

IMMOVABLE DESCRIPTION IN LAND REGISTRY PREVENTION AND RESOLUTION OF PROBLEMS - LEGAL EFFECTS

Land Registry System's aim is essentially to provide information on the legal situation of immovable property in view of the security of real estate transactions. Accurate information on the rights and charges over immovables, with legal effects on third parties, is considered one of the most important tools for the functioning of mortgage markets and, therefore, for economic development.

Land Registry systems do exist to serve trust and confidence.

In the *real folio systems*, opening a new file means the existence of a new object over which the rights and burdens will be inscribed. The new file can be the result of the division or the joining of previous existing into new ones, but these situations do not raise major difficulties, precisely because they result from the previous registered properties.

The important issue, in which to focus, is the opening of a folio for the very first time in the land registry, knowing that, even in the most ancient systems, there are still parts of the national territory that have never been registered, no matter the reasons why.

In Portugal, before the opening of a file it is necessary that the immovable is declared to the tax department, whether it is a piece of land or an urban construction, and it is mandatory to present a valid title deed or court decision to inscribe the right or burden.

Although the *real folio* system in Portugal, existing since 1863, has been continuously the same, the information for tax purposes that bases the *folio* changes without correspondence with the previous existing one (either as a general replacement of data, or, more often, as an individual change or update of a specific immovable information). This lack of correspondence is one of the main reasons to induce possible error when opening new folios - if the applicant does not inform about the previous identification of the immovable in the tax database, it is difficult to search and find in the Land Registry indexes the previous existing folio, if it is the case.

In addition to what has just been referred, in the Portuguese System the main causes of possible duplication of folios are identified:

- how and for what cadastre and tax information is created;
- how is it used for registry purposes;
- the way land parcels are described in the land registry system – only a literary description; and
- the circumstances that, with some ease, allow the opening of new files.

The Portuguese Courts have been asked to decide about disputes arising from duplication of folios, and recently, in January 2017, the Portuguese Supreme Court of Justice case-law n. 1/2017¹ has considered the duplication of a registry file one of the greatest pathologies of the registry system - a compelling reason for the study that the Portuguese Registrars Association is carrying on.

Therefore, the aim of the request of ELRA collaboration is to understand, within other countries systems:

- how registry files or descriptions are born or opened in the different Land Registry Systems;
- which information bases the description of the immovable,
- the legal value of the said information, and
- the mechanisms to prevent and solve possible arising problems.

Except from England and Wales, Ireland, Northern Ireland and Malta, all other countries systems demand previous cadastre or tax identification of the immovable to open a new file, and the content of this information will be part of the land registry.

Regarding graphical information, it is interesting to note, that Land Registry Systems from sixteen countries already include it in the file content. Ten countries also include geo-referenced information when identifying the immovable. Exclusively literary description of the immovable is still used in Portugal, Belgium, Estonia, Latvia and some parts of Greece.

Let us think, at first, about the reliability of the information provided by the Land Registry Systems, specially in the ones that grant, towards third parties, the accuracy of it, whether as a *iuris et de iure* or as a *iuris tantum* presumption.

Except from Portugal, Belgium, the Netherlands, Northern Ireland and some parts of the Greek territory, the information on the immovable composition is, although in different ways, legally presumed correct or considered acceptable evidence.

In the Portuguese system, being the Registrar a legal professional that checks the legality of the documents presented, there is a presumption of correctness (*iuris tantum*) concerning rights and burdens inscribed. However, as regards to the description and composition of the immovable the Registrar uses the information existing in the tax authority database, whether delivered by the applicant or directly obtained on-line, which is only formally *controlled* or checked – therefore the description of the immovable is not presumed to be correct.

In fact, once the purpose of the immovable information created and managed by the tax authority is to collect taxes, decision makers do agree that it does not comply with the demands of faithfulness for registry purposes.

¹ Along with Margarita Herrero Oviedo “Pluralidad de folios registrales para una misma finca; Eliminación de esta disfunción”, Madrid 2006

Besides the above said cadastre and tax information, most countries systems require other special precautions concerning the opening of a new file, by ensuring that the origin of the information is an independent and certified entity:

- in Croatia the information is under the surveillance of the Joint Information System (JIS);
- in Lithuania the plan of the real property object must be prepared in a manner that is possible to be located using the data of the national coordinate system;
- England and Wales, Northern Ireland, Scotland and Ireland use graphical information provided by “Ordnance Survey”; and
- Romania “E-Terra 3 system” issues warning if the geometry of the immovable overlaps an immovable already enrolled in the Land Book.

Other countries have different requirements. For instance, Estonia demands the publication of a notice in a specific website and any other manner available to the persons concerned, so they can complain about the opening of the new file; Ireland also requires that the applicant identifies the property by reference to a map in an affidavit; and Spain sends personal communications to the owners of charges, rights or actions if known, to the owners of neighbouring properties and to the corresponding municipality, and, still, a generic communication to any interested party is done by means of an edict published in the Official Bulletin.

Within the present systems of Cyprus, Finland, Latvia, the Netherlands and Sweden it is technically impossible that an error from overlapping occurs.

Nowadays, land registry systems cannot ignore modern mapping and geo-referencing technologies, as indispensable tools used by the surveyors; the same way cadastre and mapping agencies need to rely on land registry consolidated and dynamic data on rights and burdens.

“New technologies are essential instruments for increasing the efficiency of the Property registry but must not damage or condition the legal value of the information provided” – Cinder Congress Dubai 2016²

In short, the issue is how to deal with both data – cadastre and tax information on one hand, and land registry on the other hand – and how to make the most of them both, respecting their different purposes.

An efficient relation between updated and reliable physical identification of immovables, irrespective of its origin (tax department, cadastre services, specific or technical surveyors), and Land Registries will help to improve trust and confidence in the information made available.

² <http://ipra-cinder.info/conclusiones-congreso-dubai/?lang=en>

Coordination is the key word!

From the perspective of the Land registry services, when opening a file for the very first time, it is fundamental to assure that the parcel of land, the object of the entry, is not yet in another folio, with a possible different cadastre or tax identification number, even if it is not the updated one. A serious searching task within the land books themselves, including historical information about previous owners, is crucial to avoid errors and overlapping.

Beyond that, it is necessary to consider that many countries proceed to the opening of a new file not only when inscribing ownership, but also when registering other encumbrances, in many of which the owners' intervention is only indirect (for example the owner was noticed in the court demand to be inscribed).

Experience has taught that the information provided by the applicant when pretending to inscribe an attachment or a judicial procedure is not as complete and strict as the one delivered by the owner himself.

So, errors and overlapping may also occur in these situations due to insufficient information on previous elements regarding the immovable or its owners.

In Portugal, it is also possible to open a new file based on a title deed of adverse possession, which is a document signed before a notary in presence of three witnesses confirming the possessing of the immovable for more than the *usucapio* period (20 years). Despite the searches and the public announcements (that must be done in a local newspaper) for this purpose, duplication of folios and overlapping are often caused by such title deeds. Hence, the Portuguese Supreme Court of Justice has standardized case-law (Decision 1/2008³) considering that the registry inscriptions of ownership based on this kind of title deed are excepted from the presumption of correctness, and so, the burden of proof lies with the possessor despite having his ownership inscribed in the land books.

Moreover, the Portuguese system allows the opening of a new file with the declaration of succession of a deceased person, as long as a statement is made by an heir or executor that the property is part of the inheritance. In this case, there is no need to submit proof of the deceased property right.

Circumstances that legally allow the opening of new folios need to be reconsidered.

The above referred Portuguese Supreme Court of Justice decision n. 1/2017⁴ has, standardized case-law considering that when duplication of folios occurs and two

³ <https://dre.pt/application/conteudo/246538>

⁴ <https://dre.pt/application/conteudo/106509198>

different inscriptions are conflicting, none of the registered owners can rely on the legal presumption of correctness. The legal presumptions of ownership in both files, reciprocally, exclude each other.

De iure condendo, we could think about an advisable *quarantine* provisional period (determined by law) for registry entries in a new file with lack of information concerning the history of the immovable or with indirect intervention of the owner, before having legal presumption of correctness.

Even though most countries have identified preventive measures to avoid duplication and overlapping of files, as far as solving the possible overcoming problems is concerned, some others, like Portugal, have no legal determinations allowing the resolution of the incorrectness out of court.

In Portugal, as soon as the duplication of files is stated, an annotation will be done in both of them. Then, two different situations must be distinguished:

- if the file opened in the second place totally repeats the previous one, it will be cancelled and the rights and burdens therein are transcribed to the first file, no matter if they are conflicting – the same seems to happen in the Irish and the Romanian systems;
- if the file opened in the second place repeats only in part the previous one, none of them is cancelled, and the above said annotation will be done, with no legal effects.

In both cases the decision on the prevailing right or burden, in the first situation, or on the boundaries dispute in the second case, need to be solved in court.

Although the Portuguese system assigns a wide range of competences to the Registrar in matter of correcting inscriptions (in some circumstances, even without the interested parties agreement), in respect of the duplication of descriptions, because of the conflicting rights over the same property, only the court is considered competent to decide.

Differently, almost all countries' systems establish the possibility of resolution by agreement validated by the registrar, avoiding a judicial procedure.

The last issue to think about, is the one related to the registration consequences of the duplication once it is found and before it is solved either by agreement or court decision.

The above referred Portuguese Supreme Court standardized case law does not rule on the consequences of the aforesaid conflict of inscriptions, namely in what concerns the

opposability, the legitimacy for conveyancing or encumbering and the subsequent enchainment of rights in the land books.

In what concerns the already existing entries, most systems determine that they will just remain, although in Belgium the beneficiary of the first registered deed becomes the owner; in Malta the second registration in chronological order, will be deemed to be of no effect; and in Spain, after offering notice to all holders and if there are no charges, in case of unanimous agreement the most modern history will be cancelled. In Spain, if there is absolute correspondence among the content of both files, there won't be any discussion on the corresponding ownership and priority, simply the newest file is cancelled with the consent of every interested party.

As regards to the subsequent entries over the immovable, it is possible to conclude that most countries have no legal determination, except from Lithuania, Malta and Scotland. In Lithuania there would be no possibility to perform any action with that real property object until the problem of double registration is solved; in Malta subsequent entries will be of no effect; and in Scotland, RoS will continue to maintain and update the original title sheet and refuse any subsequent application to the rejected first registration.

Like in most of the countries, in Portugal there is no legal determination about the subsequent entries. Land registry experts have to study the consequences of the duplication of files, having in mind, in my opinion, that the registered rights in both files become somehow uncertain, and therefore, to some extent, the legal presumption of certainty fails.

The aforesaid Portuguese Supreme Court case law n. 1/2017 determines a kind of “suspension” of the effects of the entries in the duplicated files, unless one of the owners proves that the other has acted on bad faith to obtain the register.

Therefore, we may also say, that none of the owners is fully entitled to perform any transmission or encumbrance over the immovable, otherwise we would have to accept that conflicting property rights could co-exist on the same object. It seems that the purpose of the Land Registry, itself, demands that subsequent entries cannot be unharmed by the duplication of files.

The confidence and reliability on the land registry information would be affected (as if “contaminated”) if transactions could continue to be performed over an immovable, once the duplication of files is confirmed.

Although duplication of files is not to occur everywhere and so frequently, it is important to discuss the problem thinking about prevention and trying to find solutions.

Technological evolution leads to believe in a *smart future*, a wonderful *new world* with smart registries, the ones that serve “the purpose of providing legal certainty to real estate traffic, introducing advanced information technologies for a more efficient

management, with full respect to the inherent principles of each system”.⁵ New tools also provide more efficient means for going backwards and organizing historical information for prevention of conflicts in property rights; they “should be put in the hands of highly skilled and specialized personnel, always keeping human talent in the decision loop”⁶

After all, “it's not a faith in technology, it's faith in people.”⁷

As result of the work developed so far, it is possible to draw the following conclusions:

1. **Prevention** is essential and almost all systems have mechanisms to avoid errors when opening new files.
Reliable information from surveyors, making a previous control of overlapping properties, in development of pre-existing information, is fundamental.
2. Once verified and confirmed the duplication of files, conflicting property rights over the same immovable determine that inscriptions therein become, somehow, frail and unable to legitimate further conveyancing. Therefore, subsequent entries on the duplicated files cannot be unharmed.
3. **Solving** the duplication problem should be, on behalf of accuracy, a demand to the Registrars acting with legal tools and means, *ex-officio*, making notice to the interested parties, contacting the surveyors and validating a unanimous agreement. A wide range of competence should be granted to the Registrar as a legal professional and expert on rights in rem.

Riga 28th of September 2017

Luisa Clode – Land Registrar

⁵ The above referred <http://ipra-cinder.info/conclusiones-congreso-dubai/?lang=en>

⁶ idem

⁷ Steve Jobs