask and to order the contracting party to let him see the annual report. Besides, the annual report represents the situation as on 31st December of last year. As most annual reports are published in the second quarter of the next year, the situation and which assets are encumbered in the annual report do not reflect the current situation.*"[479]

An annual report is made once a year and provides some rough information. Thus, it neither shows the instant state of proprietary encumbrances nor supplies the details of security interests, in particular the date of creation. Moreover, failure to record a security interest in the report does not bring any disadvantage to the secured creditor, and no good faith protection is granted to third parties who believe that this security interest does not exist. Therefore, the debtor's financial report cannot completely address the problem of information asymmetry and should not be treated as an adequate alternative to registration.

The asymmetry of information might be alleviated to some extent on the basis of the subsequent acquirer's local knowledge and business experience. For example, in Germany and the Netherlands, neither of which has a general system of registration for corporeal movables and claims, protection will not be granted to a person who deems that the possessor has full ownership if the transaction occurs in a particular industry where retention of ownership is common.[480] Moreover, diligent businessmen and professional banks are expected to know that the debtor's assets are usually encumbered with a security interest.

Nonetheless, the problem of information asymmetry still exists. In general, what third parties can get by virtue of their commercial knowledge and experience is that a proprietary encumbrance might exist. The commercial knowledge and experience can by no means be sufficient for clearly knowing whether and to what extent the encumbrance exists with respect to what specific collateral. Precise information is needed.[481] Moreover, the judgement on the basis of commercial knowledge and experience is unfair to those debtors whose movable property is mostly not encumbered with any security interest. The debtor has to try to convince its potential counterparties that the movable property involved is not encumbered.[482]

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479 Zeldenrust 2011, p. 25.

480 In a German case in 1980, "*the BGH decided that in those business sectors where practically all goods are sold under retention of title, purchasers can no longer trust that the goods which the seller possesses are in fact his property.*" See Kieninger 2007, p. 653. According to a Dutch case adjudicated by the court of appeal of Hertogenbosch in 1985, "*[…] goede trouw is niet aanwezig indien het eigendomsvoorbehoud in de branche gebruikelijk is en de derde met de mogelijkheid rekening had moeten houden dat de koper zijn verplichtingen jegens leveranciers niet op normale wijze had afgewikkeld.*" See Hof's-Hertogenbosch 27 maart 1985, NJ 1986, 431. English translation: "*[…] good faith is not present if the reservation of ownership is common in the industry, and the third party should have taken into account the possibility that the buyer does not dicharge its debt to suppliers in a normal way.*"

481 Vriesendorp and Barendrecht 1993, p. 30.

482 Zeldenrust 2011, p. 13.

A3: The Information Provided

As has been presented above, there is some doubt about the usefulness of the register: the information provided is general, and the register is not as reliable as the land register. This doubt is not completely groundless. It is true that the notice-filing system perhaps fails to inform third parties of the details of secured transactions. On the other hand, the register is supplemented by a scheme of disclosure by the secured creditor. Under this scheme, the secured creditor bears a duty to provide detailed information upon the request of third parties (see 5.3.1.4). More importantly, the reliance of third parties on the information provided by the secured creditor will be protected, such as in the way of allowing them to acquire a security interest or claim damages (see 5.3.3.5).

A4: The Search of the Register

Another doubt as mentioned above is based on the fact that some subsequent acquirers, in particular buyers, do not inspect the register before entering into transactions. In fact, this doubt is, to a large extent, in line with our viewpoint that a rule of the "ordinary course of business" should be recognized (see 5.3.3.3). Under this rule, third parties are not expected to search the register because the debtor usually has qualified authority of disposal in the ordinary course of its business. Registration does not constitute constructive notice to third parties in the ordinary course of business. In general, this can be treated as a limitation of the system. However, this limitation is necessary and desirable since it guarantees that the formality of registration will not hamper the smooth operation of transactions and commerce.

In sum, there is information asymmetry affecting subsequent acquirers, including buyers and secured creditors, in the field of secured transactions concerning corporeal movables and claims. This makes it desirable to have a register, under the supplement of a scheme of disclosure, as a reliable source of information. Despite the fact that the German financing market currently operates well, as indicated in 5.4.2.1.B, it is desirable to introduce a system of registration in the future.[483] The traditional system is facing new challenges, such as the growth in cross-border transactions.[484]

B The Importance for General Creditors

In arguing for a system of registration for corporeal movables and claims, some writers also attempt to find justifications from the usefulness for general creditors, as has been shown above. Unsecured creditors have a legal position inferior to secured creditors. Thus, there is a need to allow them to know about the existence of security rights. As an exception to the *paritas creditorum*, the preferential effect of security rights requires a basis of pub-

483 Von Wilmowsky 1996, p. 163.
484 Brinkmann 2016, p. 351.

licity.[485] The register for secured transactions concerning movable property can provide such basis. However, this view is exposed to several doubts mentioned above. In general, we hold that these doubts are tenable, and the register is nearly of no use for general creditors (see 5.1.3.2 and 5.3.3.2).

Firstly, general creditors often rely on the debtor's overall financial health (see 2.2.2.2.C).[486] General creditors do not require the debtor to supply proprietary security because, in many situations, they believe that the debt will be paid off on the basis of the debtor's cashflow.[487] For example, "*small creditors*" often believe that the "*big debtor*" will pay and thus rarely, even if possible, search the system.[488] Compared with a register, the debtor's financial reports are more comprehensive and seems more important for general creditors.[489] Financial reports include information that is of great use for evaluating the overall financial health of the debtor. This is a reason why some writers question that a notice-filing system can sufficiently justify the preferential status of secured creditors over unsecured creditors.[490]

Secondly, even if an unsecured creditor searches the register, the information obtained will become out-of-date in a short period of time. The debtor continues to create new encumbrances and remove the already-created encumbrance by discharging the secured debt.[491] Thus, the state of the debtor's assets and that of the encumbrance over the assets are always in fluctuation, and unsecured creditors cannot be expected to search the system every day. Provided that there is a general creditor searching the system every day and finds out that an asset is disposed of, nothing can be done by this creditor since the disposal has been completed validly.

Thirdly, the system is useless for involuntary creditors and those who have already acquired a personal claim before the creation of the registered security right.[492] Persons, such as a tort victim, might be "forced" to become a general creditor.[493] In this situation, the creditor is unable to decide whether to have an obligational relationship with the debtor since the legal relationship is a result of the operation of law. In this situation, the system of registration provides no help to the creditor.[494] In addition, if a right of pledge is created after granting credit in the absence of any security, registration of this right is of no use for the general creditor. Truly, the unsecured creditor can be expected to know that the debtor might dispose of his or her assets after granting an unsecured credit, thus requiring the unsecured

485 Vriesendorp and Barendrecht 1993, p. 4-5; Finch 2009, p. 634.
486 Van den Heuvel 2004, p. 93.
487 LoPucki 1994, p. 1941.
488 Snijders 1970, p. 34.
489 Van den Heuvel 2004, p. 93.
490 LoPucki 1994, p. 1948; Finch 2009, 640.
491 Hamwijk 2011, p. 619.
492 Snijders 1970, p. 33.
493 Hamwijk 2011, p. 623.
494 Finch 1999, p. 662.

creditor to bear the risk of underpayment does no injustice to him or her.[495] However, this argument just proves that the information out of the system of registration is of little importance: every searcher is expected to be aware that the debtor might conduct further disposals.

However, it is not completely correct to say that registration is of no use for unsecured creditors. As observed by E.M. Meijers, the lack of an objective scheme to determine the date of creation offers a chance for transacting parties to fraudulently antedate their security right at the sacrifice of the general creditor's interest.[496] If there is a system of registration, and entry in such system is prescribed as a prerequisite of the effectiveness against unsecured creditors, the problem of antedating can be avoided.[497] However, as pointed out above, the New Zealand practice has proven that most secured creditors choose to register their legal positions for the sake of priority over subsequent acquirers, which means that the date of creation can be indicated by the registration system in most situations (see 5.3.3.2). Moreover, the notice-based system cannot fully preclude the problem of antedating. This is because the security interest might be registered in advance, which could cause a dispute arises with respect to the question when the security agreement was created.[498] Therefore, to what extent the register book can satisfy the general creditor's demand for certainty concerning the date of the creation of security interests is still open to doubt.

In a nutshell, the information asymmetry between the debtor and its general creditors either does not exist or has been generally addressed by alternative methods, in particular the debtor's financial reports. The purpose of protecting unsecured creditors cannot be realized by virtue of a system of registration. Instead, it seems better to protect general creditors in other ways, such as establishing a "*prescribed part*" rule or granting a privilege to involuntary creditors (e.g., tort victims).[499] It is also proposed by some scholars that companies ought to be compelled to buy liability insurance against tort claims to ensure that tort victims are able to obtain full compensation in the event of the debtor's insolvency.[500]

C The Concern about Fluidity of Transactions

It has been mentioned that opponents contend that the formality of registration forms a regulative interference in transactions and hampers commercial fluidity. Truly, movables have a higher circulation frequency than immovable assets, and registration affects, to a certain degree, the smooth operation of transactions. Nevertheless, we argue that this concern might be overstated. The system of registration proposed in this research

495 LoPucki 1994, p. 1949; Finch 1999, p. 645.
496 Meijers 1954, p. 276.
497 Bridge 2008, p. 186.
498 Gedye 2016, p. 132.
499 Eger 2001, p. 40; Finch 2009, p. 635-636; Leebron 1991, p. 1643-1649.
500 Finch 1999, p. 653-654.

will not exert much influence on the smooth operation of transactions and commerce.

Firstly, the system of registration is proposed to be digital, self-service, and notice-based (see 5.3.1.2-5.3.1.4). By making use of new information technology under the notion of self-service, the system is easy to use and access: both registration and investigation can be done online without involving any registrar. This guarantees that the system will not create much inconvenience to the transacting parties as well as searchers. Moreover, the register is a notice-based system, instead of a transaction-filing system. In doing so, the burden of documentation can be reduced significantly, so that the influence of registration over rapid commercial transactions will be limited to an acceptable degree.

Secondly, the scope of application of the system proposed is limited on the basis of several factors, which also restricts the undesirable influence on smooth commence. For example, the factor of transactional frequency is taken into consideration (see 5.3.2.3.A). The system will not include corporeal movables and claims that have a high frequency of circulation. Moreover, the duration of the hidden state of the secured transaction is also relevant (see 5.3.2.3.B). For those transient and short-term hidden proprietary interests, the requirement of registration will simply hinder the smooth operation of the register and the secured transaction. For short-term secured transactions, granting a grace period offers a chance for the transacting parties to complete the transaction without being exposed to the risk arising from the lack of registration. Here a typical example is reservation of ownership by the supplier.[501] In the end, a threshold is set up for the amount of the collateral value, so that the register will not be cluttered by "small transactions" (see 5.3.2.1.E). This threshold also guarantees that small transactions are not affected by the formality of registration.

Thirdly, the rule of voluntary registration further reduces the effect of registration over transactional fluidity. As argued above, registration is not a prerequisite for the creation of a security interest (see 5.3.3.1). Instead, it is only relevant to the legal effectiveness against subsequent acquirers. This means that if transacting parties think registration is not worthwhile, they can opt not to register the security right by bearing a risk of *bona fide* acquisition by a third party.

> "*In this sense, registration is not compulsory as ultimately it is a? matter of commercial judgement and risk for the creditor to determine whether or not the costs attendant with registration are outweighed by the risk of losing priority or even the extinguishment of security interest.*"[502]

If there is not any system of registration, the secured creditor will always face the problem of being defeated by a third party acting in good faith,

501 Veneziano 2008, p. 92; Faber 2014, p. 35.
502 Davies 2004, p. 309.

which will further lead to a burden of monitoring the debtor's activities with respect to the collateral, provided that the secured creditor really desires to preserve its preferential position.[503] If there is a system of registration, the security right can be made effective against third parties after registration. This will save on monitoring costs.[504] In this sense, we could say that registration provides a chance, rather than a burden, for secured creditors to eliminate the risk of *bona fide* acquisition.

Fourthly, the system proposed includes a rule of the "ordinary course of business" (see 5.3.3.3.B). Under this rule, transactions carried out in the ordinary course of the secured debtor's business will not be affected by registration. Particularly, buyers in the ordinary course do not have to search the register before deciding to purchase the collateral inventory. Moreover, the collateral can be acquired free of the proprietary encumbrance registered. Thus, the rule restricts the undesirable influence of registration over the smooth operation of transactions in the ordinary course of business.

D The Concern About Privacy

Another form of resistance against a system of registration comes from the fear that the information out of this system might be misused or would violate business or personal privacy. Company debtors often do not want their secured transactions to be known about by others, especially their competitors.[505] For natural persons, the disclosure of the personal information required for creating a folio forms a threat to their privacy. In general, the fear has no firm ground and should not be overstated under a notice-filing system, as has been argued above (see 5.3.1.4 and 5.3.1.5). The personal privacy of natural persons is not a sufficient reason to deny registration either, which also has been demonstrated above (see 5.3.2.2).

5.4.3 The Scope of Registration

As pointed out above, most systems of registration for secured transactions are constructed under the functional approach, an approach focusing on the economic substance and unifying different types of secured transactions under one concept, such as security interest or charge (see 5.4.1). In other jurisdictions where a functional approach is not taken, some secured transactions, despite their economic function of security, are exempted from the formality of registration. A typical example is reservation of ownership.[506]

503 Finch 1999, p. 641.

504 Jackson and Kronman 1979, p. 1152-1153.

505 Lwowski 2008, p. 178.

506 In French law, for example, a system of registration was introduced for non-possessory pledge (*gage*) over corporeal movables and charge (*mantissement*) over claims in 2007. However, retention of title still falls outside this system. See Renaudin 2013, p. 386-390. Under English law, reservation of ownership is not subject to registration either. See Bridge, Gullifer, McMeel and Worthington 2013, p. 14.

In the following discussion, we demonstrate that the problem of the scope of registration is not necessarily connected to the issue of whether a functional approach is adopted. In general, whether a security device should be included in the system is contingent on whether this device triggers a problem of information asymmetry. As a result, both reservation of ownership and security transfer of ownership require registration (see 5.4.3.1). In discussing the scope of registration, possessory pledge of corporeal movables is often neglected. Registration is treated as unnecessary for this classic type of security right, because delivery of the collateral has fulfilled the requirement of publicity. However, we contend that registration is also desirable for possessory pledge (see 5.4.3.2).

5.4.3.1 Title-Based Security

In general, title (including ownership of corporeal movables and "ownership" of claims) might serve a function of security in the following transactions:[507] (1) security transfer of title in the narrow sense; (2) sale and leaseback; (3) retention of title in the narrow sense; (4) hire purchase; (5) financial lease; and (6) consignment.[508] These six secured transactions can be divided into two groups: ownership *transferred* for security (type (1) – (2)) and ownership *retained* for security (type (3) – (6)).

In the situation of corporeal movables, all of these transactions share the feature that ownership is held by the creditor to secure its claim, and the debtor possesses the collateral. In these secured transactions, there is a divergence between ownership and possession. Like non-possessory pledge, they are also a type of non-possessory security device, having a function of security associated with an ownership-possession divergence. In general, transfer of ownership for security amounts to granting a right of non-possessory pledge to the transferee, and retention of ownership for security amounts to reserving a right of non-possessory pledge by the transferor. Therefore, if non-possessory pledge is required to be registered, there is no reason to treat title-based security interests differently (see 5.3.2.1.C). For those jurisdictions where non-possessory pledge is included in a register which excludes title-based security device, it is difficult to explain this different treatment.

In the situation of claims, individuals might provide security in the way of security assignment or reservation of title, instead of creating a disclosed pledge or an undisclosed pledge. Claims are invisible, and notification to the debtor does not qualify as an eligible means of publicity (see 4.1.1.2). Thus, the two types of title-based security device and the two types of pledge should also be made through registration (see 5.3.2.1.D). This is not difficult to understand. In the following discussion, attention is mainly afforded to title-based security in relation to corporeal movables.

507 It should be noted here that title is used in the sense of ownership or "belonging", instead of the legal basis on which the property right is acquired.

508 Proprietary Security in Movable Assets 2014, p. 229-260.

A Security Transfer of Ownership

Security transfer of ownership performs a pledge-like function in the situation of corporeal movables. This explains why this security device was replaced with the non-possessory pledge during the re-codification of the BW.[509] In terms of enforcement, the security owner is treated like a pledgee: different from an ordinary owner, the security owner has no right to vindicate the collateral and, in principle, only enjoys a priority in claiming the proceeds out of the sale of the collateral.[510] Thus, what the individuals intend to create is no more than a right of pledge that does not require dispossession of the collateral from the security provider. In German law, "security transfer (*Sicherungsübereignung*)" is covered under the concept of "non-possessory security over movables (*Besitzlose Mobiliarsicherheit*)".[511]

Usually, where non-possessory pledge is not recognized, individuals will turn to security transfer of ownership in the way of *traditio per constitutum possessorium* in order to avert the inconvenience out of the requirement of dispossession for possessory pledge.[512] However, *traditio per constitutum possessorium* is merely a change of possessory intention which cannot provide any indication to third parties (see 3.4.2.2.B and 3.4.2.3.B). Consequently, the security transfer is in essence hidden to third parties. Although the debtor-transferor might dispose of the collateral to others since the collateral remains in his or her factual control,[513] the creditor-transferee might also dispose of the collateral in violation of its fiduciary duties after acquiring ownership.[514] It seems unusual that German law objects to the secrecy of trusts, as we will see below, but does not require publicity for the security transfer.[515]

In general, registration of security transfer of ownership can preclude potential conflicts from arising to a large extent. Firstly, registration is able to indicate the underlying basis of the debtor-transferor's possession, which helps to avoid third parties being misled by the debtor's possession of the collateral. Secondly, when the creditor-transferee disposes of the collateral, registration provides a chance for the counterparty to know that the ownership held by the secured creditor is subject to fiduciary duties. In both situations, registration avoids or lowers the possibility of conflicts between one of the transacting parties and a third party.

Thirdly, security transfer of ownership sets up a barrier against making the most use of the collateral. Once the debtor-transferor alienates ownership of the collateral to the creditor-transferee, the former loses the author-

509 Vriesendorp and Barendrecht 1993, p. 9-10.
510 Drobnig 2011, p. 1037-1038.
511 Bülow 2012, Rn. 1277.
512 Vriesendorp and Barendrecht 1993, p. 6; Hausmann 1996, p. 455.
513 Bülow 2012, Rn. 1277.
514 Bülow 2012, Rn. 1278; Hausmann 1996, p. 459.
515 Wood 2019, no. 9-009.

ity to use the collateral again to secure other obligations.[516] This is why security transfer of ownership is treated as granting more to the secured creditor than he or she should have.[517] As a result, there is an associated problem of "excessive security (*Übersicherung*)" in German law. To address this problem, German courts positively intervene in the legal relationship of security: the security transfer will be invalidated if the value of the collateral substantially exceeds the amount of the secured obligation.[518] For example, where it unduly restricts the debtor's operation and fails to consider the interest of other creditors, the security transfer might be declared as void on the basis of violation of "good morality (*guten Sitten*)".[519] This positive judicial intervention can be partly ascribed to the lack of publicity.[520] It is conceivable that the intervention becomes less necessary when there is a system of registration from which third parties are able to know about the security transfer: in principle, a decision made on the basis of sufficient information must be respected.

After discussing security transfer of ownership in the strict sense, we turn to two particular transactions that are related to the concept of security transfer: one is sale and repurchase, and the other is sale and leaseback.

Repurchase, also known as "repo" or "*pactum de retroemendo*", is a form of transaction mainly arising in the field of investment securities, such as bonds and shares. It is an important way to obtain finance by using investment securities as a collateral.[521] However, sale and repurchase can also take place in the field of corporeal movables.[522] In a repo transaction of corporeal movables, the seller transfers the object to the buyer for obtaining "credit" in the form of the purchase price. The "debt" is discharged by repurchasing the object or another object of the same species by the original seller, who will pay the agreed price to the original buyer. What legal position is held by the original seller before the repurchase? With respect to this question, there are, in general, two approaches. Under one approach, the original seller has no more than a personal or a contractual right to repurchase.[523] Under the other approach, the seller retains a proprietary interest with respect to the object, such as being able to reclaim the object by paying the agreed price in the situation of the buyer' bankruptcy or to exercise its right of purchase against the third party to whom is disposed of by the buyer.[524] The difference between these two approaches relates to the principle of *numerus clausus*. The second approach is more flexible than the

516 Wilhelm 2010, p. 797-798.
517 Parlementaire Geschiedenis (3) 1981, p. 388.
518 Schwab and Prütting 2020, Rn. 420.
519 Schwab and Prütting 2020, Rn. 420b.
520 Vriesendorp and Barendrecht 1993, p. 16.
521 Keijser 2006, p. 101; Rank 2010, p. 304.
522 Sagaert and Cauffman 2011, p. 218-221; Greco 2008, p. 448-451.
523 Dalhuisen 2016, p. 512.
524 Sagaert and Cauffman 2011, p. 218; Greco 2008, p. 449; Dalhuisen 2016, p. 512.

first in the sense that the former approach allows, in essence, the creation of a proprietary security interest on the basis of the legal relationship of ownership.[525]

In general, where the original seller's right of repurchasing corporeal movables is a personal claim, there is no need to include the transaction in the system of registration. This is because both ownership and possession are transferred to the buyer, and the seller retains no proprietary interest with respect to the object (see 5.3.2.1.C). In this situation, no information asymmetry is caused to third parties. However, it is possible that the original transfer is carried out without involving dispossession, such as in the way of *traditio per constitutum possessorium*, and the seller retains actual possession of the object. In this situation, registration should be used to address the problem out of the divergence of possession and ownership. The transaction amounts to a security transfer of ownership in the strict sense. Under English law, the transaction constitutes a sham repo and should be treated as a charge, a proprietary security interest which is subject to registration.[526] If the right of repurchase is prescribed as effective against third parties, especially subsequent acquirers, under the second approach, there will be a need to register the transaction.

Sale and leaseback might be treated as a form of security transfer of ownership when the security transfer is understood broadly. The main difference of this transaction from the ordinary security transfer is that a legal relationship of lease is created between the seller and the buyer. In many situations, sale and leaseback has a purpose of providing security to the seller (lessee). However, it is possible that the buyer does obtain ownership of the object and then grants a possessory interest to the seller.[527] Undoubtedly, the boundary between security lease and true lease is not completely clear. Nevertheless, this has nothing to do with the issue of registration. In general, sale and leaseback needs to be included in the register, regardless of whether the parties intend to create a security interest. For registration, what matters is that ownership and possession diverge and are held by buyer (lessor) and seller (lessee) respectively. The divergence causes a problem of information to third parties who should be made aware through a system of registration (see 5.3.2.1.C).

525 The new BW excludes the repurchase transaction in the proprietary sense because the right of repurchase is in violation of "*het gesloten systeem van de zekerheidsrechten* (the closed system of security rights)". However, individuals are entitled to insert a resolutive condition under the new BW (art. 3:84 (3)). In general, this resolutive condition can perform a similar function as the right of repurchase. See Asser/Bartels & Van Mierlo 2013, nr. 240.

526 *Re Curtain Dream plc* [1990] BCLC 925.

527 Beale, Bridge, Gullifer and Lomnicka 2018, no. 4.28.

B Retention of Ownership

Retention of ownership is an important security device in the situation of corporeal movables.[528] However, the functional approach and the formal approach treat this security device in different ways. Under the functional approach, retention of ownership is no more than a security interest with super priority. In other aspects, it does not give the creditor more benefits than what the other security devices, such as pledge, can provide. Under the latter approach, however, retention of ownership confers on the secured creditor (the seller of the collateral), in addition to an interest of preference, some other advantages. For example, the seller-owner is on the basis of its ownership entitled to reclamation in the event of the debtor's bankruptcy and the execution of the object.[529] It is held that these advantages do no injustice to the buyer or other creditors of the buyer, because the collateral retained comes from the seller and is a new asset that is helpful for the debtor's business.[530] There are controversies, however, as to whether the formal approach should be replaced by a functional approach.[531]

In some jurisdictions, this issue is connected to the problem of publicity. For example, although a charge of corporeal movables needs to be registered under English law, retention of title is usually treated as an outright sale that needs no registration because English law takes a formal approach.[532] However, those retention-of-title transactions with a "*proceeds of sale*" or "*aggregation*" clause might be characterized as a charge, which will be void in the absence of registration.[533] This different treatment in the aspect of publicity is not convincing.

> *"If a codified system of remedies is not seen as a necessary part of a secured transactions reform in Europe, it should be possible […] to disregard functionality and bring title-based schemes and traditional security under the same roof of a scheme that lays down common rules for priority and publicity."*[534]

For example, the DCFR requires retention of ownership to be registered but treat it differently in the aspect of enforcement, and the UNCITRAL Legislative Guide on Secured Transactions also recommends registration

528 Dirix and Sagaert 2014, p. 252.
529 Drobnig 2011, p. 1035.
530 McCormack 2004, p. 172-173.
531 For proponents of the formal approach, treating reservation of ownership just as a security interest under the functional approach is not appropriate. In essence, this treatment constitutes an intervention in parties' autonomy: after all, the seller does not have an intention to give up ownership before the purchase price is paid. Under the functional approach, the location of ownership is problematic: between the seller or the buyer, which party is the owner before the fulfillment of the suspensive condition? See De Groot 2012, p. 145; Bridge 2017, p. 7.
532 Bridge, Gullifer, McMeel and Worthington 2013, p. 200.
533 Bridge, Gullifer, McMeel and Worthington 2013, p. 315-316.
534 Bridge 2008, p. 214.

for retention of ownership, irrespective of whether this security device is governed under a functional approach.[535]

It is without doubt that retention of ownership has a problem of information asymmetry because of the divergence between ownership and possession.

> *"The reservation of ownership lacks publicity. Since the buyer obtains possession of the goods, he becomes the ostensible holder of unencumbered ownership. Due to the lack of any requirement of public notice, the seller's reservation of ownership and the security interest in the goods may remain a secret in trade."*[536]

The debtor-buyer might dispose of the object in breach of the agreement with the seller-owner.[537] In this situation, the seller-owner's right might be sacrificed for protecting third parties acting in good faith under the rule of *bona fide* acquisition.[538] On the other hand, the seller-owner might also dispose of the same collateral object to a third party by keeping silent on the clause of retention.[539] In this situation, the first buyer faces a risk when the second buyer acts in good faith.[540] In both of these situations, there is a conflict.[541] To prevent the occurrence of conflicts, it is desirable to include the transaction in a system of registration.[542]

Truly, the formality of registration will affect the smooth operation of the reservation-of-ownership transaction, and this is a reason why some jurisdictions refuse to introduce registration.[543] However, this side effect is limited under the system of registration proposed in 5.3. Firstly, registration is a requirement of effectiveness only against third parties, and ownership can be retained validly in the absence of registration (see 5.3.3.1). Individuals have a right of option. Secondly, the way how the system operates guarantees that the formality will not create a heavy burden on individuals.[544] Registration involves filing only a simple summary in the digital system without involving any registrar (see 5.3.1.2-5.3.1.4). Thirdly, the grace period allows the secured creditor, especially suppliers of goods, to preserve its safe position even in the absence of registration (see 5.3.2.3.B). As a result, the creditor cannot register when the obligation is expected to be paid within the grace period.[545] Fourthly, the permission of in-advance registra-

535 Keininger 2008, p. 219.
536 Hausmann 1996, p. 456.
537 Bülow 2012, Rn. 766.
538 Sagaert 2017, p. 40.
539 Bülow 2012, Rn. 801.
540 Sagaert 2017, p. 54.
541 Bridge, Macdonald, Simmonds and Walsh 1999, p. 592.
542 Struycken 2009, p. 178.
543 Dirix and Sagaert 2014, p. 252.
544 Bridge, Gullifer, McMeel and Worthington 2013, p. 316.
545 Veneziano 2008, p. 92; Faber 2014, p. 35.

tion also helps to streamline the transaction since "*a single registration can, in effect, cover all future deliveries within a long-term business relationship*".[546]

In general, the preceding discussion is also applicable to other transactions that embody an element of reservation of ownership, such as financial lease, hire purchase, and consignment. Thus, these transactions need to be included in the system of registration proposed in this research. With respect to financial lease and hire purchase, it should be noted that the term of lease and the installment period are usually long. Therefore, the rule of grace period should not be applied to these two types of secured transaction.

5.4.3.2 Possessory Pledge

From the preceding discussion, we can easily make a conclusion that possessory pledge never resolves the problem of information asymmetry through dispossession of the corporeal and movable collateral. Instead, it gives rise to a new problem. Like many other security devices, possessory pledge also causes a divergence between ownership and possession. For the following reasons, the requirement of dispossession is of no help in making the proprietary encumbrance visible.

Firstly, the factual control of the collateral by the pledgee can only make the property right of pledge visible in an abstract way (see 3.2.1). If the collateral is under control by a third party, which means that the pledgee, at most, has indirect possession, the right of pledge is completely invisible since indirect possession has no function of publicity (see 3.2.2). Moreover, the pledgor's right of ownership becomes completely hidden because possession is given up to the pledgee or a third party. Because of the divergence between ownership and possession, possessory pledge not only creates a chance for the pledgee or the third party to dispose of the collateral in the name of the owner, but also a chance for the pledgor to dispose of the collateral without mentioning the existence of the proprietary encumbrance.

> "*Strictly speaking, pledges of chattels, which were recognized at common law, created ostensible ownership problems as well, because the creditor holding pledged property would appear to own property that in fact belonged to another.*"[547]

Possessory pledge not only means that the pledgor grants an interest of security to the pledgee, but also that the pledgor is exposed to the risk out of *bona fide* acquisition if the pledgee disposes of the collateral to a third party.

Secondly, possessory pledge also causes a difficulty to third parties who want to ascertain which collateral is under the encumbrance of pledge.

546 Faber 2014, p. 35.
547 Baird 1983, p. 54.

> "*In our view, perfection of security by possession creates unnecessary costs and problems. Where a financier takes security by possession, the cost of discovery of such security is unduly high to creditors looking to take further security in the same asset. There is also an increased risk of fraud on such creditors.*"[548]

The means of publicity of pledge (dispossession) is advantageous for the secured creditor, who is able to gain factual control of the collateral. However, this means of publicity brings a disadvantage to other creditors of the pledgor: it fails to make possessory pledge easy to discover.[549]

Thirdly, the recognition of possessory pledge by treating possession as a means of publicity might give rise to "*systemic costs*".[550] For jurisdictions that have a system of registration for secured transactions, the recognition of possessory pledge implies that there are two different means of publicity for corporeal movables.[551] One is registration, and the other is possession. If a conflict between a possessory pledge and a registered security interest arises with respect to the same object, the creditor who completes either of the two means of publicity earlier will win.[552] The permission of dual means of publicity is in violation of the principle that one type of property should have one method of publicity (see 2.3.3.2). This principle is a requirement of efficiency. If both possession and registration are allowed for creating a security right on corporeal movables, then third parties not only have to search the register, but also investigate the possessory state of the collateral involved. Undoubtedly, this will compromise the reliability of the register.[553] Moreover, the investigation is expensive for third parties, especially on account of the fact that it is difficult to discover the possessory pledge.

Fourthly, pledge and lease are treated differently in some jurisdictions. For example, possession is a means of publicity for corporeal movable collateral under the Australian PPSA, and it is possible to create a possessory security interest that is effective against third parties.[554] However, lease of corporeal movables is subject to a requirement of registration, and possession obtained by the lessee cannot make the right of lease effective against third parties.[555] In the situation of lease, possession by the lessee gives rise to a "'*publicity' problem*", instead of being a means of publicity.[556] There is no reason to view possessory pledge and the right of lease, also a possessory

548 Secured Transactions Law Reform Project 2013, p. 1.
549 Secured Transactions Law Reform Project 2013, p. 4.
550 Phillips 1979 (1), p. 43.
551 For example, Article 9 UCC recognizes both dispossession and registration as a means of perfection or a way to make the security interest effective against third parties. See Sigman 2008, p. 148-149.
552 For example, this is accepted by Article 9 UCC. See Sigman 2008, p. 162.
553 Phillips 1979 (2), p. 227.
554 Whittaker and Partner 2015, p. 127-128.
555 Whittaker and Partner 2015, p. 74-76.
556 Whittaker and Partner 2015, p. 76.

interest, differently in the aspect of publicity. The "prejudice" against lease indicates that possession is a problematic means of publicity, and possessory pledge falls short of the principle of publicity. An appropriate solution to eliminate this systematic incoherence is requiring both possessory pledge and lease to be registered.

For the reasons presented above, we argue that possessory pledge should also be included in the system of registration proposed in this research. This argument is supported by the recent reform in some African jurisdictions. For example, in Ghana,[557] Kenya,[558] Nigeria,[559] and Sierra Leone,[560] delivery is excluded as a means of perfection for the security interest of corporeal movables. The inclusion of possessory pledge in the system does not mean that the secured creditor cannot obtain possession of the collateral. If the pledgor agrees to give up possession to the pledgee, there is no reason for a prohibition. In other aspects than publicity, obtaining possession is beneficial to the secured creditor. For example, the pledgee might be able to use the collateral, and there is no need to fear that the value of the collateral might be reduced because of the debtor's damage or overuse.

The formality of registration will not give rise to a heavy burden to the pledgor and the pledgee. The reasons for positing this have been demonstrated above (see 5.4.2.2). For example, the system is digital, self-service, and notice-based; the absence of registration does not affect the valid creation of possessory pledge because registration only yields declaratory effect; pledge of a corporeal movable having low value does not need to be registered. It is worthwhile mentioning that delivery should be retained as a qualified means of publicity for securities to goods. The reason is simple. Securities to goods take negotiability as the central function, and the formality registration will destroy this function (see 5.3.2.1.B).[561]

In general, two benefits can be achieved by introducing registration to possessory pledge. The first benefit is that the pledgor does not have to worry that the pledgee will dispose of the collateral without any approval. Thus, the risk of *bona fide* acquisition by a third party can be alleviated to a large extent. The second benefit is that subsequent secured creditors of the pledgor do not have to investigate whether the collateral is in the possession of the pledgor and, if not, why the collateral is controlled by others. Simply searching the system of registration suffices. There is no doubt that this will reduce the costs out of collecting information.

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557 S. 14 (1) Ghana Borrowers and Lenders Bill (2020): "*A security interest is effective against third parties when the security interest has been created and registered under this Act.*"

558 S. 15 Kenya Movable Property Security Rights Act (2017): "*A security right in any movable asset is effective against third parties if a notice with respect to the security right is registered with the Registrar.*"

559 See s. 8 (2) Nigerian Secured Transactions in Movable Assets Act (2017); Igbinosun 2020, p. 364.

560 See s. 12 Sierra Leone Borrowers and Lenders Act (2014); Kanu 2018, p. 145-146.

561 Secured Transactions Law Reform Project 2013, p. 5.

5.4.4 Conclusion

In sum, it is desirable to apply the system of registration proposed in 5.3 to the secured transactions of corporeal movables and claims. Indeed, the system is not important for general creditors but can address the problem of information asymmetry to subsequent acquirers. The registration will not impose an unacceptable impact on the smooth operation of secured transactions. Instead, it is able to reduce the costs of the collection of proprietary information and facilitate the certainty of secured transactions. In general, the worry about the threat to privacy should not be overstated, because the information provided by the system is limited.

The legal form a secured transaction takes is irrelevant to the scope of application of the system. What matters is whether the security interest created is hidden to third parties. Thus, both limited property rights of security and ownership-based security device, such as reservation of ownership, should be included in the register. Moreover, possession does not qualify as a means of publicity in secured transactions concerning corporeal movables. Thus, possessory pledge is a hidden property right and should also be included in the system.

5.5 Registration as a Solution | Case Study II: Trust

Trust is another topic that has a connection with the principle of publicity. As pointed out by some scholars, one obstacle to the introduction of this common law device in a civil law system is related to the principle of publicity.[562] This principle, associated with the idea of preventive justice, is deeply entrenched in civil property law. A proprietary interest should be made transparent to third parties. Otherwise, its broad effectiveness will easily cause a conflict between the proprietor and a third party. Trust is a form of transfer of ownership which can give rise to proprietary consequences, in particular the effect on subsequent acquirers. These consequences need, at least at first sight, to be justified by publicity.

The relationship of trust can be created for either a purpose of security (*fiducia cum creditore*) or a purpose of management (*fiducia cum amico*). The prominent example of the former is security transfer of ownership, which is popular in German law but prohibited to a large extent by Dutch law (see 5.4.1). Security trust is often dealt with under the topic of secured transactions, which has been discussed in 5.4. In that section, our conclusion is that registration should be introduced to secured transactions, including the device of security transfer (see 5.4.3.1). The following discussion focuses on the other type of trust, i.e. the trust for management purposes. In the following discussion, the term trust refers to trust for management purposes

562 Banakas 2006, p. 6-7; Aertsen 2004, p. 162; Matthews 2013, p. 330; Kötz 1963, p. 167.

if there is no contrary indication. The discussion concerns only the trust of corporeal movables and claims since this research confines itself to these two types of movable property. Trust of immovable property will be mentioned as a reference or an illustration when necessary.

5.5.1 Setting the Scene

5.5.1.1 The Obstacle of Doctrines

In general, trust is a legal institution of common law and rejected by the civil law system. It is incompatible with a number of doctrines of Continental property law. This incompatibility creates several difficulties for civil law jurisdictions to accept trust. Even though some countries have a law of trust, they dilute it.[563] In this part, we introduce three doctrinal difficulties and then point out that these difficulties can be overcome to a large extent.

A The Unitary Nature of Ownership

The first hindrance to the introduction of trust is the unitary nature of ownership. Since the enactment of the French Civil Code (1804), ownership is treated as the most comprehensive and thus unitary property right. The unitary nature is partly a result of the fear of the revival of the feudal legal system.[564] Ownership cannot be divided or fragmented, and the distinction between legal ownership and economic ownership is not recognized by Continental property law. However, such division and distinction are seen as natural and useful in common law.[565] According to the prevailing opinion, trust is a legal device which can cause a division of ownership: the trustee is the legal owner in common law, and the beneficiary the economic or equitable owner in equity. It is hard to explain the consequence of the division under the framework of Continental property law under the principle of unitary ownership.

> "*In klassieke analyse van de Engelse trust kenmerkt deze rechtsfiguur zich door dual ownership: zowel degene die belast is met beheer over een goed, als degene in wiens belang het goed wordt beheerd, hebben op dat goed een aanspraak, die in het Engelse recht wordt gekwalificeerd als ownership […]. Van een absoluut eigendomsbegrip, dat de continentale rechtstraditie kenmerkt, is in het Engelse recht nooit sprake geweest.*"[566]

563 Alexander 2013, p. 305.
564 Sagaert 2012, p. 40.
565 Matthews 2013, p. 319.
566 Struycken 2007, p. 513-514. English translation: "*In the classical analysis of the English trust, this figure is characterized by dual ownership: both the person who is in charge of managing a thing and the person in whose interests the thing is managed are entitled as having ownership under English law [...]. An absolute concept of ownership, which is the feature of the continental legal tradition, has never been recognized in English law.*"

Truly, ownership has a unitary attribute. However, this doctrine has eroded in legal practice to some extent, on account of the possibility of retention of ownership in almost every jurisdiction and that of security transfer of ownership in some jurisdictions.[567] In these two cases, we can say that ownership is, in essence, divided between the two transacting parties in the sense that one's interest forms a proprietary restriction on the other's right.

In fact, if we do want to maintain the unitary attribute of ownership, the problem of fragmentation can be avoided by shaping the beneficial interest as a limited property right.[568] In fact, this is what Dutch law has already done: (1) using the silent pledge to replace security transfer of ownership, which has been achieved by the new code; and (2) using the *bewind* as an alternative to the management trust, which is in suspension now. In the case of management trust, there is no need to follow the common law approach, having a distinction of economic ownership or equitable ownership. The interest enjoyed by the beneficiary can be treated as a limited right, as a proprietary limitation over ownership.

> "*De 'dual ownership'-gedachte zou in de continentale systematiek kunnen worden uitgewerkt met behulp van de in de continentale systematiek overbekende figuur van een 'moederrecht' waaruit 'beperkte rechten' zijn afgesplitst. Ten overvloede zij in dit verband daarbij nog opgemerkt dat het 'zakelijk karakter' van het recht van de beneficiary voortvloeit uit het feit dat er sprake is van obligatoire aanspraken, die mede ten opzichte van verscheidene categorieën van derden kunnen worden gehandhaafd.*"[569]

In fact, some English lawyers have already pointed out that the distinction between legal ownership and economic ownership is misleading, and what is at the heart of the seeming distinction is the right-duty relationship.[570] For example, Maitland noted that the notion of legal ownership and equitable ownership was "*not merely nonsensical but mischievous*" because it might lead to the possibility of conflict between common law and equity, and he also opined that an equitable right was "*essentially jura in personam*".[571]

B The Unitary Feature of Patrimony

The second hindrance results from the singleness of patrimony. Under Continental patrimonial law, one person can only have one patrimony, consisting of future and existing assets and debts. A person is responsible for its debts on the basis of its all assets including those acquired in the future. The

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567 Sagaert, Tilleman and Laurent 2013, p. 56-57; Loof 2012, p. 108.

568 Kötz 1963, p. 169.

569 Venema 1985, p. 115. English translation: "*The 'dual ownership' theory could be reconfigured in the continental system with the help of the idea that a 'limited right' is subtracted from the 'mother right'. As a consequence, it has been observed that the 'proprietary character' of the beneficiary's right derives from the fact that the obligational claim can be maintained against several types of third parties.*"

570 Matthews 2002, p. 206, 218-219.

571 Maitland 1936, p. 106-107.

creation of a trust requires separating the trustee's own patrimony from the trust property, which enables one person (the trustee) to have two or more patrimonies and undermines the "*unity and indivisibility of the patrimony*".[572]

> "*By definition, therefore, every living person must have a patrimony, and originally he could only have one patrimony. Accordingly, although a person can alienate assets so that they become part of another's patrimony, he should not be able to segregate assets into a second patrimony of his own […]. To a civilian it might seem that the trustee […] has two patrimonies, a private patrimony and a trust patrimony.*"[573]

The singleness of patrimony can be traced to the 18th century when "*a metaphysical concept of patrimony prevailed in the civil law countries*".[574] According to this concept, patrimony is the external and economic manifestation of the subject, and the patrimony must be single and indivisible because one subject has only one indivisible personality.[575]

In general, the singleness of patrimony is not a large problem either. There is no convincing reason why one person cannot have two or more separate patrimonies at the same time. For example, English law deems it as "*in any event unnecessary*".[576] In the early 20th century, the idea of singleness of patrimony was criticized and rejected by more and more scholars.[577]

> "*This is reflected by the very simple objection to the singleness of patrimony doctrine: what is single and indivisible is not the patrimony itself, but rather the right to have a patrimony, which belongs to any individual as an external expression of his personality. As a consequence of this new viewpoint, an individual was no longer identified with his patrimony, nor was the latter considered a unique attribute of the human personality.*"[578]

In fact, civil private law has recognized some exceptions to this conventional notion, such as the one-shareholder company,[579] the "separate property (*Sondervermögen*)" in German law,[580] and the "qualitative account (*kwaliteitsrekening*)" held by notaries in Dutch law.[581] Moreover, some civil law jurisdictions have recognized a trust-like device (such as the French *fiducie*), which has an effect of separation and permits one person to have two or more patrimonies. The DCFR also provides that the singleness of patrimony can be restricted in order to introduce a regime of trust (Book X).[582]

572 Sagaert 2012, p. 32.
573 Matthews 2002, p. 214-216.
574 Elgueta 2010, p. 527.
575 Elgueta 2010, p. 527.
576 Matthews 2002, p. 215.
577 Elgueta 2010, p. 529.
578 Elgueta 2010, p. 529.
579 Sagaert 2012, p. 39.
580 Rehahn and Grimm 2012, p. 94-95.
581 Art. 22 Wet op het Notarisambt (Law of Notary Service); Milo 2012, p. 77.
582 Sagaert 2012, p. 36.

C *The Principle of* Numerus Clausus

Another doctrinal obstacle is the principle of *numerus clausus*. It is commonly held that individuals are not allowed to create a property right as they like. Instead, they have to choose from the list of property rights recognized by property law. The principle is closely related to the unitary feature of ownership: ownership cannot be fragmented, but trust can lead to a division of ownership, which amounts to creating a new form of ownership.[583] Trust is difficult to reconcile with the principle of *numerus clausus* in another sense. The content of trust is flexible and largely determined by individuals themselves, which implies that the principle of *numerus clausus* might be easily circumvented by the device of trust.[584] It is difficult to explain the permission of such broad party autonomy under the principle: after all, the principle of *numerus clausus* takes restrictions as its starting point.

> "*Any new or additional real right (here in the form of the beneficial or equitable ownership of the trust beneficiary) falls outside the closed system (numerus clausus). Acceptance of the numerus clausus principle in the sphere of real rights thus forms an almost insurmountable obstacle to the reception of the English law of trusts into civil law jurisdictions.*"[585]

In general, the principle of *numerus clausus* is not a large problem either. The fact that the principle of *numerus clausus* is also accepted by common law indicates that this principle will not be an insurmountable obstacle, if the legislature intends to recognize trust.[586] Moreover, the principle prevents the recognition of a new proprietary right by legislators and, when necessary, by courts.[587] Once trust is recognized in statutory law, as what occurred in France in 2007, we can say that this legal device is included in the closed system of property rights. In fact, there are a number of intermediary rights straddling typical property rights and typical personal rights.[588] In most situations, the reason why an intermediary right can be effective against third parties is that law recognizes it.[589] Therefore, the critical question here is not whether trust can be compatible with the principle of *numerus clausus*, but whether and under what conditions the relationship of trust can bind third parties.

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583 Van Erp 2006 (2), p. 1056.
584 Dalhuisen 2010, p. 282.
585 De Waal 2000, p. 442.
586 Ryan 1959, p. 79; Nolan 2006, p. 261-262.
587 Kötz 1963, p. 168.
588 Meijers 1948, p. 276; Van Erp 2013, p. 15.
589 According to Smits, the principle of *numerus clausus* should be interpreted in a new way: it refers to the notion that the situations in which individuals can create a legal relationship that have third-party effect are limited by law. See Smits 1996, p. 54.

5.5.1.2 The Issue of Publicity

In addition to the three obstacles mentioned above which, in fact, do not exist or can be overcome, there is a fourth barrier concerning the principle of publicity. Under this principle, property rights should be made transparent for third parties because of the third-party effect. In general, trust has proprietary effect in two aspects: one is the effect against subsequent acquirers of the trust asset, and the other is the effect against personal creditors of the trustee.

> "*In het voorgaande is gebleken dat de trust op zijn minst twee rechtgevolgen heeft die aan derden tegengeworpen kunnen worden, te weten het feit dat de beschikkingsbevoegdheid van de trustee door het trustverband wordt ingeperkt en het feit dat de trustgoederen een afgescheiden vermogen vormen.*"[590]

The first proprietary effect arises in the situation where the trustee manages or disposes of the trust asset in a way that violates the fiduciary duty under law or the trust agreement. In this situation, the beneficiary is entitled to trace the trust asset to the place of the transferee and recover the asset, except when *bona fide* acquisition by the transferee takes place. This is known as the tracing effect of trust.[591] The second third-party effect means that the trust property owns an independent position from the trustee's own assets, thus the trustee's personal creditors cannot distribute the trust asset. This is called the function of separation (partition or shielding) of trust.[592] In the reform of the law of property, the Belgian legislature also emphasizes these two proprietary consequences in constructing a regime of "trust (*fiducie*)".[593]

Concerning the issue of publicity in the context of these proprietary consequences, different jurisdictions take different approaches. In the following, we give a brief introduction to English law, French law, Belgian law, German law and Dutch law to show the complexity of this issue. Trust is an essential regime in English law, a representative of the common law system. The other four jurisdictions belong to the civil law system. French law has introduced a general trust (*fiducie*), and there is a move to introduce a general trust (*fiducie*) in Belgium, while both German law and Dutch law do not have a general system of trust. However, there is also discussion concerning the publicity of trust in German and Dutch legal theory, as we will see further below.

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590 Aertsen 2004, p. 163. English translation: "*In the foregoing, it has been shown that the trust imposes at least two legal consequences that might be against third parties: one is that the trustee's power of disposal is restricted by the trust, and the other is that the trust assets constitute a separate patrimony.*"

591 Ramjohn 2004, p. 602.

592 Hansmann and Mattei 1998, p. 438.

593 Wetsontwerp Houdende Invoeging van Boek 3 "Goederen" in het Nieuw Burgerlijk Wetboek (2018-10-31), p. 93.

A English Law

In English law, the proprietary benefits enjoyed by the beneficiary are not supported by any publicity. As a principle, creating a trust does not require any formality, let alone publicity, due to the consideration of respecting the settlor's intention.[594] This fits into the doctrine that "*equity looks at the intent rather than the form*".[595] It is also pointed out by some English lawyers that the absence of publicity serves the policy of "*the free circulation of assets*".[596] Only in two exceptional cases, i.e. the trust of land and testamentary trust, there is a requirement of certain formalities, such as making the trust agreement in written form.[597] It should be noted that the purpose of these formalities is to preserve evidence, rather than to provide publicity to third parties. Therefore, a trust is generally hidden under English law. Moreover, trust can be a result of the operation of law, which is known as constructive trust. This type of trust is also hidden to third parties.

There is no doubt that the formality-free approach is in conflict with the principle of publicity, and Weiser deems this principle as the "*public enemy*" of accepting trust by civil law jurisdictions.[598] The English law approach affects the certainty of the relationship of trust and creates a source of conflicts. In the viewpoint of Finch, trust, as an undisclosed legal device, is a source of "*deception*" and informational disparities, which is unfair to actual and potential creditors of the trustee.[599]

> "*The law imposes few formalities on the formation of trusts. A transfer of assets to a person who accepts that the property will be held on trust or a declaration by a person who already holds property that the property is held on trust is normally sufficient. Not surprisingly, such informality may encourage abuse by a dishonest trustee who may claim the transfer to him, or that the property is held by him, as the beneficial owner. There is no doubt that the trustee holds the legal title: the problem is that he may deny the existence of his obligations towards the beneficiaries or that there may be genuine doubt as to the nature of the arrangement.*"[600]

Nevertheless, the rejection of publicity is deeply entrenched in common law which takes an *ex-post* approach to trust. In other words, the English law of trust does not prevent the occurrence of conflicts concerning the trust asset, but seeks to resolve conflicts after they take place.

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594 "*In fact, the basic rule is along the latter lines: that no formality is required to make trust. Ultimately, therefore, the desire not to frustrate settlors in the making of informal trusts is given precedence over the advantages of a converse rule.*" See Gardner 2011, p. 89.

595 Ramjohn 2004, p. 40.

596 Lupoi 2000, p. 173.

597 Gardner 2011, p. 86; Aertsen 2004, p. 262.

598 Weiser 1936, p. 8.

599 Finch 2009, p. 663-665.

600 Goldsworth 1997, p. 15.

B French Law and Belgian Law

B1: The French Fiducie

Trust is also recognized, subject to some modifications, in some civil law jurisdictions, such as French law. One achievement of the 2007 law reform is translating trust (*fiducie*) into French law. *Fiducie* is a general concept which can be used for both security purposes (*fiducie-sûreté*) and management purposes (*fiducie-gestion*).[601] In terms of publicity, French law treats immovable property and movable property differently.

If the trust object is an immovable asset, registration is treated as the method of publicity and yields declaratory effect, and the register (*publicité foncière*) is open to third parties.[602] In other words, creating a trust on land is subject to the same rule of publicity as transfer or mortgage of the land. In the case of trust of movable property, registration is a prerequisite for valid creation, but such registration is mainly for an administrative purpose, instead of for the purpose of publicity.[603] The only private-law function is to avoid the risk of backdating.[604] Third parties cannot search the system of registration for the trust of movable property, and the problem of secrecy of *fiducie* still exists. This is considered as "*a weakness of the French legal framework*".[605]

> "*However, when the fiducie bears upon movables that are not subject to publicity by registration and the settlor remains in possession thereof, the beneficiary of the fiducie faces the risk of competition between her rights and those of the legal successors of the settlor […]. As has already been mentioned, in a case where the property is made available to the settlor and there is no publication of the beneficiary's rights, there is a risk that a third party will seize or acquire the property and then set up her possession in good faith against any subsequent claims.*"[606]

Moreover, delivery of the corporeal movable is not necessary for establishing a trust over the asset, which means that the transferor or settlor is entitled to continue using the asset entrusted.[607] This fits with the consensual system in French law: ownership passes upon the effect of the agreement.

Because of the lack of an appropriate regime of publicity, the existence of *fiducie* of corporeal movables leads to a risk to personal creditors of the trustee as well as third parties who contract with the trustee.[608] In the view

601 Mallet-Bricout 2013, p. 143.
602 Fix 2014, p. 211.
603 Likewise, Cyprus also introduced a system of registration for trust in 2013, and this system is not accessible to third parties either. See Aristotelous and Christodoulou 2014, p. 498.
604 Barrière 2012, p. 229.
605 Barrière 2013, p. 123.
606 Barrière 2013, p. 123.
607 Braun and Swadling 2012, p. 573-574.
608 Barrière 2012, p. 233.

of some French scholars, for the purpose of certainty and fluidity of transactions, third parties acting in good faith should be protected from the legal relationship of trust.[609] This amounts to saying that the beneficiary's interest should be respected by the third party who is aware of the trustee's breach of the fiduciary duty. However, French law has no provisions with respect to the scope and conditions of the protection of third parties.[610]

B2: The Belgian Fiducie

Inspired by French law, the Belgian legislature intends to introduce a general concept of trust (*fiducie*) into the Belgian civil code. In the draft of Book 3 concerning "property (*goederen*)", thirteen provisions (art. 3.38-3.50) are proposed for a general system of trust.[611] On account of the third-party effect of the trust, the legislature plans to include a rule of publicity in art. 3.46.

> Art. 3.46: "*De fiducie moet met het oog op de tegenwerpelijkheid aan derden, worden geregistreerd in het nationaal pandregister indien het betrekking heeft op goederen waarvan de verpanding in dat register moet worden ingeschreven, of worden overgeschreven in de registers van de hypotheekbewaarder indien het op onroerende goederen betrekking heeft. Voor roerende goederen kan de tegenwerpelijkheid ook door een buitenbezitstelling plaatsvinden.*"[612]

According to this provision, trust of immovable property takes registration as a means of publicity. Moreover, the register involved is the general register for the transaction of land, namely the "register of hypothec (*hypotheekregister*)". This register is open to general third parties.[613] Thus, the legal relationship of trust is able to be made visible. Trust of corporeal movables has two means of publicity: registration and delivery.[614] To publicize the trust through the former means, the parties need to file basic information in the register constructed for non-possessory pledge, which is also

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609 "*Hence these third parties will not bear the consequences where the trustee acts wrongly by exceeding his powers: the excess of power cannot be invoked against them, unless they are aware of it.*" See Barrière 2012, p. 233. About similar opinions, see Matthews 2007, p. 22.

610 Braun and Swadling 2012, p. 589.

611 The name of the draft is "*Wetsontwerp houdende invoeging van Boek 3 'Goederen' in het nieuw Burgerlijk Wetboek*" (2018-10-31), which can be translated in English as "Legal draft of incorporating Book 3 'property' in the new Civil Code".

612 English translation: Art. 3.46: "*For enforceability against third parties, the fiducie must be registered in the national register for pledge when the trust involves property for which the pledge needs to be registered; the fiducie must be registered in the register managed by the hypothec manager when the trust involves immovable property. For corporeal movables, delivery can also give rise to such enforceability.*"

613 Sagaert 2014, p. 724.

614 I doubt that delivery can qualify as a means of publicity here. The reason is simple: (1) direct possession is an ambiguous means of publicity (see 3.2.1), and indirect possession has no effect of publicity (see 3.2.2); and (2) visible delivery is ambiguous, and invisible delivery cannot make the trust transparent to third parties (see 3.4.2.4.B).

known as the "pledge register (*pandregister*)". This register is open to third parties, and the trust registered can thus be made visible.[615] It can be seen that the Belgian draft and the French law differ in the aspect of publicity of trust of movable property: the former plans to make the trust visible to third parties by including it in the pledge register, while the French register is not open to third parties.

C German Law and Dutch Law

C1: The German Treuhand

For those jurisdictions that are still hesitant to introduce a general concept of trust, publicity is an important consideration. For example, the *Treuhand* is a trust-like device in Germany and straddles property law and the law of obligations. In general, there are three types of *Treuhand* under German law: fiduciary *Treuhand* (*fiduziarische Treuhand*), *Treuhand* by authorization (*Ermächtigungstreuhand*), and *Treuhand* by agency (*Vollmachtstreuhand*).[616] The main difference between the first type and the other two types is that fiduciary *Treuhand* involves transfer of full ownership.[617] This is why fiduciary *Treuhand* is also known as "full-right *Treuhand* (*Vollrechtstreuhand*)". Fiduciary *Treuhand* can be created for the purpose of security and of management, which are known as *Sicherungstreuhand* and *Verwaltungstreuhand* respectively. Security transfer of ownership (*Sicherungsübereignung*) will lead to a legal relationship of *Sicherungstreuhand*.[618] Under *Treuhand* by authorization and *Treuhand* by agency, ownership is not alienated.[619] In the following introduction, we focus only on fiduciary *Treuhand* for the purpose of management.

Under fiduciary *Treuhand*, the settlor (*Treugeber*) enjoys a personal right with some proprietary effects.[620] This right is associated with a partitioning effect and in exceptional cases a tracing effect.[621] For example, where a personal creditor of the trustee attempts to seize or attach the trust asset (*Treugut*), the beneficiary is entitled to release the asset from the attachment in the name of a third party.[622] If the trustee becomes insolvent, the beneficiary

615 Bontinck 2017, p. 216.
616 Braun and Swadling 2012, p. 561-562.
617 Braun and Swadling 2012, p. 561-562.
618 Rehahn and Grimm 2012, p. 101.
619 Rehahn and Grimm 2012, p. 100-101. Between *Treuhand* by authorization (*Ermächtigungstreuhand*) and *treuhand* by agency (*Vollmachtstreuhand*), there is a difference in the legal basis. The former is based on § 185 BGB, while the latter is based on § 167 BGB. Thus, *Treuhand* by authorization arises where the "trustee (*Treuhänder*)" is authorized *ex post* to dispose of the object, and *Treuhand* by agency comes to the fore in the situation where the trustee receives the authority of disposal in advance. See Jacoby 2007, p. 35.
620 Canaris 1978, p. 410.
621 Grundmann 1998, p. 471-477; Kötz 1999 (1), p. 56-57.
622 Kötz 1999 (2), p. 56.

can also prevent the trustee's personal creditors from distributing the trust assets.[623] If the trustee disposes of the trust asset in violation of the fiduciary duty arising from the *Treuhand* contract, third parties can acquire the asset, irrespective of whether they act in good faith. This is because third parties "*acquire the property from the legitimate owner*".[624] However, it is another thing that a *mala fide* third party conspires with the trustee to harm the settlor's personal right.[625] In this situation, the settlor is entitled to protection under tort law (§ 823 BGB).[626] The protection against *mala fide* third parties is an exception and is subject to strict conditions.

Under German law, there is not any specific requirement of formality on the creation of *Treuhand*. However, as a matter of course, transfer of the entrusted asset requires certain formalities according to the nature of the assets.[627] If the trust property is a parcel of land, registration is a prerequisite of the transfer of ownership, but no indication of *Treuhand* is allowed to be recorded in the land register. The reason is that *Treuhand* forms only an obligational or personal limitation over the owner's right of disposal.[628] With respect to the *status quo*, some writers believe that it is desirable to show the settlor's legal position that is partly proprietary.

> "*Daraus folgt für das Liegenschaftsrecht, dass die Drittwiderspruchsklage und das Aussonderungsrecht nur gegeben sind, sofern die Rechtsstellung des Treugebers aus dem Grundbuch ersichtlich ist […]. Außerhalb des Liegenschaftsrechts kann die Offenkundigkeit grundsätzlich nicht nur durch Besitz, sondern durch jede beliebige Tatsache, insbesondere durch Gewerbe oder Beruf des Treuhänders gewährleistet werden […].*"[629]

> "*Voor de Treugeber of een derde-begunstigde kan publicatie van het Treuhänderschap daarentegen wel relevant zijn, met name voor het geval de Treuhänder in strijd met de bepalingen uit de Treuhandovereenkomst over het Treugut heeft beschikt […]. Voorts kan het ook voor de derden belangrijk zijn om te weten dat hun wederpartij handelt in haar hoedanigheid van Treuhänder.*"[630]

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623 Kötz 1999 (2), p. 57; Jacoby 2007, p. 35.
624 Kötz 1999 (2), p. 60-61.
625 Kötz 1999 (2), p. 61.
626 Jacoby 2007, p. 36.
627 Braun and Swadling 2012, p. 568.
628 Coing 1973, p. 120.
629 Canaris 1978, p. 427. English translation: "*As a result, in the property law of land the third party's claim and the right of segregation are only given if the legal position of the grantor is visible from the land register. Outside of the land law, the disclosure can in principle be guaranteed not only by possession, but also by any other fact, in particular by the trade or business of the trustee [...].*"
630 Van Dongen 1996, p. 162. English translation: "*However, publicity of the relationship of trust might be important for the grantor or a third beneficiary, especially when the trustee disposes of the entrusted asset in breach of the provisions of the trust agreement […]. Moreover, it may also be important for third parties to know that their counterparty acts in the capacity as a trustee.*"

If the trust property is a corporeal movable, then delivery is necessary for transfer of this asset. According to the first excerpt above, possession (*Besitz*) is treated as being able to made the *Treuhand* visible to third parties. This reminds us that the Belgian draft also includes delivery as a means of publicity for publicity of corporeal movables (see 5.5.1.2.B).

C2: The Dutch Bewind

In Dutch law, trust is generally prohibited by art. 3:84 BW under the recodification of the BW. The then drafters proposed an alternative device: *bewind*, a type of agency (*vertegenwoordiging*).[631] The *bewind*, which was initially intended to be incorporated in Chapter 6 of Book 3 BW, was not recognized as a part of the BW in 1992. It is unclear whether this chapter will enter into force in the future.[632] In recent years, some Dutch scholars have proposed introducing a general system of trust in the Netherlands, but with necessary modifications.[633] In the following discussion, we provide an outline of the Dutch view with respect to the problem of publicity of trust and the alternative device of *bewind*.

In Meijers' viewpoint, the common law trust, a device granting ownership to the trustee for the purpose of management, has a problem of excessive bestowment.[634] This is in line with his opinion on the security transfer of ownership: this security device gives more to the creditor than he or she deserves. On the basis of this opinion, security transfer of ownership has been replaced by silent pledge in Dutch law (art. 3:237 BW). Likewise, Meijers proposed using *bewind* as a replacement for the management trust. In his draft for a new civil code, *bewind* is constructed as a legal relationship of agency existing on property.[635] In the relationship of *bewind*, the manager (*bewindvoerder*) has a proprietary right of management including the authority of disposal.[636] Ownership of the object is not alienated to the manager. In this aspect, the Dutch bewind and the German *Treuhand* by agency (*Vollmachtstreuhand*) do not differ.

In general, *bewind* can give rise to some proprietary consequences. For example, where the owner transfers the object to a third party, the relationship of *bewind* will not be affected and will continue to exist on the object.[637] This is why *bewind* is also considered as a "proprietary burden (*zakelijke belasting*)".[638] Because of the proprietary effect of *bewind*, publicity is involved, at least when the object is registerable property.

631 Struycken 2007, p. 524-526.
632 Snijders and Rank-Berenschot 2017, p. 123.
633 Aertsen 2004, p. 299-300.
634 Struycken 2007, p. 523.
635 Meijers 1954, p. 241.
636 Struycken 2007, p. 525.
637 Meijers 1954, p. 241-242.
638 De Boer 1982, p. 39.

> "*Het doen inschrijven van het bewind over registergoederen, hetwelk door het tweede lid wordt verordend, is van groot belang met het oog op de werking van het bewind tegenover derden. Het kan nochtans zijn dat hij die een bewind instelt, wenst dat die geheim zal worden gehouden. Alsdan zal de bewindvoerder niet mogen inschrijven. Dit brengt het gevaar met zich, dat derden dit bewind kunnen verwaarlozen; de insteller heeft echter dit gevaar boven het bekend worden van het bewind verkozen.*"[639]

According to Meijers, where registration is absent in the case of *bewind* of registerable property, third parties acting in good faith will not be bound by this burden.[640] In Meijers' draft, there is no particular provision on the publicity of *bewind* of corporeal movables. In article 3.6.11 of the draft, protection of third parties acting in good faith is recognized: those who neither know nor should know about the existence of *bewind* should not be prejudiced.[641]

Unlike Meijers who proposed a regime of *bewind*, Aertsen argues in his dissertation that a system of common law trust should be introduced in the Netherlands. Under this system, ownership is alienated to the trustee.[642] The beneficiary's right should be treated as a personal right, according to Dutch legal terminology.[643] On the other hand, Aertsen proposes that the Dutch legislature should make a balance between the beneficiary and third parties in the event of a breach of the fiduciary duty by applying a rule of *bona fide* acquisition.[644] In this respect, Aertsen's opinion does not differ from Meijers' proposal. Moreover, both scholars acknowledge a separation of the trust property from the trustee's personal property.[645] In sum, Aertsen holds that the beneficiary's interest is personal in nature but has certain proprietary effects.

Because of the proprietary effects of the beneficiary right, Aertsen advises the Dutch legislature to construct a regime of publicity when introducing trust. Publicity is related to "delineation of trust property (*afbakening van het trustvermogen*)": how to clearly separate the trust property from the trustee's personal property.[646] Moreover, publicity is also relevant to the "protection of third parties (*derdenbescherming*)".[647] For trust of regis-

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639 Meijers 1954, p. 244. English translation: "*Enrollment of the administration of registerable property, which is prescribed by the second paragraph, is of great importance from the perspective of operation of administration against third parties. However, the case may be that the person who creates administration wants to keep it as a secret. Then the administrator cannot register it. This brings the risk that third parties may neglect the administration, but the creator has chosen this risk that they do not know about the administration.*"

640 Meijers 1954, p. 245.

641 Meijers 1954, p. 245.

642 Aertsen 2004, p. 203-204.

643 Aertsen 2004, p. 279.

644 Aertsen 2004, p. 525.

645 Struycken 2007, p. 527.

646 Aertsen 2004, p. 222-231.

647 Aertsen 2004, p. 248-249.

terable property, registration is not only a means of delimitation,[648] but also a crucial factor for the protection of third parties.[649] With respect to non-registerable property, Aertsen draws a distinction between claims and corporeal movables. The separation of claims can be realized by notifying the debtor involved.[650] In the situation of corporeal movables, they should be separated from the trustee's own corporeal movables "in physical sense (*in fysieke zin*)" when they are "generic property (*soortzaken*)".[651] In terms of the protection of third parties acting in good faith, Aertsen argues that art. 3:86 and 3:88 BW should be applied. In the situation where the trustee's disposal breaches the fiduciary duty, the corporeal movable can be acquired by *bona fide* third parties (art. 3:86 BW), and *bona fide* acquisition of claims is possible when the requirements in art. 3:88 BW are satisfied.[652]

5.5.1.3 Summary

From the preceding introduction, it can be seen that the reception of trust as a notion in the civil law system has some doctrinal difficulties. In general, these difficulties are not insurmountable. With respect to publicity of trust, there are several different approaches in contemporary law and theory. The first approach is that trust is, in principle, subject to no formalities, let alone publicity. English law follows this approach. The second approach is including trust in the existing system of publicity according to the nature of the trust asset involved. If the trust asset is immovable property or registerable property, the trust needs to be registered in the register. This is commonly accepted, as the preceding introduction shows. In the situation of trust corporeal movables, controversies exist in the aspect of publicity. French law only requires registration that is not open to third parties. Unlike French law, the Belgian draft legislation allows trust of corporeal movables to be filed in the "pledge register (*pandregister*)" and, at the same time, recognizes delivery as an eligible means of publicity. In some German and Dutch writings, delivery is also treated as a means of publicity for trust of corporeal movables. In general, the preceding introduction mainly concerns immovable property and corporeal movables, and the issue of publicity is often overlooked in the situation of trust of claims.[653]

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648 Aertsen 2004, p. 222.
649 Aertsen 2004, p. 249.
650 Aertsen 2004, p. 227.
651 Aertsen 2004, p. 230.
652 Aertsen 2004, p. 248.
653 For example, the Belgian draft only mentions immovable property and corporeal movables in explaining art. 3.46, a provision on publicity of trust. See Wetsontwerp houdende invoeging van Boek 3 "Goederen" in het nieuw Burgerlijk Wetboek, p. 93.

5.5.2 The Desirability of Registration

After providing a general introduction to publicity of trust, particular attention will be paid to publicity of trust of corporeal movables and claims. In general, the problem of publicity can be addressed easily when the object is immovable property or certain movable but registerable property (such as aircraft and vessels). This is because there is an existing system of registration in which trust can be included. Publicity is often a problem in the situation of trust of corporeal movables and claims. In general, we hold that this problem can be addressed by including trust in the register proposed in this research (see 5.3).

In section 5.3, we contend that a subject-based, notice-filing, self-service, and digital system of registration should be introduced to corporeal movables and claims. In section 5.4, we further argued that secured transactions of corporeal movables and claims should be included in the register proposed. In this section, we examine the desirability of including trust of corporeal movables and claims in the register. In general, it is desirable to publicize the trust for the reasons presented in 5.5.2.1. With respect to registration of the trust, a fear is that this formality will hamper the smooth transaction of the trust asset. In 5.5.2.2, particular attention is devoted to this fear.

5.5.2.1 Arguments for Registration of Trust

A Trust and Information Asymmetry

It is often held that the principle of publicity is not an obstacle to the reception of trust, because this principle has been abandoned in some situations, such as non-possessory pledge and security transfer of ownership in some jurisdictions.[654] The principle is less tenable as it appears in the contemporary law of movable property. Thus, it should not be treated as a barrier against trust being received.[655] Just as the French *fiducie* indicates, trust of corporeal movables is hidden to third parties, albeit that the trust of immovable property is made visible by virtue of the land register (see 5.5.1.2.B). It is acceptable that the law of immovable property has a stronger principle of publicity than the law of movable property.

In general, the preceding view is somewhat evasive. It is not convincing to say that trust can be introduced in the absence of any publicity because some other proprietary rights also lack a method of publicity.[656] On the contrary, as has been argued above, hidden proprietary security interests can cause a problem of information asymmetry and thus should be made transparent through registration, save for some exceptional secured transactions (see 5.4). In the viewpoint of Canaris, abandonment of the principle

654 Nolan 2006, p. 263; Kötz 1963, p. 169.
655 Milo 2012, p. 74.
656 Canaris 1978, p. 412.

of publicity can only be tolerated where there is sufficient justification.[657] In general, such sufficient justification does not exist in the situation of trust of corporeal movables and claims. The relationship of trust stands on the borderline between typical property rights and typical personal rights.[658] Ownership is acquired by the trustee, but this acquisition is limited in a proprietary sense for the beneficiary. The beneficiary's interest is not purely personal: the positive claim of access to the benefit out of the trust assets is reinforced to be partly proprietary on the basis of the associated legal effect of separation and tracing. In a word, though the interest might fail to be qualified as a typical property right, its proprietary features, in particular the tracing effect, should be justified by a means of publicity.

Truly, it is possible to choose another solution: denying the proprietary effect of the beneficiary's interest, instead of including the trust in a register. In fact, this is what has been followed by German law and French law, but an important difference exists between these two jurisdictions. In German law of *Treuhand*, the proprietary effect of the beneficiary's interest is restricted: in brief, the interest has an effect of separation but lacks the tracing effect (see 5.5.1.2.C). In the situation of disposal of the trust asset to a third party, the starting point is that it is irrelevant whether or not this third party is aware of the trustee's breach of fiduciary duties. The French *fiducie* grants a stronger position to beneficiaries: they enjoy a right of separation and a right of tracing under the restriction of *bona fide* acquisition by third parties (see 5.5.1.2.B).

In general, both rules are under an *ex-post* approach and differ only in the degree to which the beneficiary is protected. Under this approach, German law and French law choose to resolve conflicts, instead of attempting to prevent the occurrence of conflicts. This is unfair to beneficiaries and subsequent acquirers, as a type of third party.[659] In practice, beneficiaries desire proprietary protection in the event the trustee breaches its fiduciary duties. Here, proprietary protection means that the beneficiary is able to recover the object that was disposed of in violation of fiduciary duties. In general, German law and French law allow a remedy under the law of obligations, namely obtaining compensation from the trustee.[660] The demand for proprietary protection is extensive, and the legislature should not turn a blind eye to this demand. Moreover, the absence of a system of publicity might also cause a disadvantage to third parties. Even when *bona fide* acquisition free of the trust is possible, the subsequent transferee who intends to acquire the trust asset has to be prudent with respect to the trustee's authority of dis-

657 Canaris 1978, p. 412.
658 Merrill and Smith 2001, p. 843; Nolan 2006, p. 233.
659 Coing 1973, p. 123.
660 Truly, the proceeds out of the disposal contrary to the fiduciary duty belong to the trust assets, as a result of proprietary substitution. However, two risks still exist: (1) the proceeds might be mixed with the trustee's own assets; and (2) the transferee who obtains the trust asset from the trustee falls insolvent and is unable to pay the purchase price.

posal. Otherwise, the transferee might be treated as *mala fide*. In general, this often implies a burden of investigation for the transferee.[661] In the absence of an appropriate means of publicity, the investigation is often costly.

Therefore, the best way is to recognize the proprietary effect of the beneficiary's interest and allow the interest to be made transparent to third parties. This *ex-ante* approach can be seen as a consequence of balancing the interests of the parties to the trust and that of third parties: the parties to the trust cause information asymmetry to third parties by creating a proprietary relationship, thus they should be required to show this relationship to third parties.

> "*Perhaps more important than the default rule remedies, moreover, is the way in which trust law facilitates signaling to third parties the existence of the trust-like relationship, and hence helps put them on notice that the Manager lacks the authority to make the transfer.*"[662]

In the viewpoint of Coing, the prohibition on entering a "mark of *Treuhand* (*Treuhandvermerk*)" in the land register is not desirable.[663] At the international level, the Convention on the Law Applicable to Trusts and on Their Recognition (1984) recognizes a formality of registration in article 12.[664] This formality is a result of the third-party effect of trusts.

> "*The obligation of the trustee to the beneficiaries in respect of the trust property must, indeed, be a specially preferred obligation conferring on the beneficiaries a preference over the trustee's private creditors, spouse and heirs. Giving effect to such preference in a civil law country will, however, require the existence of a trust affecting property to be discoverable in public registers where ownership of such property has to be registered.*"[665]

In a nutshell, the broad effect of trusts and the associated problem of information asymmetry make it desirable to include trust of corporeal movables and claims in the system of registration proposed by this research.

B Trust and Systematic Coherence

From the perspective of systematic coherence, there is no reason to treat the trust for security (*fiducia cum creditore*) and the trust for management (*fiducia cum amico*) differently in the aspect of registration. In some jurisdictions, security can be provided in the manner of transfer: the debtor alienates the collateral to the creditor or a third party for the purpose of securing the

661 Snijders and Rank-Berenschot 2017, p. 67.
662 Hansmann and Mattei 1998, p. 455.
663 Coing 1973, p. 123.
664 Article 12: "*Where the trustee desires to register assets, movable or immovable, or documents of title to them, he shall be entitled, in so far as this is not prohibited by or inconsistent with the law of the State where registration is sought, to do so in his capacity as trustee or in such other way that the existence of the trust is disclosed.*"
665 Hayton 2016, p. 3.

creditor's claim. Truly, the "trust for security (*fiducie-sûreté*)" is not made visible to third parties under French law. However, registration open to the public is necessary in many other jurisdictions. For example, the PPSA systems in New Zealand, Canada and Australia,[666] Article 9 UCC,[667] and Book IX DCFR[668] all recognize that trust for security (*fiducia cum creditore*) is a device of security that is subject to the same requirement of publicity as other types of security device. Thus, registration is a prerequisite of the effectiveness against third parties.

In the situation of corporeal movables and claims, the trust for management should also be required to be entered a system of registration. The principal difference between trust for management and trust for security lies in the aspect of economic purposes, rather than their legal structure. In general, both types of trust involve transfer of ownership under proprietary restrictions. Thus, both cause a problem of information asymmetry to third parties. It is interesting that English law requires registration as the means of publicity for mortgage (in essence, trust for security) but exempts trust from the requirement of publicity. In fact, both mortgage and trust give rise to a kind of division of ownership under English law.[669] There seems to be no reason to treat these two types of trust differently in regard to publicity.

It is often said that the special treatment of trust for security is consistent with the fact that reservation of ownership is not subject to registration either in some jurisdictions, such as French law.[670] Security transfer of ownership is a reflection of reservation of ownership, thus the two devices should be treated alike in regard to the aspect of publicity.[671] In general, this line of reasoning is not persuasive. It only compares reservation of ownership with security transfer of ownership and ignores their significant

666 Whittaker and Partner 2015, p. 47.

667 Gilmore 1999, p. 86.

668 "*Occasionally, a trust is used for the purpose of creating a security, e.g. by the debtor or other security provider transferring the assets to be encumbered to the secured creditor or a third person as trustee for security purposes. Another example may be the trust receipt which aims to achieve a similar purpose. The rules of Book X on trusts explicitly provide that in their application to a trust serving security purposes those rules are subject to the provisions of this Book on proprietary security (X.-1:202), so that any conflict is avoided.*" See DCFR 2009, p. 4447.

669 In common law, the transferor-debtor enjoys an equitable interest known as the equity of redemption, rather than equitable ownership held by the beneficiary in the trust. Nevertheless, mortgage might be deemed to create "*a similar distinction between legal and equitable ownership but without concepts of trusteeship*". See Hudson 2003, p. 954. Of course, there is an obvious distinction between mortgage and trusts. Mortgagees hold ownership for their own benefit, namely using the collateral to guarantee the payment, while trustees hold ownership for beneficiaries. Nevertheless, there is a tendency of deeming the mortgagee as "*trustee of the property pending exercise of the mortgagor's contractual or equitable right to redeem*" in English law. See Devonshire 1997, p. 266.

670 Riffard 2016, p. 385.

671 "*The conflict is of the same kind and resolves itself in an equivalent fashion. For both institutions this is thus only a relative disadvantage; since the success of reservation of title is not undermined by this disadvantage, there is no reason to think that it would have any more effect on the success of the security fiducie.*" See Barrière 2013, p. 120.

similarity with the non-possessory pledge. In other words, the question should be: if non-possessory pledge requires public registration, do the two types of ownership-based security also need to be registered? In our opinion, the answer should be in the affirmative, as has been argued above (see 5.4.3.1). The reason is simple: all of the three types of security device cause a problem of information asymmetry. French law has introduced a register for non-possessory pledge for the purpose of transparency, but this purpose can be frustrated easily by turning to the hidden *fiducie-sûreté*. As a result, it is still difficult for third parties to ascertain whether a specific movable asset is used as collateral.

In sum, if trust for security (*fiducia cum creditore*) is subject to a requirement of registration, there is no reason to dispense with this requirement in the case of trust for management (*fiducia cum amico*). For systematic coherence, it is desirable to include trust of corporeal movables and claims, irrespective of the economic purpose served, in the register proposed by this research. Moreover, it is worthwhile noting that if the law requires registration only of trust for security and allows trust for management to remain hidden, then it will raise the question of how to draw the boundary between these two types of trust in relation to the requirement of registration.[672]

C Trust and Public Policy

Introducing a system of registration for trusts is not only desirable in private law, but also in public policy, especially the policy to combat money-laundering and tax evasion. Trust is a legal arrangement of managing wealth. However, it is also a means often used to conceal property for certain purposes, such as tax avoidance: "*one of the most popular reasons for the creation of a trust is to avoid or mitigate the settlor's liability to tax*".[673] This concern about tax is an important reason why many civil law jurisdictions are reluctant to introduce trust as a legal concept. In general, a system of registration is useful for addressing this problem.[674]

As pointed out above, French law requires the trust of corporeal movables to be registered for tax and money-laundering reasons (see 5.5.1.2.B).[675] It is worthwhile reiterating that the register is not accessible to third parties. The FATF (Financial Action Task Force) clearly emphasizes in a report the necessity of transparency of trust (FATF Recommendation 25).[676]

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672 Bridge, Gullifer, McMeel and Worthington 2013, p. 203.

673 Ramjohn 2004, p. 14.

674 Sagaert 2012, p. 46.

675 Barrière 2012, p. 231.

676 FAFT Recommendation 25: "*Countries should take measures to prevent the misuse of legal arrangements for money laundering or terrorist financing. In particular, countries should ensure that there is adequate, accurate and timely information on express trusts, including information on the settlor, trustee and beneficiaries, that can be obtained or accessed in a timely fashion by competent authorities. Countries should consider measures to facilitate access to beneficial ownership and control information by financial institutions and DNFBPs undertaking the requirements set out in Recommendations 10 and 22.*"

In addition, registration of trusts is also related to other public policy. For example, according to the World Bank, trusts form "*a hurdle to investigation, prosecution (or civil judgement), and asset recovery that they are seldom prioritized in corruption investigations*".[677]

In sum, a system of registration can satisfy the demand for transparency of trust for administrative purposes.[678] In addition to providing information to individual third parties, this system also assists the government in the combat against tax evasion, money-laundering, corruption and so forth. As a result, the system will resemble the land register which performs both administrative functions and private law functions.[679]

5.5.2.2 Doubts on Registration of Trust

As mentioned above (see 5.5.2.1.A), the Convention on the Law Applicable to Trusts and on Their Recognition (1984) requires a formality of registration for trusts. However, this requirement is deemed as "*surprising*" and cannot be understood by the Law Society of England and Wales.

> *"We find the existence of this article surprising and do not understand its purpose. It is a fundamental principle of English law that trusts are 'veiled'. The existence of a trust and the fact that the trustee is not the true owner of the assets are irrelevant to the world at large and are not disclosed by registration or documents of title. A trust only concerns trustee and beneficiary (and the tax authorities). In fact, it is regarded as desirable or even necessary for protection of persons dealing with the trustee that they should not be concerned whether it is a trustee or the true owner of assets."*[680]

In light of this viewpoint, invisibility is a merit, rather than a disadvantage. The invisibility of trust facilitates the smooth operation of transactions concerning the trust asset: since trust is invisible, the transferee does not have to be concerned about whether the transferor is a trustee or the real owner.

The above viewpoint is not without problems. Firstly, only knowing that the transferor is a trustee does not harm the transactional liquidity, since the law never denies the disposal by the trustee, provided that the fiduciary duty is not violated. Precisely speaking, what the potential buyer is concerned about is not whether the seller's ownership is subject to a relationship of trust, but whether and to what extent the seller has valid authority of disposal. Secondly, if the disposal breaches the fiduciary duty, facilitation of the transactional smoothness by protecting the transferee means that the beneficiary's interest will be sacrificed. It is conceivable that stronger protection of the transferee implies that the settlor and the benefi-

677 The World Bank 2011, p. 45-46.
678 Reich 2013, p. 351.
679 Dekker 2003, p. 132.
680 Lupoi 2000, p. 173.

ciary will spend more on monitoring the trustee.[681] Thirdly, if law does not grant protection to the transferee acting in bad faith, the transferee has to be prudent and investigate, when necessary, the trustee's authority of disposal. English law has a rule of *bona fide* acquisition: in the situation where the fiduciary duty is violated, acquisition of the trust asset is only possible when the transferee acts in good faith.[682] Therefore, third parties can never transact with a trustee as with a true owner: the buyer, as a third party, should be concerned about whether the seller is "*a trustee or the true owner of assets*".[683] Just unveiling the trustee's qualification cannot fully guarantee the smooth operation of the transaction concerning the trust asset.

The concern about transactional fluidity has been met in examining the inclusion of the secured transaction of corporeal movables and claims in a register in 5.4.2.2.C. There, we argue that the system of registration proposed in 5.3 can guarantee that smooth transactions will not be affected by the formality of registration to an unacceptable extent. Likewise, the formality of registration will not affect heavily the smooth operation of transactions concerning the corporeal movables and claims entrusted. In general, the concern just presented should not be overstated for the following reasons.

Firstly, the operation of the system of registration proposed by this research guarantees that the formality of registration can be completed easily. Under the system, registration requires individuals to file only a simple notice, namely a summary of the legal relationship of trust. In this summary, detailed information about the subject should be included, the object should be described through a general clause with sufficient accuracy, and a mark of trust needs to be included (see 5.3.1.1.C). In general, this is in line with the requirement of the three certainties of trust: certainty of subject, certainty of object, and certainty of intention.[684] Individuals can register the trust without disclosing the other details of the relationship, which restricts the burden of registration (see 5.3.1.4). Moreover, the system will operate in a digital and self-service manner, without involving any registrar (see 5.3.1.2-5.3.1.3). This further reduces the costs of registration and search.

Secondly, the scope of the application of the system proposed is limited for the sake of efficiency (see 5.3.2). In particular, an object of low value should be excluded from the system, so that "small trusts" will not be

681 Hansmann and Mattei 1998, p. 464.

682 Edwards and Stockwell 2011, p. 13.

683 Lupoi 2000, p. 173.

684 Hudson 2014, p. 91-92. Certainty of subject is known as "*certainty of object*" in English writings. In this research, this certainty requires that the parties of the trust, in particular the beneficiary, should be ascertainable. See Hudson 2014, p. 145; Pettit 2012, p. 54. Certainty of object is known as "*certainty of subject*" or "*certainty of subject matter*" in English writings. In this research, certainty of object means that the trust property must be identifiable. See Hudson 2014, p. 116; Pettit 2012, p. 51. Certainty of intention is also known as "*certainty of words*", which means that the settlor has a clear intention to create a trust. See Hudson 2014, p. 92; Pettit 2012, p. 48.

registered (see 5.3.2.1.E). In addition, where the trust asset is money and securities that have a high frequency of transaction, registration is unnecessary (see 5.3.2.3.A). Trust often lasts for a long period of time. Thus, there seems to be no need to prescribe a grace period (see 5.3.2.3.B).

Thirdly, registration is not a requirement of creating a valid trust and only yields declaratory effect (see 5.3.3.1). Valid creation of a legal relationship of trust has nothing to do with registration, and individuals are allowed to decide whether to make the trust created visible to third parties. Registration only affects the breadth of effectiveness against third parties: in the absence of registration, the trust has no binding effect on third parties acting in good faith (see 5.3.3.2). In general, settlors and beneficiaries who believe in the abilities of the trustee should be allowed to set aside the formality of registration. In relation to the possible disposal contrary to the trustee's fiduciary duty, if settlors and beneficiaries choose an obligational remedy in advance, there is no reason to deny this choice. However, if the settlor and the beneficiary deem registration as necessary, they can file a summary of the trust in the register. In this sense, registration implies freedom of choice, instead of a burden, for individuals.

Fourthly, it should be noted that searching the register does not constitute an extra burden to third parties. This is because trust is included in the register which also serves as a means of publicity for other transactions, especially secured transactions. In other words, both trusts and secured transactions share the same register proposed for corporeal movables and claims. Needless to say, the centralization of proprietary information makes searching the register much more convenient for the searcher.[685] The prospective buyer who searches the register because of a concern about possible secured transactions can also find the trust registered without much difficulty.

5.5.3 Publicity and the Proprietary Effect of Trust

5.5.3.1 Publicity and the Partitioning Effect

In general, the trust property can be separated visibly from the trustee's personal assets through registration, specifically speaking, the description of the trust property. Thus, registration has a function of visible separation. Here we note that identification of the trust property should be carefully distinguished from visible separation. By proper measures taken by the trustee, it is possible to identify the trust property from personal assets owned by the trustee. However, this does not necessarily mean that third parties will be aware of the scope of the trust property. This identification is called "invisible separation" in this research. For example, a trustee stores

685 Hansmann and Kraakman 2002, p. 401.

the bicycles entrusted to him at one place and puts his own bicycles at another place, and both groups of bicycles are under his factual control. In this situation, the bicycles entrusted are separated from his own bicycles in a physical sense, but this physical separation is of no help to an outsider who wants to ascertain whether the bicycle involved is under a relationship of trust. Therefore, separating the trust property is one thing, and making the separation of the trust property is another thing. Registration has a function of making the separation of trust property visible to third parties.

For subsequent acquirers, making the separation of trust assets visible by registration is of great importance. As mentioned above, the summary filed should include a description of the trust assets with sufficient accuracy (see 5.3.1.1.B). In the preceding case about bicycles, a potential buyer can easily ascertain whether the bicycle to be sold is under a relationship of trust by searching the register. If it is, this buyer should be alert with respect to the scope of the seller's authority to dispose. For example, the buyer can request the trustee to present the trust agreement or inquire with the settlor or the beneficiary. It is possible that a third party is able to be aware that the disposal made by the trustee violates the fiduciary duty after searching the register. For example, the trustee donates the trust property or pledges the trust property for his or her own debts. In these two situations, it is hard to say that the trustee acts for the benefit of the beneficiary.[686]

Trusts have an effect of separating the trust property from the enforcement by the trustee's personal creditors. In this sense, personal creditors of the trustee can be seen as a type of third party in relation to the legal relationship of trust, precisely speaking, the beneficiary's right. In general, registration of trusts has limited value to the trustee's unsecured personal creditors. The main reason for saying this is that general creditors are mainly concerned about the overall financial health of the debtor (see 2.2.2.2). In general, however, publicity is to make the proprietary legal relationships on specific assets visible to third parties. For general creditors, whether a specific asset will belong to the bankruptcy assets, if the debtor becomes bankrupt, is of no importance. This conclusion has been demonstrated in 5.1.3.2 and 5.3.3.2. It is necessary to reiterate here that the debtor's assets are always in fluctuation.

In reality, the debtor may be a professional trustee whose principal business is managing assets for the benefit of others. In this situation, the nature of the trustee's business usually already conveys an indication to general creditors.[687] It can be expected that potential and existing creditors are aware that most of the assets held by the trustee will not be distributed

686 It is possible that the trust is created for the purpose of charity, which gives rise to a charitable trust. In this special case, donation is not in violation of the purpose of the trust, and thus the fiduciary duty is not breached.

687 In the practice of pawn lending, the pawnbroker's identity provides an implicit signal that they are not possessing the goods for their own benefits. See Baird and Jackson 1984, p. 307.

to them in the event of the trustee's bankruptcy. In addition to the nature of the trustee's business, accounting measures can also convey some useful information to general creditors. As a fiduciary duty, the trustee has to make a separate account for the trust assets in order to avoid confusion with the trustee's own property.[688] Making separate accounting books can guarantee that unsecured creditors will not be misled by trusts in the evaluation of the trustee's overall financial health.

> "*In contrast, with the rules of trust law in effect, simple accounting measures can easily signal to the Manager's potential creditors which of the properties in the Manager's possession is held in trust and therefore is unavailable to satisfy the creditors in case of the Manager's insolvency.*"[689]

As registration is of no importance for general creditors, failing to register the trust will not affect its effectiveness against the personal bankruptcy administrator (or the personal unsecured creditor) of the trustee. Thus, where a trust is not registered, the trust property remains separated from the bankruptcy assets of the trustee.

5.5.3.2 Publicity and the Tracing Effect

Registration is useful for protecting the beneficiary in the situation where the trustee disposes of the trust asset in violation of its fiduciary duty. In general, English law confers the most extensive right of tracing on beneficiaries.[690] Nevertheless, beneficiaries can only in a few cases recover the trust asset from third parties because the law also grants general protection to subsequent acquirers who act in good faith and obtain the trust asset for value.[691] It is conceivable that it is often difficult for the beneficiary to prove that third parties are aware of the violation in the situation where there is no possibility to register the trust. As a result, tracing the asset held by a third party by the beneficiary will be easily interrupted. In this sense, the rule of *bona fide* acquisition can be treated as an advantage to subsequent acquirers of the trust property. On the other hand, settlors and/or beneficiaries might be motivated to invest more time and energy in monitoring the trustee's management.

In general, registration is a solution to address the preceding problem. After making the trust visible, the trustee will be discouraged from violating its fiduciary duty when disposing of a trust asset to third parties. Moreover, where a trust is registered, it is difficult for third parties to claim *bona fide* acquisition of a trust asset. Correspondingly, the beneficiary has a more secure legal position by registering the trust: registration lowers the possi-

688 Finlay 2012, p. 63-64.
689 Hansmann and Mattei 1998, p. 455.
690 Ho 2013, p. 11.
691 Edwards and Stockwell 2011, p. 13.

bility that the beneficiary's right to trace is excluded by *bona fide* acquisition. In general, this does no injustice to subsequent acquirers: they are provided with a channel, namely registration, through which the relationship of trust can be known.

> "*Under a system of registration the owner of the equitable interest is able to protect himself by registering the interest. Purchasers could never be absolutely certain that they had undertaken a thorough enough investigation in order to take free of any interest which had not been revealed by their searches. The system of registration means that the purchaser simply has to inspect the register to know what interests will bind him.*"[692]

In sum, registration provides a basis on which a balance can be struck between the beneficiary and the subsequent acquirer. The beneficiary has a chance to preclude *bona fide* acquisition by the subsequent acquirer by registration. In turn, the subsequent acquirer is able to obtain the information concerning the trust from the register.

5.5.4 Conclusion

There are several difficulties concerning trusts being received in civil law systems, one of which is about publicity of trusts. In common law, trusts do not have any requirement of publicity. In contrast, this legal device is subject to, to a larger or lesser extent, a principle of publicity because of the proprietary consequences triggered. This research argues that, in the situation of corporeal movables and claims, trusts should be included in the general register proposed in 5.3. In general, the problem of information asymmetry can be addressed by the register, and the interests of the relevant parties can be well balanced on the basis of registration. Moreover, the formality of registration will not give rise to unacceptable influence on the smooth transaction of the trust asset.

5.6 Registration as a Solution | Case Study III: Motor Vehicles

5.6.1 Setting the Scene

Motor vehicles are the last specific case study this research plans to examine: whether a system of registration should be introduced to the transaction of vehicles. In some jurisdictions, such as Portugal, Spain, and Denmark, a system of registration is constructed for vehicles, which is, like the land register, able to show ownership, the property right of use, and the

692 Edwards and Stockwell 2011, p. 13.

property right of security to third parties.[693] The system is comprehensive in terms of the scope of the registerable property right. A different approach is adopted by the PPSA systems in Canada, Australia and New Zealand. In these jurisdictions, the secured transaction of motor vehicles is incorporated within the system of registration for secured transactions of movables.[694] For example, the Australian PPSA treats motor vehicles as a typical category of "*serial-numbered property*", and valid registration requires an indication of the serial number of the motor vehicle, namely the VIN.[695] As a result, searchers are able to find the folio of the motor vehicle by entering the VIN. In this sense, we can say that the PPSA systems are not only subject-based but also have an object-based dimension.

In France and Italy, a narrow register is introduced for the pledge of motor vehicles for the purpose of publicity.[696] As the pledge does not involve dispossession, it is known as "movables hypothec (*ipoteche mobiliari*)" in Italian law and "pledge without dispossession (*gage sans dépossession*)" in French law.[697] Under Italian law, registration is a constitutive element for creating a property right of pledge, and the register has "public reliance (ö*ffentliche Glaube*)" for third parties.[698] According to art. 2351 of the French Civil Code, registration is a requirement to make the pledge opposable against third parties.[699] In both jurisdictions, ownership of motor vehicles can be transferred independently from the formality of registration.[700] The register is only constructed for the pledge of motor vehicles. In the end, it should be noted that the two registers are an object-based system.[701]

In contrast, many other countries use conventional rules of possession to regulate disputes concerning vehicle transactions. In these countries, there is an administrative system of registration. But this system, in principle, has nothing to do with the transaction of motor vehicles *per se* and only serves a function of public administration. In the aspect of publicity, motor vehicles are treated differently from aircraft and vessels: the latter two corporeal movables have, like immovable property, a comprehensive register. In the next part, English law, German law and Dutch law are selected as three examples to show the deficiency of the rule of possession (see 5.6.2).

693 About the Portuguese law concerning the registration of motor vehicles, see Gomes and Nóbrega 2011, p. 651-653; Nóbrega 2014, p. 94-95. About the Spanish law concerning the registration of motor vehicles, see Pacanowska and Soto 2011, p. 516, 522. About Danish law on this aspect, see Pedersen 1993, p. 159-160; Kieninger 2003, p. 337.

694 Walsh 2016, p. 76-77.

695 Whittaker and Partner 2015, p. 178-179.

696 The registration of pledge of motor vehicles is articulated in art. 2810 of the Italian Civil Code and art. 2351 of the French Civil Code.

697 Lipsky 2010, p. 118-120; Winter 2014, p. 191.

698 Lipsky 2010, p. 119.

699 Leavy 2007, p. 109-110.

700 Winter 2014, p. 187.

701 Leavy 2007, p. 118; Veneziano 2007, p. 169.

These three jurisdictions do not have a register for property rights of motor vehicles. For example, motor vehicles are subject to the rule of *bona fide* acquisition of corporeal movables, a rule centering on possession.

After the comparative discussion, the construction of a comprehensive and central system of registration is argued for property rights of motor vehicles (see 5.6.3). In other words, the notice-filing system of registration proposed in 5.3 should not apply to motor vehicles. This is mainly because, unlike ordinary corporeal movables and like vessels and aircraft, motor vehicles have a unique feature (the VIN) according to which an object-based registered can be established. The system proposed in 5.3 is only applicable to ordinary corporeal movables and claims. In 5.6.4, we provide a brief discussion of the legal effect of registration of motor vehicles. A conclusion is offered in 5.6.5.

5.6.2 The Rule of Possession

5.6.2.1 English Law

A General Introduction

In general, the English rule concerning the transaction of motor vehicles is embodied in cases and statutes, especially the Hire-Purchase Act (1964). The starting point is the consensual principle and the *nemo dat* rule. Under this principle, ownership of motor vehicles can be transferred upon the effect of the underlying contract, provided that the transacting parties do not agree otherwise. Delivery of the subject matter is never a prerequisite of the transfer. Next to the consensual principle is the *nemo dat* rule, a rule which was applied in the landmark case *Helby v. Matthews*. In this case, the court held that the hirer who only had an option to purchase could not transfer ownership of the motor vehicle to the third party.[702] The consensual principle and the *nemo dat* rule are disadvantageous to buyers, especially those who buy a used motor vehicle, because "*there was no adequate notification mechanism for discovering the interest of the financier as owner of the vehicle*".[703]

For the purpose of fluidity and security of transactions, English law introduces four rules as an exception to the *nemo dat* rule: (1) s. 27 of the Hire-Purchase Act (1964); (2) s. 24 (seller in possession) of the SGA (1979); (3) s. 25 (buyer in possession) of the SGA (1979); and (4) s. 2 of the FA (1889). Roughly speaking, these four provisions find their justification in the notion that possession serves as an outward mark of ownership.[704] S. 27 Hire-Purchase Act (1964) expressly grants a special protection to "*private purchasers*" of a vehicle which is subject to the "*hire-purchase*" or "*a condi-*

702 *Helby v. Matthews* [1895] AC 471.
703 Davies 1994 (2), p. 474.
704 Davies 1994 (2), p. 475.

tional sale agreement".[705] The main requirement of this protection is that the private purchaser acts in good faith without having a notice of the hire-purchase agreement or the conditional sale agreement, and the term "*private purchaser*" implies that the buyer has to acquire the vehicle for value.[706]

The two provisions of the SGA (1979) might apply where the vehicle in question is controlled by a seller who retains possession but has transferred ownership (s. 24 SGA) or a buyer who obtains possession but no ownership (s. 25 SGA). The principal requirement of the two provisions is that the third party has to act in good faith, and the subject matter must be delivered to this party. In addition, gift is not an eligible cause for acquisition by third parties acting in good faith. S. 2 FA (1889) provides another exception to the *nemo dat* rule. Pursuant to this provision, successful *bona fide* acquisition by a third party requires that this party acts in good faith, and the transaction occurs in the ordinary course of business of the seller.

In England, there is an administrative system of registration for motor vehicles, and a certificate of registration is issued to the owner of the motor vehicle. In reality, the certificate is also relevant to transactions concerning motor vehicles. Before turning to the relevance of the certificate to the transaction, it is useful to mention that there are now two private registers for the transaction of motor vehicles in England. One is the HPI (Hire Purchase Inspection), and the other is the AutoCheck.[707] These two systems do not have a statutory law basis and are maintained by several large finance companies. In general, the two systems can be seen as "*a market response to the lack of a statutory registration requirement*".[708] The two systems provide comprehensive information regarding motor vehicles, and most dealers are members who are entitled to search the systems. Nevertheless, the systems have no legal effect of public reliance, as indicated in the case *Moorgate Mercantile Co Ltd v. Twitchings*.[709] This means that the owner's failure to register his or her right of ownership does not prevent him or her from recovering the motor vehicle from third parties acting in good faith.

B The Role of Registration Certificates

In applying the four exceptional rules stated above, a common and central issue is how to determine that the requirement of "*good faith*" and that of the "*ordinary course of business*" are satisfied.[710] In the context of transactions concerning cars, this issue has a close connection with the registration certificate of motor vehicles. In English law, the registration document is issued by the Driver Vehicle Licensing Agency (DVLA) for the purpose of public

705 The Act draws a distinction between the "*private purchasers*" (i.e. consumers) and the "*trade or finance purchasers*", and only the former is under the statutory protection. See Macleod 2002, p. 690.
706 Benjamin 2014, p. 410-411.
707 Beale, Bridge, Gullifer and Lomnicka 2018, no. 9.26-9.33.
708 Beale, Bridge, Gullifer and Lomnicka 2018, no. 9.26-9.33.
709 *Moorgate Mercantile Co Ltd v. Twitchings*, [1977] AC 890.
710 Davies 2001, p. 499.

regulation.[711] The registration certificate is not a condition of the transfer of vehicles, despite the fact that there is a duty of altering registration after completion of the transfer.[712] The registration certificate is not, in the wording of English law, a document of title to the motor vehicle: "*the owner of the vehicle does not hold out another as having authority to sell the car merely by giving up possession of the car and its registration book*."[713] However, it is often treated as akin to the document of title because it can produce some private law consequences.[714] For example, the registration certificate is often taken into consideration in determining whether the third party acts in good faith and whether the transaction occurs in the "*ordinary course of business*".[715]

The requirement of the ordinary course of business is embodied in s. 2 (1) FA (1889). The starting point is that a transaction without involving delivery of the registration certificate is suspicious and should not be treated as taking place in the ordinary course of business of the seller.[716] New vehicles should be treated differently from used vehicles in this aspect. The transferor of new vehicles has no registration certificate, and there is no possibility of delivery of the document.

> "*There is all the difference in the world between a case where an owner of a second-hand car retains the log book while handing over physical possession of the car to a dealer so as to ensure that no-one will suppose that the dealer has authority to sell the car, and the case where a dealer effects a sale of a new car while the registration book is with the registration authority for registration or tax purposes. I find it difficult to see why a sale of the latter type should not be in the ordinary course of business of a motor dealer who holds a car on sale or return terms.*"[717]

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711 "*Following on from this, a major purpose of registration is fiscally related--that is, mechanically propelled vehicles used or kept on public roads in Great Britain must have an excise license which attracts payment by way of a duty […]. It is for this reason that the particulars contained in the register are made available for use by a local authority for any purpose connected with the investigation of an offence and also the police or, on the payment of a fee, any person who can show to the satisfaction of the Secretary of State that he has reasonable cause, notably theft, for wanting the particulars to be made available to him.*" See Davies 2001, p. 476.

712 "*I do not see how a registration document, which on its face states that it records the name of the registered keeper and that the registered keeper is not necessarily the legal owner can possibly be said to be a document used in the ordinary course of business on proof of the possession or control of goods or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented […].*" See *Beverley Acceptances Ltd v. Oakley* [1982] R.T.R. p. 432.

713 Davies 2001, p. 499.

714 Davies 1995 (2), p. 479.

715 Davies 2001, p. 500.

716 "*A sale to a finance corporation does require in the ordinary course of business that delivery of the car can be given to the proposed hirer. To make that delivery effective, it must be given in such a way that the hirer can license and use the car, and this involves that the registration book must be delivered with the car. A sale involving delivery to the hirer of the car without its registration book would not, in my judgement be in the ordinary course of business.*" See *Stadium Finance Ltd v. Robbins* [1962] 2 Q.B. 665, p. 675.

717 *Astley Industrial Trust v. Miller* [1968] 2 All E.R. 36, p. 42-43.

Here, it should be noted that the requirement of the "ordinary course of business" and the requirement of good faith overlap to a large extent: the absence of delivery of the registration certificate often means that the purchaser does not act in good faith.[718] In a nutshell, delivery of the registration document is, at least in the situation of the transaction of used cars, has a close connection with the ordinary course of business and good faith.

In general, the registration certificate plays a similar role in applying s. 27 of the Hire-Purchase Act (1964) and in determining whether the third party acts in good faith.[719] In particular, the registration certificate is irrelevant in the situation of new vehicles, while it is important for answering the question of good faith when the object is a used vehicle.

With respect to the two provisions of the SGA (1979), delivery of the registration certificate is relevant in determining whether the purchaser acts in good faith, at least when the transaction involves a used car.[720] However, it should be noted that where the buyer steals the registration certificate retained by the seller and delivers the document to a third party, this third party is not entitled to *bona fide* acquisition.[721] In other words, the registration certificate must be acquired by the transferor with the consent of the original owner.[722]

C Mortgage, Charge, and Pledge of Vehicles

Mortgage and charge of vehicles are subject to registration according to the Companies Act (2006), provided that the security provider is a company.[723] Through this means of publicity, the security interest can be made visible to and consequently effective against third parties. However, it should be noted that the registration only has limited effect against third parties, and buyers in the ordinary course of business should not be treated as having constructive notice of the security interest.[724] For the mortgage and charge of motor vehicles, the registration certificate does not play any role since delivery of the collateral is not required.

To create a right of pledge, giving up factual control of the vehicle to the pledgee is a prerequisite since delivery is necessary for pledging corporeal movables under English law (see 3.5.3.1.A).[725] There is no need to give up the registration certificate to the pledgee since the certificate is not a document of title. The pledgee does not have to worry that the pledgor will further dispose of the collateral, as the former has obtained possession of the motor vehicle pledged. Needless to say, the delivery causes severe inconvenience to the pledgor who usually wants to continue using the vehicle.

718 Ulph2000, p. 256-257.
719 Bridge 2014, p. 261.
720 Ulph 2000, p. 256-257.
721 Benjamin 2014, p. 400.
722 Ulph 1998, p. 410.
723 Davies 1994 (1), p. 15.
724 Beale, Bridge, Gullifer and Lomnicka 2018, no. 12.05.
725 Goode 2013, p. 32; Bridge 2007, p. 142.

In a nutshell, it can be concluded that the rule of transactions of motor vehicles is complex and patchy in England. English law takes a piecemeal approach in regulating the transaction of vehicles: it involves common law, equity law, the Sale of Goods Act (1979), the Factors Act (1889), the Hire-Purchase Act (1964), and the Companies Act (2006). In general, the transaction is conducted in the absence of a reliable source of information for third parties, and the applicable law is based on the idea of resolving conflicts, rather than the notion of preventing conflicts. The registration certificate and possession play an important role in resolving a conflict between the original owner and third parties. Truly, mortgage and charge provided by companies can be made visible to third parties through registration, but neither the other property rights nor security interests granted by a natural person are able to be shown to third parties.

5.6.2.2 German Law and Dutch Law

Compared with English law, both German law and Dutch law take a unitary approach to the transaction of motor vehicles: the *traditio* system plus a rule of *bona fide* acquisition. Under the *traditio* system, the transfer of ownership of a motor vehicle requires delivery of this motor vehicle to the transferee. For transfer of motor vehicles, *traditio per constitutum possessorium* is an eligible form of delivery, which means that the transferor does not have to give up physical control. Handing over the registration certificate is neither a prerequisite of valid transfer nor has any effect of delivery.[726] This is because the registration certificate (*Kraftfahrzeugebrief* in German law and *kentekenbewijs* in Dutch law) is merely a tool of administrative regulation. The nature of motor vehicles as a corporeal movable is not altered by the issuance of a certificate. In the terminology of Dutch law (art. 3:10 BW), motor vehicles are not a kind of "registerable property (*registergoederen*)" that takes public registration as the method of publicity.[727]

In the aspect of the legal nature of registration certificates, both German law and Dutch law are not different from English law. The starting point is that the registration certificate is not a document of title or title-conferring certificate. Thus, the transaction of motor vehicles can take place independently from the certificate. Changing the document is merely a requirement by administrative law and has nothing to do with the private law transaction. However, this does not mean that the registration certificate is totally irrelevant to the transaction. In general, it has a close connection with *bona fide* acquisition of motor vehicles in both jurisdictions, despite the fact that statutory law is silent about this connection. It is an important factor that should be considered in determining the issue of good faith: whether and to what extent a third party has to conduct an investigation of the counterparty's authority of disposal.

726 Salomons 2008 (2), p. 78; McGuire 2008, p. 107.
727 Reehuis and Heisterkamp 2019, p. 7.

Under both German law[728] and Dutch law[729], the basic rule is that a third party will be treated as not acting in good faith or as acting with gross negligence, if this party fails to conduct further inquiry where the transferor does not present the registration certificate. In German law, if the transferor is not registered on the certificate, or there is any doubt regarding the certificate, the purchaser bears an obligation of further inquiries.[730] As confirmed by a Dutch case, the mere fact that the transferor's name is not on the document does not necessarily mean that the buyer acts in bad faith, provided that there is a "reasonable explanation (*aannemelijke verklaring*)" with respect to this fact.[731] Therefore, presenting the registration document, paying diligent attention to the information on the document and, when necessary, conducting further inquiry are essential in determining the question of good faith.

However, two important exceptions to the preceding rule are accepted by both German law and Dutch law. The first exception is that failure to present the registration document does not imply bad faith when the motor vehicle involved is new and the seller is a commercial dealer.[732] This reminds us of the practice of English law: the transaction of new vehicles is treated differently in applying s. 2 (1) FA (1889). The second exception is that a purchaser will not be treated as acting in good faith, if this purchaser is by virtue of his or her professional experience able to know that the motor vehicle is under a clause of reservation of ownership.[733]

The preceding introduction concerns only the transfer of ownership. In reality, leasing and pledging of motor vehicles are also popular. Under both German law and Dutch law, motor vehicles can be leased. In this situation, factual control should be surrendered by the lessor to the lessee. During the lease, any further disposal by the owner cannot affect the legal relationship of lease in Dutch law, as a result of the rule of "*sale does not break lease*" (art. 7:226 BW). However, the rule is not accepted by German law in the case of lease of motor vehicles: § 566 BGB, a corresponding provision to art. 7:226 BW, confines itself to the lease of immovable property. Therefore, it is easy to conclude that Dutch law, compared with German law, grants more protection to the lessee of motor vehicles. On the other hand, German law is more advantageous to purchasers of the motor vehicle leased.

728 BGH NJW 1975, p. 735; BGH NJW 1996, p. 2226; Wolf and Wellenhofer 2011, p. 107; Westermann 2011, p. 421.

729 *Apon/Bisterbosch* (HR 4 april 1986, NJ 1986, 710); *Coppes/Van de Kolk* (HR 7 oktober 2005, NJ 2006, 351); Nieuwenhuis 1986, p. 790; Kortmann 2006, p. 288; Van Vliet 2006, p. 191.

730 BGH NJW 1994, p. 2022; Baur and Stürner 2009, p. 674; Wilhelm 2010, p. 401; Wolf and Wellenhofer 2011, p. 107.

731 *Bull's Eye/Chrysler* (HR 11 oktober 2002, NJ 2003, 399); Van Vliet 2006, p. 191; Salomons 2006, p. 121.

732 OLG Düsseldorf NJW-RR 1992, p. 381; Wolf and Wellenhofer 2011, p. 107; Westermann 2011, p. 420; Salomons 2006, p. 121.

733 BGH NJW 2005, p. 1365; Westermann 2011, p. 420; *DFM/Mobiel Lease* (HR 21 oktober 2011, NJ 2011, 494); Salomons 2011 (1); Van Swaaij 2012, p. 125.

For pledging a motor vehicle, giving up factual control by the pledgor is necessary in German law (§ 1205 BGB), while it is not essential in Dutch law because of the recognition of the silent pledge (art. 3:237 BW). In general, German law recognizes, as an alternative to the non-possessory pledge, the security transfer of ownership, a form of transfer in the manner of *traditio per constitutum possessorium*. The security transfer is also a non-possessory security device (see 3.5.3.1.D). Unlike English law, both jurisdictions do not have a system of public registration for the non-possessory security device. As a result, the proprietary encumbrance over motor vehicles is in general hidden to third parties under German law and Dutch law.

5.6.2.3 The Problems Observed

From the preceding comparative introduction, it can be found that all the three jurisdictions lack a comprehensive system of registration for the transaction of motor vehicles. English law allows registration of only mortgage and charge of motor vehicles in the situation where the security provider is a company. There is an administrative system of registration in the three countries, but its purpose and function determine that the transaction of motor vehicles is independent of this system. As an exception, the only private law effect of the system is that the registration certificate, issued by the public registry, is related to *bona fide* acquisition of motor vehicles. Where the motor vehicle involved is used, the certificate is a factor that should be taken into consideration in answering the question whether the third party acts in good faith or is grossly negligent. In general, the proprietary relationship on motor vehicles remains invisible to third parties, and it is still the conventional rule concerning possession that is applied to resolve conflicts after they arise. There is no doubt that the transaction is exposed to a severe risk of uncertainty because of the lack of a reliable source of information for third parties. On account of the high value of motor vehicles, it seems that the conflict is more common in the situation of motor vehicles than in the situation of ordinary corporeal movables.[734]

In the situation of new vehicles, there is no registration certificate that can help a potential buyer to know whether the motor vehicle belongs to the seller. In this situation, the *nemo dat* rule is the starting point, and the rule of *bona fide* acquisition only applies exceptionally. Because of the preferential application of the *nemo dat* rule, potential acquirers have to be very prudential with respect to the legal state of the motor vehicle involved. As German law and Dutch law indicate, a professional trader is often not allowed to claim *bona fide* acquisition because of his or her having commercial experience. Indeed, we can say that commercial experience implies that prudential traders will not assume naively that the possessor of the motor vehicle has full ownership. However, the problem of information asymmetry is not

734 Davies 2001, p. 489.

completely addressed by commercial experience. As has been argued above (see 5.4.2.2.A), commercial experience only allows professional parties to not be misled by possession, but it can never indicate clearly whether the seller has unencumbered ownership. Moreover, the assumption on the basis of commercial experience is unfair to those possessors who have unencumbered ownership of the motor vehicles possessed: those possessors have to persuade their counterparties to believe that they have unencumbered ownership, which is not without costs. In addition, it has to be borne in mind that there are a large number of consumer purchasers who have no professional knowledge or commercial experience.[735] Therefore, it can be concluded that the transaction of new vehicles faces a problem of information asymmetry, as indicated by Roskill L.J. in the case *Stevenson v. Beverely Bentinck Ltd*.

> "*Ever since hire-purchase was invented, round about the turn of the century, there have been hire-purchase frauds, and the books are full of examples of such frauds, which have caused loss to innocent parties. Again and again—and the present case is yet another example—courts have to decide where, as between two wholly innocent parties, that loss should fall. This is particularly so in the case of motor cars, because persons who hire motor cars under hire-purchase agreements persist in selling them or purporting to sell them, to innocent purchasers when as persons in possession they have no right whatsoever to sell.*"[736]

For used vehicles, the problem of information asymmetry also exists and cannot be fully addressed by registration certificates or by possession of motor vehicles. In fact, the registration certificate might be a source of misleading information and fraud, since it does not seem difficult to forge a registration certificate.[737] The main defect of the registration certificate is that it only shows the relationship of "*keepership*" rather than the ownership of the motor vehicle.[738] For example, one cannot know whether there is any proprietary encumbrance over the vehicle from the registration certificate. Moreover, the relationship of ownership cannot always be reflected by the registration certificate, on account of the fact that transfer of ownership is not contingent on delivery of the certificate. Truly, inspection of and delivery of the registration certificate are common steps in ordinary transactions. However, this does not mean that *bona fide* acquisition by a third party will be completely excluded when the transferor is not registered on the document, or that the mere fact that the transferor is recorded on the document can supply absolute safety to the transferee. Precisely speaking, registration certificates are at most a factor that should be considered in determining whether the third party acts in good faith. The information derived from registration certificates is never decisive: the document has no legal effect of reliance.

735 Lurger 2006, p. 48.
736 *Stevenson v. Beverely Bentinck Ltd*, [1976] 1 W.L.R. 483, p. 486-487.
737 Davies 1995 (1), p. 42; Baur and Stürner 2009, p. 674; Benjamin 2014, p. 400.
738 Davies 2001, p. 499; Tiedemann 1994, p. 159; Salomons 2006, p. 118.

It should be noted that the information asymmetry presented above is not only a problem for third parties, but also a source of risk for the owner of vehicles (usually the financier of the seller). As has been discussed above, a third party acting in good faith is entitled to defeat the original owner by applying the rule of *bona fide* acquisition. Thus, it is conceivable that the owner, who gives up possession of the vehicle, will invest more resources in monitoring the direct possessor, so that the direct possessor will not dispose of the vehicle in violation of the agreement with the owner.[739] This accounts for the private action taken by English finance companies to establish a system of registration (see 5.6.2.1.A). The failure to provide an efficient means of communication of information by the government motivates individuals to construct a system themselves.[740]

5.6.3 The Desirability of Registration

5.6.3.1 Necessity

The comparative introduction above has shown that where there is not any private law register, the transaction of motor vehicles will be regulated by conventional rules concerning ownership and possession of corporeal movables. Possession, registration certificate, and commercial experience cannot successfully address the problem of information asymmetry existing in the field of the transaction of motor vehicles. In general, regulation is an *ex-post* approach. Instead of preventing the occurrence of conflicts by creating a reliable source of information for individuals, it offers a bundle of sophisticated rules to resolve conflicts after they arise. The approach is undesirable and should be given up for three principal reasons.

The first reason is that motor vehicles are of high value and have become an ordinary commodity in our daily life, and the lack of a preventive regime leads to ubiquitous conflicts and even theft and fraud.[741] This is the main reason why the Danish legislature decided to introduce a register for the transaction of motor vehicles.[742]

The second reason is that the *ex-post* approach always faces "*the dilemma of identifying which two innocent parties must bear the loss*".[743] Here the "*two innocent parties*" refer to the original owner who gives up possession and the third party who acts in good faith. The dilemma has been stated above (see

739 Davies 1995 (2), p. 469.

740 Beale, Bridge, Gullifer and Lomnicka 2018, no. 9.26.

741 "*Ever since hire-purchase was invented, round about the turn of the century, there have been hire-purchase frauds, and the books are full of examples of such frauds, which have caused loss to innocent parties.*" See *Stevenson v. Beverely Bentinck Ltd*, [1976] 1 W.L.R. 483, p. 486-487.

742 "*The Danish media have regularly criticised the fact that bona fide purchasers especially of second-hand cars run the risk that the car is burdened with latent debt and, consequently, they may risk either losing the car or having to pay for it twice.*" See Pedersen 1993, p. 159.

743 Davies 1995 (1), p. 54.

5.2.1). It should be noted that the rule of *bona fide* acquisition confers preferential protection to the third party at the sacrifice of the original owner's interest.

> *"The traditional common law nemo dat doctrine and the civilian 'possession vaut titre' approach cannot provide a satisfactory ex post solution to the ostensible ownership problem that emerges in asset financing and more specifically motor vehicle financing."*[744]

The third reason is that the possibility of *bona fide* acquisition will make the owner conservative in determining whether to give up possession of the motor vehicle. This implies an indirect restriction on the circulation of motor vehicles in the situation where ownership and possession have to be apart. Moreover, to preclude *bona fide* acquisition, the owner who gives up factual control needs to monitor the direct possessor's activities with respect to the motor vehicle. This means that the owner has to incur some monitoring costs.

For these three reasons, introducing a system of registration for the transaction of motor vehicles is needed. This system can address the problem of information asymmetry to a large extent, and the certainty of the transaction of motor vehicles can thus be facilitated. This has been illustrated by the Danish system of registration: the *Bilbogen*.[745] Moreover, the system can eliminate or alleviate the owner's fear of *bona fide* acquisition by a third party.

5.6.3.2 Possibility

A Format: An Object-Based System

In general, it is possible to construct a system of registration for the transaction of vehicles. Motor vehicles can easily be identified uniquely, especially with reference to the plate number or the vehicle identification number (VIN). For the purpose of security, it is preferable to use the latter as the index of the register. One reason is that the vehicle plate can be easily counterfeited, and another reason is that the VIN can uniquely identify the make, model, color and exact specification of the vehicle.[746]

> *"Although there are usually some components, large and small, that is part of the vehicle that has separate serial numbers of their own, the VIN is the unique identifying number that represents the vehicle as a whole. In most cases, the original VIN affixed to a vehicle consistently follows it during an entire service lifetime through periodic license plate updates, transfers of ownership, changes in title and registration from state to state, and eventually even possible replacement of some of the vehicle's original major compo-*

744 Davies 1995, p. 479.
745 Pedersen 1993, p. 159-160.
746 Davies 1995 (2), p. 478.

> *nents due to extensive wear, damage, or even theft. The VIN is the principal identifying number used by virtually all government vehicle titling and registration authorities for issuing ownership and related documents for modern motor vehicles."*[747]

Because of the VIN, each individual motor vehicle can be identified easily and efficiently. Thus, it is possible to construct an object-based register. In this aspect, motor vehicles are different from ordinary movables which can only have a subject-based system, such as the notice-filing system proposed for ordinary corporeal movables and claims in 5.3.

In fact, the present system of registration for administrative regulation of motor vehicles has provided a perfect basis on which a private-law register can be built. In general, two principal changes need to be made. The first change is that the present system needs to be more inclusive: ownership and limited property rights should be allowed to be entered in this system. The second change is that the system should be made accessible to third parties, so that third parties are able to collect relevant proprietary information from the system. After these two changes, the system will not only have a public-law function, but also a private law function.[748]

B Scope: An Independent and Comprehensive System

As indicated at the beginning of this section, there are in principle two patterns of registration of vehicles. One is the central and independent system adopted by China and Denmark, and the other pattern is the PPSA system which incorporates registration of motor vehicles within the notice-filing system for secured transactions of movable property. The PPSA system not only includes motor vehicles, but also other "*serial-numbered*" assets, such as aircraft and vessels.[749] Between these two patterns, this research prefers the former, namely the central and independent system of registration for motor vehicles.

Some of the reasons for this preference have been mentioned above. Firstly, it is possible to build an independent system of registration and allocate a separate folio to each motor vehicle according to the VIN. Secondly, there is already a central and independent system of registration for the purpose of administrative regulation of motor vehicles. This system can be reformed to serve private law transactions at the same time. Thirdly, motor vehicles have become an ordinary commodity in our daily life, and there are a large number of motor vehicles in use and transactions. This means that the costs involved in the operation of the system can be easily overweighed by the benefits of scale the system yields.

In addition, the main deficiency of the PPSA pattern is that the scope of registerable property rights is limited, which can be seen as the fourth reason. The aim of the PPSA system is to publicize the secured transaction

747 Smylie 2006, p. 127.
748 Winter 2014, p. 187.
749 Whittaker and Partner 2015, p. 178-179; Walsh 2016, p. 77.

of movable property to third parties. A transaction which has nothing to do with providing proprietary security cannot be entered in the system. Though the PPSA system might include a category of "*deemed security interests*" that have no function of security, such as long-term lease, many transactions remain outside of the system. For example, the outright transfer of ownership of motor vehicles in the absence of a clause of retention of ownership cannot be included in the system, because this transaction does not give rise to a security interest. Another example is that the property right of usufruct, a right with respect to the use of and collection of proceeds of motor vehicles, cannot be entered in the system either.

Aircraft and vessels are entered in an independent register in most jurisdictions and are treated as quasi-immovable property. For example, Dutch law classifies these two special corporeal movables as "registerable property (*registergoederen*)" which are regulated by the rules applicable to immovable property.[750] In Germany, there is also an individual system of registration of aircraft and vessels for the purpose of transactions.[751] In general, there is no reason to treat motor vehicles differently from aircraft and vessels. All of these three types of corporeal movables are a means of transportation that is of high value and durable. This can be seen as the fifth reason to construct an independent and comprehensive register for motor vehicles.

5.6.3.3 Efficiency

Efficiency seems to be the most controversial issue for the introduction of a register for the transaction of motor vehicles. There is always the fear that the formality of registration will hamper transactional fluidity. As has been shown above, an inevitable side effect of publicity is that additional costs will be caused (see 5.1.1.3). However, the formality of registration also yields benefits (see 5.1.1.2): it enhances the certainty of transactions and reduces the costs of investigation and monitoring. Therefore, the issue of whether registration should be introduced is dependent on the result of the cost-benefit test.

> "*It is a highly political decision to introduce or abolish a registration system for the ownership of certain types of movables, because such decisions have an important impact on the trade with such goods. The introduction of a registration system is costly and burdensome, for the parties as well as the state or other institutions involved, and it will be justified only for very few categories of goods—which are valuable, long-lasting, and important for the economy, and trade without registration would be too insecure for the market participants.*"[752]

750 Reehuis and Heisterkamp 2019, p. 7.
751 Baur and Stürner 2009, p. 406-407; Rakob 2007, p. 89-90; Steppler and Brecke 2015, p. 55.
752 DCFR 2009, p. 3987.

In general, this research argues that a comprehensive system of registration of motor vehicles is desirable and can pass the cost-benefit test for the following reasons.

Firstly, motor vehicles are valuable. Like aircraft and vessels, motor vehicles have higher value than ordinary corporeal movables.[753] In general, the high value of vehicles makes registration desirable in two aspects: (1) the high value can overweigh the costs triggered by the formality of registration; and (2) the high value often implies a strong incentive to commit fraud and theft, which further means that it is desirable to use registration as a counter device.

Secondly, motor vehicles are durable. In general, the longevity of the object is another important factor that should be taken into consideration. For things of a short lifespan, it is undesirable to have an object-based register for them. Otherwise, the system would have to be updated after the extinction of the things. Motor vehicles usually have a long lifespan, which can justify registration in two aspects. One is that the folio will exist for a long term after being allocated to a motor vehicle, which implies that the folio can be made use of for a long period of time. The other aspect is that long lifespan often implies that a large number of legal relationships might be created on the vehicle, which further means a high possibility of conflict. As a result, the need for having a system of registration to prevent conflicts is strong.

Thirdly, motor vehicles have a moderate transactional frequency. In general, after buying a new car, the buyer will use it for a long period of time before selling it as a used car to another person. Unlike securities, motor vehicles do not take circulation as their fundamental function. This also makes motor vehicles suitable for registration. As we have demonstrated in 5.3.2.3, movable things which have a very high transactional frequency (such as currency and negotiable securities) or a very low transactional frequency (such as jewelry) are not suitable for registration.

Fourthly, a notice-filing system constructed by taking advantage of the new information technology can alleviate the fear that the formality of registration will hamper the smooth operation of the transaction of motor vehicles (see 5.3.1).[754] For example, the system can operate online, so that registration and searching the system can be conducted without having to go to the registry office. Therefore, like the register for the "*international interest*" under Cape Town Convention on International Interests in Mobile Equipment, the register proposed for motor vehicles here is also an object-based notice-filing system.[755]

753 Lurger 2006, p. 51.
754 Davies 1994 (2), p. 479.
755 Van Erp 2004, p. 96-98.

Fifthly, the existing register for administrative regulation can provide a perfect basis for registering property rights of motor vehicles (ownership, the right of use, and the right of security). Nearly every jurisdiction has built a system of registration for administrative purposes. In this system, the vehicle is registered on a separate folio. The system can be modified to be capable of performing a private law function, namely making the proprietary relationship of motor vehicles transparent to third parties. The project of modification is not expensive, at least it is less costly than constructing a new register. After the modification, the system will resemble the land register: both the administrative purpose and the publicity purpose can be realized. For example, when a motor vehicle is stolen, the system can supply a warning of theft, which has an anti-criminal effect and a publicity effect to third parties.[756] The system should be in principle open to public officials and individuals because of its dual function. If there is any sufficient reason, such as confidentiality of public authorities' activities, to restrict inquiry by third parties, a threshold or certain restrictions can be set up.

5.6.4 The Legal Effect of Registration

In general, the register for motor vehicles should yield similar legal effects as the system of registration proposed in 5.3 for ordinary corporeal movables and claims. In other words, registration is not a constitutive requirement of acquiring property rights of motor vehicles (see 5.3.3.1). Instead, it has declaratory effect and can make the acquisition effective against third parties. Thus, individuals are allowed to decide whether to have their transaction registered in the system. There is no doubt that the declaratory effect can ease the impact of the formality of registration on the smooth operation of transactions concerning motor vehicles (see 5.4.2.2.C).

As to the scope of the third-party effect, it is argued by this research that registration is a condition for the acquisition to be effective against subsequent acquirers acting in good faith (see 5.3.3.2). In other words, the absence of registration does not preclude the property right acquired from being effective against strange interferers and general creditors. Moreover, subsequent acquirers acting in bad faith should not be allowed to take advantage of the absence of registration (see 5.3.3.4). The reason why a property right registered is effective against subsequent acquirers is that they are expected to be aware of this property right by searching the register. In the situation of motor vehicles, every subsequent acquirer, including the transferee, the pledgee, and the lessee, should be expected to search the register. Therefore, the legal effect of constructive notice is not limited, which is different from the register for ordinary corporeal movables and claims (see 5.3.3.3).

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756 Davies 1995 (2), p. 485.

In the end, the system can be reliable and have the effect of public reliance, provided that the legislature the dynamic security or transactional certainty in a primary position (see 5.3.3.5). For example, A transfers a motor vehicle to B on an invalid basis, and B further alienates this vehicle to C who relies on the registration of B as the owner and acts in good faith. In this situation of consecutive transactions, whether C is entitled to obtain ownership of the motor vehicle is, in essence, an issue of legal policy. If preferential protection is allocated to C, and the system is recognized to be reliable, C will be able to acquire ownership without being affected by A's claim. However, if an opposite legal policy is followed, A can recover the motor vehicle from C despite C's having reliance on the register. This means that the system of registration does not have public reliance.

5.6.5 Conclusion

The existing system rules applicable to the transaction of motor vehicles centers on possession and falls under an *ex-post* approach. Possession and the registration certificate cannot make all transactions of motor vehicles visible to third parties. As a result, information asymmetry exists in the field of motor vehicles ubiquitously. To address this problem, it is desirable to introduce a central and comprehensive system of registration by modifying the present system constructed for administrative regulation. Therefore, the system of registration for motor vehicles is different from the system proposed in 5.3 for ordinary corporeal movables and claims. The modification will make the system perform both a public law function and a private law function, i.e. the publicity function. The formality of registration will not affect the smooth operation of the transaction to an unacceptable extent. This is mainly because the register is a digital, self-service and notice-filing system. Moreover, motor vehicles have a moderate frequency of transaction and are durable and of high value, which enables the formality of registration to pass the cost-benefit test.

In general, registration does not affect the acquisition of property rights of the motor vehicle. It is only relevant to the legal effectiveness against certain third parties, namely subsequent acquirers acting in good faith. Registration of a property right implies a constructive notice of this right for third parties. The absence of registration does not preclude the acquisition from being effective against strange interferers, general creditors, and subsequent acquirers acting in bad faith. This restriction of the scope of the third-party effect is an outcome of the purpose of publicity and the special demand of proprietary information by strange interferers and general creditors. Generally speaking, the restriction of the scope of third-party effect is helpful for easing the impact of the registration on the smooth transactions of motor vehicles.

5.7 Conclusion

After the general discussion (5.1-5.3) and the three case studies (5.4-5.6), a concluding remark is provided here. In general, publicity is a formality that has merits and downsides. Therefore, it should only be treated as relevant when necessary and appropriate. Generally speaking, strange interferers take possession as a system of navigation to guide their conduct, unsecured creditors are mainly concerned about the debtor's overall financial health, and subsequent acquirers have a demand for specific and detailed proprietary information. The strange interferers and unsecured creditors do not need to know about the details of the proprietary right. Because of this difference in the demand for proprietary information by these different types of third parties, the consensual principle and the causation principle are more in line with the rationale of publicity. Under these two principles, transactional certainty can be safeguarded generally by the rule of *bona fide* acquisition on the basis of registration. The rule is underlaid by the rationale of publicity and matches with our sense of morality.

The merits and downsides of publicity also determine that a trade-off should be carefully made in introducing registration in the law of corporeal movables and claims. In general, property rights existing on corporeal movables and claims remain hidden to a large extent, which makes it necessary to introduce a system of registration to have a strong principle of publicity in the law of corporeal movables and claims. In Chapter 5, two different registers are proposed: one is the register for ordinary corporeal movables and claims (see 5.3-5.5), and the other is the register for motor vehicles (see 5.6).

In general, the register for ordinary corporeal movables and claims should be a notice-filing, self-service, subject-based and digital system. The scope of application of the system is limited on the basis of some factors, such as the frequency of transactions, the duration of the hidden period, and the value of the object involved. The registration has declaratory effect, and the acquisition of property rights is a result of mutual agreement. The registration can yield legal effect against subsequent acquirers acting in good faith, save in the situation where the transaction arises in the ordinary course of business. The system can be recognized as reliable for third parties acting in good faith, provided that the legislature puts dynamic security in a primary position. In general, the system should be applied to both secured transactions, regardless of whether they are title-based, and trusts of corporeal movables and claims.

Unlike the register for ordinary corporeal movables and claims, the register for motor vehicles is an object-based notice-filing system. The index is the VIN of the motor vehicle. The system should be introduced by modifying the existing register constructed for the administrative regulation of motor vehicles. By doing so, the system will perform both a public law function and a private law function. The system is central and comprehensive: it applies not only to the transfer of ownership, but also to the creation

of limited property rights. In general, the registration yields similar legal effects as the registration for ordinary corporeal movables and claims: it can make the acquisition effective against subsequent acquirers.

In a nutshell, we can say that this research argues for an expansion of registration to the field of corporeal movables, including motor vehicles, and claims. The expansion is backed by the idea of preventive justice and can significantly alleviate the perennial tension observed by Denning LJ.

> "*In the development of our law, two principles have striven for mastery. The first is for the protection of property: no one can give a better title than he himself possesses. The second is for the protection of commercial transactions: the person who takes in good faith and for value without notice should get good title.*"[757]

By extending the scope of application of registration, the principle of publicity can be strengthened in the law of corporeal movables and claims.

757 *Bishopsgate Motor Finance Corporation v. Transport Brakes*, [1949] 1KB 322.