



Wolfgang Faber
Associate Professor
University of Salzburg

Proprietary Security Rights in Movables—European Developments:

A Spotlight Approach to Book IX DCFR

1. Introduction: Some problems and developments

Proprietary security rights in movable assets are an issue of significant practical importance in all European countries. Accordingly, it may be appropriate to start this article with a statement of reassurance: If you are a practitioner—an attorney, a judge or notary, or a lawyer in the banking business—you have no need to be afraid. There is no forthcoming European legislation turning your well-known national system upside down within the next couple of years. In fact, for the time being, there is no European legislation in sight in this area at all.

However, if you are a practitioner, you may wish certain issues to be resolved in a suitable and efficient way, within a framework providing legal certainty. Depending on the jurisdiction you practise in, the particular problems in that respect may differ. I may start a short list of examples by referring to my own country, Austria. Under the Austrian regime for proprietary security rights, many goods are, from a practical point of view, completely precluded from being used as collateral for credit. Because of a strict understanding of the principle of publicity, which applies both to pledge rights and to transfers of ownership for security purposes, the security provider must actually be dispossessed of the encumbered assets.^{*1} Consequently, it will not be possible to use the encumbered asset (machine, motor vehicle, or other asset) for the debtor's business. A narrow exception, allowing 'symbolic' delivery, applies in cases where handing over the collateral goods would, on account of their physical character, be 'impossible or unreasonable';^{*2} but the scope of this rule is very uncertain in practice (which, for example, makes it extremely difficult to pledge inventory).

Matters are certainly easier under German and Estonian law, wherein a transfer of ownership for security purposes is possible by way of *constitutum possessorium*—i.e., on the basis of a mere agreement, without physical delivery.^{*3} However, such a security interest is generally lost once the encumbered asset (e.g.,

¹ §451 of the Austrian Civil Code.

² §452 in conjunction with §427 of the Austrian Civil Code. For an account on the latter provision in the English language, see W. Faber. National report on the transfer of movables in Austria. – W. Faber, B. Lurger (eds.). *National Reports on the Transfer of Movables in Europe, Volume 1: Austria, Estonia, Italy, Slovenia*. Munich: Sellier European Law Publishers 2008, pp. 1–218, on p. 88 ff. – DOI: <http://dx.doi.org/10.1515/9783866537019>.

³ See M.-R. McGuire. National report on the transfer of movables in Germany. – W. Faber, B. Lurger (eds.). *National Reports on the Transfer of Movables in Europe, Volume 3: Germany, Greece, Lithuania, Hungary*. Munich: Sellier European Law

a truck) crosses national borders. In fact, the differences between the legal regimes concerning proprietary security rights adopted in the various European countries cause a lot of practical problems, and, on account of the mandatory *lex rei sitae* rule in private international law, these problems can hardly be overcome by contractual regulation.

If you are advising a large firm producing raw materials or goods that are sold under retention of title, you may want your client's security interest to be 'durable'—i.e., to persist upon resale of these goods by your client's customer, or when the material is used in a further production process by the buyer. Both will be impossible in, for instance, the Netherlands.*⁴

If you are a judge in Estonia or Germany, you may—perhaps—feel somewhat uncomfortable when ruling (in accordance with the prevailing opinion) that a transfer of ownership for security purposes is valid without delivery*⁵ whereas the creation of a pledge, which is functionally equivalent, would not.*⁶ Or you may wish to find clear guidance in the law on how to integrate 'new' or 'modern' forms of proprietary security, such as financial leasing or sale and lease-back transactions, into the legal framework in an adequate way.

I have not spoken of academics so far, nor did I speak of the people preparing legislative drafts for the Ministry of Justice. You may want your legal system to be both adequate and dogmatically consistent. And you may long for some inspiration.

At this point, I should draw your attention to a set of model rules published as Book IX of the Draft Common Frame of Reference (DCFR) in 2009.*⁷ This set of rules is influenced mainly by the 'functional' approach and the 'notice filing' concept adopted in Article 9 of the American Uniform Commercial Code (UCC). However, the working group responsible for Book IX DCFR, headed by Professor Ulrich Drobnig, managed to 'Europeanise' the American archetype in several instances and to present the rules in a much clearer and more stringent way than in Article 9 UCC. This set of rules, although originating from a private academic initiative, could actually operate as a motor for future law-reform projects in Europe in a medium-term or long-term perspective. Such reform could be implemented as an EU regulation (either replacing or—perhaps more likely—amending the existing national systems, as in the case of an optional instrument). Alternatively, if there is not sufficient political will at the pan-European level, individual states

Publishers 2011, pp. 1–192, on p. 101 ff. – DOI: <http://dx.doi.org/10.1515/9783866539006>; K. Kullerkupp. *Vallasomandi üleandmine. Õigusdogmaatiline raamistik ja kujundusvõimalused* ['Transfer of Movable Property: Dogmatic Legal Framework and Scope of Contractual Arrangements']. Tartu, Estonia: Tartu Ülikooli Kirjastus 2013, p. 259 f (in Estonian), p. 356 f (English summary). From a *de lege ferenda* perspective, abolishing the transfer of ownership for security purposes and *constitutum possessorium* as a mode of transfer has been suggested by V. Kõve. *Varaliste tehingute süsteem Eestis* ['The Estonian System of Property Transactions']. Tartu, Estonia: Tartu Ülikooli Kirjastus 2009, pp. 242, 354 (in Estonian), p. 388 (German summary). However, also this author accepts that transferring ownership for security purposes by way of *constitutum possessorium* is possible under the law currently in force in Estonia.

⁴ Under Dutch law, contractual stipulations to 'extend' the security right established by retention of title in the case of resale—which is possible under, for example, German or Austrian law through assignment of the reselling buyer's claim for the purchase price to its seller (so-called *verlängerter Eigentumsvorbehalt*)—are prevented by the mandatory provision of Article 3:84(3) of the Dutch Civil Code. This rule provides that security agreements shall not serve as a basis (*causa*) for transfers, including assignments of claims. Regarding the situation of new goods being produced from the goods sold under retention of title, Article 5:16 of the Dutch Civil Code in its paragraphs (2) and (3) (which are also mandatory) provide that the producer acquires sole ownership of the product, which causes retention of title to be an unsuitable security device in selling of raw materials or semi-furnished products. See, for example, A. Salomons. National report on the transfer of movables in The Netherlands. – W. Faber, B. Lurger (eds.). *National Reports on the Transfer of Movables in Europe, Volume 6: The Netherlands, Switzerland, Czech Republic, Slovakia, Malta, Latvia*. Munich: Sellier European Law Publishers 2011, pp. 1–157, on pp. 67, 102 ff., 131 ff. – DOI: <http://dx.doi.org/10.1515/9783866539235>.

⁵ §92(1) in conjunction with §94 of the Estonian Law of Property Act ('LPropA'); §929 in conjunction with §930 of the German Civil Code, addressing the transfer by *constitutum possessorium*.

⁶ §281 and §282 of the LPropA; §1205 of the German Civil Code.

⁷ Published in C. von Bar, E. Clive (eds.). *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Full Edition* (in six volumes). Munich: Sellier European Law Publishers 2009. On Book IX of the DCFR in particular, see, for instance, R. Macdonald. Transnational secured transactions reform: Book IX of the Draft Common Frame of Reference in perspective. – *Zeitschrift für Europäisches Privatrecht* ('ZEuP'). 2009, pp. 745–782; M. Brinkmann. *Kreditsicherheiten an beweglichen Sachen und Forderungen: Eine materiell-, insolvenz- und kollisionsrechtliche Studie des Rechts der Mobiliarsicherheiten vor dem Hintergrund internationaler und europäischer Entwicklungen*. Tübingen, Germany: Mohr Siebeck 2011, p. 435 ff. (in German); W. Faber. Das Mobiliarsicherungsrecht des DCFR: Perspektiven für eine Reform in Österreich bzw in Europa? – *Juristische Blätter* ('JBl') 2012, pp. 341–358 (part 1), 424–432 (part 2) (in German), with further references. Regarding older draft versions, see also H. Beale. Secured transactions. – *Juridica International* 2008, pp. 96–103; A. Veneziano. A secured transactions' regime for Europe: Treatment of acquisition finance devices and creditors' enforcement rights. – *Juridica International* 2008, pp. 89–95.

could harmonise their laws in accordance with a common model regulation, which would still make it possible to draw up a common registration system for proprietary security rights (facilitating cross-border transfers of goods and cross-border lending).⁸

So far, to my knowledge, only one—or, probably more correctly, already one—European country has followed the DCFR in adopting a notice-filing system; that is Belgium, with an act of law dated 11 July 2013 that amends the Belgian Civil Code.⁹ To the best of my knowledge, the DCFR had a strong influence on the drafters, although Belgian law did not adopt all choices made in the DCFR¹⁰ and there are differences in terms of structure. In Scotland, the Law Commission is currently investigating the issue with a view to reporting on it before the end of 2014.¹¹

As to content and scope, Book IX DCFR covers all classic types of proprietary security rights as well as all ‘modern’ devices providing some means of proprietary security on a contractual basis (financial leasing, hire purchase, etc.).¹² It applies to collateral of all types of movable assets, tangible and intangible (goods, receivables, patent rights, etc.), present and future. Also, the rights secured may be present or future. Furthermore, there are no limits as to the persons covered: The security-provider may be a business or a consumer (with some specific provisions applying in the latter case).¹³ No distinction is made between ‘domestic’ and ‘international’ cases.

Book IX DCFR is a complex set of rules, extending to 131 articles spread over seven chapters. Certainly, the articles are anything but easy to read when one encounters the text for the first time. Since space is limited, I will not even try to provide a systematic overview of Book IX. Instead, I will apply a ‘spotlight approach’, pointing at only a few selected central features. The focus will be not on the draft rules themselves but, rather, on the way they operate.

2. A ‘functional approach’: One type of ‘security right’ (plus ‘retention of ownership devices’)

I have mentioned the problem of completely divergent publicity regimes for pledges and transfers of ownership for security purposes, along with the difficulty of adequately integrating ‘new’ forms of security into a legal framework. This may be supplemented by the fact that different European legal systems recognise different types of security rights. My first ‘spotlight’ is related to these issues.

The solution adopted by the DCFR is a ‘functional approach’ as promoted by Article 9 UCC, meaning that Book IX DCFR converts all limited proprietary rights functioning as security and all transfers of ‘full’ rights for security purposes—such as the transfer of ownership for security purposes (*Sicherungsübertragung*) and the assignment of claims for security purposes (*Sicherungsabtretung*)—into one single type of ‘security right’ (IX.–1:102 DCFR). This single type of ‘security right’ is subject to a uniform regime governing, in particular, all aspects of creation, priorities, and enforcement (where the secured creditor will generally have ‘only’ a right to preferential satisfaction from the collateral; not a right to separate the

⁸ For a discussion of various options, see M. Brinkmann (Note 7), p. 468 ff. See also W. Faber (Note 7), p. 431 ff.; K. Kreuzer. Die Harmonisierung des Rechts der Mobiliarsicherheiten. – J. Basedow et al. (eds). *Europäisches Kreditsicherungsrecht. Symposium im Max-Planck-Institut für ausländisches und internationales Privatrecht zu Ehren von Ulrich Drobnig am 12. Dezember 2008*. Tübingen, Germany: Mohr Siebeck 2010, pp. 31–70, on p. 47 ff. (in German).

⁹ See the instrument entitled ‘Loi modifiant le Code Civil en ce qui concerne les sûretés réelles mobilières et abrogeant diverses dispositions en cette matière / Wet tot wijziging van het Burgerlijk Wetboek wat de zakelijke zekerheden op roerende goederen betreft en tot opheffing van diverse bepalingen ter zake’, published on 2 August 2013 in *Belgian Law Gazette* no. 2013009377, p. 48463.

¹⁰ In particular, Belgian law did not adopt the policy that retention of title and comparable devices should be effective only if registered (see the second paragraph of Section 5, below).

¹¹ A discussion paper published by the Scottish Law Commission in 2011 concludes that wholesale adoption of the model of Article 9 of the UCC would not be appropriate but suggests that Scots law would benefit from adopting some of its ideas. The paper proposes that there should be a new type of security right that could cover both corporeal and incorporeal movable property, along with an online register where such rights are to be entered. See Scottish Law Commission’s Discussion Paper on Moveable Transactions (Discussion Paper No. 151, of June 2011).

¹² The DCFR’s IX.–1:101(2) in conjunction with IX.–1:102 (on security rights) and IX.–1:103 (on retention of ownership devices).

¹³ See, for example, IX.–2:107 DCFR (on restricting global securities, security rights in future assets and security rights over future salaries, pension rights, and equivalent income) and certain provisions governing enforcement, such as those in IX.–7:103(2) and IX.–7:107 DCFR.

goods).^{*14} This, evidently, solves the problems of consistency and legal certainty related to ‘new’ forms of security addressed above, and it facilitates international co-operation with respect to trade, financing, and drawing up of a common registration system (or, at least: compatible national registration systems) for collateral. Apart from that, this ‘functional’ approach taken by Book IX DCFR has some further practical implications. For instance, ‘security assignments’ of claims (and security transfers of goods) no longer prevent multiple collateralisation of the same assets: the second creditor intending to create a security right will not be left unsecured on account of the *nemo dat* principle; he will be secured with second priority, and so on. Thereby, the ‘security right’ approach also aids in mitigating the problem of ‘over-collateralisation’, or *Übersicherung*—i.e., that the value of the collateral assets far exceeds the secured claims (in Germany, where this problem plays a prominent role, courts found themselves forced to counter-act by adopting, among other approaches, application of the principle that contracts *contra bonos mores* are void^{*15} and by acknowledging a personal claim against the secured creditor to release collateral assets that are no longer necessary for covering the secured right^{*16}).

There is one exception to this ‘functional approach’ in Book IX: So-called retention of ownership devices (including retention of title, hire purchase, financial leasing, and comparable devices)^{*17} are treated as a separate constructive category throughout Book IX. In practical terms, however, the differences are not very striking.^{*18} The most important aspect is that the holder of a retention of ownership device is, in fact, entitled to separate (recover) the sold goods from the buyer’s estate; i.e., the owner’s right is not limited to a right to preferential payment.

3. Creation, effectiveness, and priority

My second ‘spotlight’ addresses some major conceptual characteristics of Book IX DCFR, which, as becomes apparent in the discussion that follows, generate certain practical effects. To see the difference, let us first consider how, traditionally, proprietary security rights come into existence in continental European legal systems. Such legal systems usually define certain requirements that must be met for a security right to be created (e.g., conclusion of a security agreement and/or a ‘real agreement’, plus delivery or registration), and once these requirements are cumulatively fulfilled, the security right comes into existence and is effective against everyone.^{*19} The DCFR parts with this—as one might call it—‘all or nothing’ principle and draws a clear distinction among three individual elements on the level of property law: creation, effectiveness against (certain) third persons, and priority.^{*20} Each of these has its own functions, and a separate chapter in Book IX is devoted to each (chapters 2–4).

¹⁴ This effect, however, is already achieved by insolvency law in at least a number of EU member states today (e.g., §51(1) of the German Insolvency Act or §10(3) of the Austrian Insolvency Act) and, therefore, does not constitute a substantive change. Rather, this can be seen as a step toward dogmatic consistency.

¹⁵ See, for example, from the German Supreme Court, or *Bundesgerichtshof*, BGH 12.3.1998, IX ZR 74/95. – *Neue Juristische Wochenschrift* (‘NJW’) 1998, p. 2047 (in German).

¹⁶ See BGH 27.11.1997, GSZ 1/97, GSZ 2/97. – *Entscheidungen des Bundesgerichtshofs in Zivilsachen* (‘BGHZ’) 137, p. 212 (in German), addressing ‘subsequent’ over-collateralisation resulting from revolving global security rights created by standard terms.

¹⁷ See IX.–1:103 DCFR.

¹⁸ IX.–1:104 DCFR declares most parts of Book IX applicable to such devices. As to substance, specific rules are provided only for creation and enforcement (in chapters 2 and 7 of Book IX DCFR).

¹⁹ A certain exception can be found in French law, wherein creation is effected by (written) contract (see Article 2336 of the French Civil Code), but opposability against third parties requires publicity—which can be achieved through dispossession (see Article 2337 of the French Civil Code) or registration (see Article 2338). Compare also the new Belgian regime (addressed in Note 9), distinguishing creation (in Articles 2 and 4) from opposability against third parties, again effected by registration (see Article 15) or dispossession (see Article 39).

²⁰ See the illustrative analysis by R. Macdonald (Note 7), p. 769. See also Comment B to IX.–2:101, DCFR Full Edition (Note 7), p. 5409 ff.

3.1. Creation (Chapter 2)

The first of these three elements is ‘creation’, which means that the security right comes into existence as a (limited) proprietary right. In consequence, the secured creditor is entitled to enforcement and satisfaction from the encumbered asset. Also, some third-party effects set in, however limited. In particular, a subsequent acquirer of the encumbered asset can acquire it free of these encumbrances only under rules on good-faith acquisition.^{*21}

There are different modes of creating a security right^{*22} or a retention of ownership device,^{*23} which I will not explore in more detail here. The basic modes of creating a security right are ‘granting’ by the security provider (comparable to creating a pledge)^{*24} and ‘retention’ by the secured creditor upon transferring of the asset (comparable to the traditional retention of title).^{*25} It is worth noting what creation requires and what it does not require. If we take the creation of a security right by ‘granting’ as an example, it is required that the parties have concluded a valid ‘contract for proprietary security’ and a ‘real agreement’ (*Verfügungsgeschäft*) and that both the asset (collateral) and the secured right exist. In addition, the asset(s) must be identified by the parties.^{*26} It is, however, not required for the element of ‘creation’ that possession be transferred or any kind of registration be performed.

3.2. Effectiveness against (certain) third parties (Chapter 3)

Such additional prerequisites must, however, be fulfilled by the security right in order for it to become ‘effective’ against certain important types of third parties. The three categories of third parties for which this is required are:^{*27}

- a) other holders of proprietary rights, including effective security rights, in the encumbered asset;
- b) a creditor who has started the process of execution against those assets and has already obtained a position providing protection against a subsequent execution; and
- c) the insolvency administrator of the security provider (who, so to say, represents all unsecured creditors)—it is, therefore, necessary to have an ‘effective’ security right in order to be protected in the matter of the security provider’s insolvency.

‘Effectiveness’ against these third parties can be achieved via three distinct methods. The general method, which is applicable to all types of assets, is registration (in an online, publicly accessible ‘European register of proprietary security’).^{*28} It is noteworthy that registration does not include any strict identification of the encumbered assets; nor does it presuppose that the security right has already been ‘created’. Alternatively, a security right in corporeal movable assets can be made effective by one’s holding possession of the encumbered asset,^{*29} and a security right over ‘financial assets’ and ‘financial instruments’ can be made effective through exercise of ‘control’ over the encumbered assets.^{*30}

²¹ Further examples of effects against third parties resulting from mere ‘creation’ are listed in Comment B to IX.–2:101, DCFR Full Edition (Note 7), p. 5409 ff.

²² See IX.–2:101 ff. DCFR. Special rules in IX.–2:301 ff. DCFR deal with the creation of security rights in specific types of assets.

²³ See IX.–2:201 DCFR.

²⁴ See IX.–2:105 ff. DCFR, including specific good-faith acquisition rules in IX.–2:108 and IX.–2:109 DCFR.

²⁵ See IX.–2:113 DCFR.

²⁶ See IX.–2:102 and IX.–105 DCFR. In addition, these rules provide that the asset must be transferable and that the security provider must have the right (as owner) or authority to grant a security right in the asset.

²⁷ See IX.–3:101(1) DCFR.

²⁸ See IX.–3:102(1) in conjunction with the registration rules in IX.–3:301 ff. DCFR.

²⁹ See IX.–3:102(2)(a) in conjunction with IX.–3:201 ff. DCFR.

³⁰ See IX.–3:102(2)(b) and IX.–3:204 DCFR. For example, ‘control’ is exercised if a financial asset entered in book accounts held by a financial institution may only be disposed of with the secured creditor’s consent; cf. IX.–3:204(2)(a) DCFR. This resembles the concept of ‘control’ applied under Directive 2002/47/EC on financial collateral arrangements. See OJ L 168/43, 27.6.2002.

3.3. Priority (Chapter 4)

Chapter 4, finally, regulates the regime of priorities between different rights *in rem* in one and the same asset. According to the basic rule,^{*31} priority is determined in accordance with the order of the relevant times (*prior tempore potior iure*). With regard to the relation between competing security rights—which is of the primary interest here—the relevant time is the time of registration, or the point in time when the security right otherwise becomes effective (whichever is earlier).^{*32}

The basic *prior tempore* principle is, however, subject to one important exception: IX.–4:102 DCFR provides ‘superpriority’, which means that certain rights are granted priority over certain other rights even if effectiveness was achieved later. The most important example is that (effective) ‘acquisition finance devices’ (i.e., retention of title and functionally equivalent devices) take priority over any security right (or other limited proprietary right) ‘created by the security provider’. Accordingly, for instance, where a buyer under retention of title has previously ‘pledged’ all future inventory, the acquisition finance device will take priority over earlier security right in inventory.^{*33}

3.4. Practical effects of splitting up creation, effectiveness, and priority

Apart from providing a technical framework for implementing the policy choice of granting privilege to acquisition financing, the splitting up of creation, effectiveness, and priority into three independent categories produces a number of remarkable practical effects. For example, it is possible to perform a registration even before a security right is ‘created’ in the sense of Chapter 2 and even before the contract for proprietary security is concluded.^{*34} Via such ‘advance filing’, effectiveness as well as priority can be ‘reserved’ for a creditor at a fairly early stage. Accordingly—and this will certainly be interesting for banks—a ‘secured’ rank can be guaranteed to the future lender already at the time of negotiation of the credit, and an attractive rank can be reserved for possible future extensions of credit. Secondly, collateralisation of ‘global units’, such as ‘all goods held as inventory’, is facilitated. In contrast to other registration systems, here precise ‘identification’ of the encumbered assets does not have to be achieved in the register—i.e., it need not exist for effectiveness and priority, only for creation. Accordingly, mistakes related to identification can be corrected later also, while the effectiveness and priority resulting from a registration already carried out can be maintained.^{*35} Thirdly, also securing future debts, even ‘all debts’ resulting from a business relation, is facilitated by allowing of filing before creation (which alone requires that the secured right already exist).

³¹ See IX.–4:101 DCFR.

³² See IX.–4:101(2)(a) DCFR.

³³ See IX.–4:102(1) DCFR. This functionally converges with the solutions adopted by courts in a number of legal systems, including Germany (with the so-called *Vertragsbruchtheorie*, assuming that a global assignment of future claims is void if it is intended to cover claims that the assignor is bound to assign to its suppliers who deliver goods under an ‘extended reservation of title clause’) and France (real subrogation). See BGH 30.4.1959, VII ZR 19/58. – BGHZ 30, 149 (in German); French Supreme Court, Commercial Chamber (or ‘Cour de cassation, chambre commerciale’) 20.6.1989, No. 88-11.720. – *Bulletin des arrêts de la Cour de cassation – Chambres civiles* (Bull. civ.) 1989 IV, No. 197, p. 131 (in French); see also V. Sagaert. Cour de cassation française, 26 Avril 2000 – priority conflict between the seller under title retention and the assignee of the resale claim. – *European Review of Private Law* 2002, pp. 823–835, with further comparative observations.

³⁴ Clarified by IX.–3:305(2) DCFR.

³⁵ For instance, according to §5 in conjunction with §29 of an Austrian draft proposal (see Note 39, below), identification of the collateral assets would have to be carried out in the register, and in case of doubt as to which assets are attached by the security right, the narrower coverage would be presumed (§5(3)). The draft was criticised for forcing the creditor to put considerable efforts into a concise description identifying the collateral and for causing the register to be overloaded with data. See M. Brinkmann (Note 7), p. 464; M. Gruber. Das Register für Mobiliarsicherheiten. Überlegungen zu Funktion und Organisation. – *Österreichische Juristen-Zeitung* (‘ÖJZ’) 2007, pp. 437–443, on p. 441ff. (in German).

4. Notice-filing

My third ‘spotlight’ is on the functioning of the electronic register. In this respect, the DCFR applies a ‘notice filing’ system, following the example of Article 9 of the UCC. I confine myself to three characteristic features, which have the effects detailed below.^{*36}

Firstly, entries in the register have no ‘constitutive effect’ on the creation (or termination) of security rights. As we have seen, ‘creation’ in the sense applied in Chapter 2 does not require registration or other acts promoting publicity.

Secondly, the information obtainable from the register does not have to be particularly precise and detailed. The information may be limited to notice that a security right (or retention of ownership device) might be in existence. Described more precisely, the minimum information accessible from the register consists of:^{*37}

- a) the name and contact details of the security provider (which information is characteristic of any personal folio system);
- b) the name and contact details of the secured creditor;
- c) the date of registration (which is particularly important for determination of priority relations); and
- d) a ‘minimum declaration’ as to the encumbered asset and an indication as to the categories of assets (defined in a list) to which the encumbered assets belong.^{*38}

No details on the secured claim(s) must be provided, nor must the collateral be ‘identified’, in the sense of the common property-law principle of specificity, in the register. This may be regarded as reasonable in order to prevent security providers from becoming ‘debtors of glass’ (fully transparent debtors), as it has been put in the discussion on a law-reform project launched in Austria a couple of years ago,^{*39} which ultimately failed for lack of support by banks and other businesses. These circles were not attracted by the idea that even persons without any business relationship with the security provider (e.g., competitors) should be provided with detailed information about the security provider’s amount of debt and conditions of credit,^{*40} and that they might obtain a relatively detailed overview of the debtor’s means of production (such as machines and licences), ultimately allowing conclusions as to the debtor’s methods of production, quantitative capacities, and technical expertise.

In addition, where a potential creditor or business partner initially only intends to get a rough overview of the security provider’s financial situation, it may well be that information in brief form by reference to certain categories of assets can serve this function better than very detailed information that includes full identification. In particular, this may be the case where the person searching the register does not understand the language in which the entry is made (whereas the DCFR-specified categories could be displayed in any of several languages)—which one can presume would be a standard problem with a pan-European register.^{*41}

³⁶ On the following, see Comment C to IX.–3:301, DCFR Full Edition (Note 7), p. 5497. For a general introduction to characteristics of a notice-filing system (in addition to the literature quoted in Note 7), see, for example, E.-M. Kieninger, *Gestalt und Funktion einer „Registrierung“ von Mobiliarsicherungsrechten*. – *Rheinische Notar-Zeitschrift* (‘RNotZ’) 2013, pp. 216–225 (in German); H. Sigman, *Perfection and priority of security rights*. – H. Eidenmüller, E.-M. Kieninger (eds), *The Future of Secured Credit in Europe*. Berlin: De Gruyter 2008, pp. 143–165, 151ff. – DOI: <http://dx.doi.org/10.1515/9783110970678.143>.

³⁷ See IX.–3:308(a)–(d) DCFR.

³⁸ See IX.–3:306(1)(b) and (c) DCFR. The provision on the ‘minimum declaration as to the encumbered assets’ in IX.–3:306(1)(b) DCFR is supplemented by IX.–3:306(2) DCFR, according to which ‘a declaration that the creditor is to take security over the security provider’s assets or is to retain ownership as security is sufficient’. What this means exactly does not become sufficiently clear from the comments to that provision; cf. DCFR Full Edition (Note 7), p. 5505. The wording of paragraph 2 does not help much; it even creates somewhat of an impression that subparagraph (b) in IX.–3:306(1) would address a specification not as to the encumbered asset (however limited that specification might be) but of the type of security interest (security right or retention of ownership device). From the comments (*ibid.*), however, it appears clear that the provision really deals with a description of the assets involved.

³⁹ Published in Martin Schauer (ed.), *Ein Register für Mobiliarsicherheiten im österreichischen Recht*. Vienna: Manz 2007 (in German), p. 33ff. (recommendations) and p. 43ff. (draft articles plus comments). This draft was not an ‘official’ (state-originated) legislative proposal; it was developed by a ‘private’ research group composed of academics and notaries.

⁴⁰ In the case of a pledge—see §29(3) in conjunction with §7(2) of the Austrian draft (Note 39)—it is required that both the amount of the secured claim and the interest rate be registered.

⁴¹ Further problems associated with language and the registration system proposed in Book IX of the DCFR (such as non-discrimination with respect to language) are discussed by Jacobien Rutgers. Registered European security instrument in a

Thirdly, any precise information, such as whether a proprietary security right has, in fact, been created, has not ceased to exist, and which assets exactly are used as collateral can be ascertained only by means of further enquiries. The source of information for such further enquiries is the secured creditor, whose name and address are visible in the register. There is—at least—a two-part logic underlying this approach:

- The secured creditor is the most reliable source for such information. The alternative source, the security provider, would be subject to significant conflict of interests: He would profit from offering the prospective creditor far-reaching collateralisation, and this could create a risk that the actual situation of encumbrances is not reported correctly. In order to be truly sure, prospective creditors would, therefore, contact the original secured creditor anyway. This, by the way, is consistent with a practice commonly applied in the German banking context, wherein future creditors must obtain an overview of non-publicised security transfers.^{*42}
- The notice-filing system further builds upon this superior reliability of the creditor and imposes on the creditor a duty to give such additional information.^{*43} However, said duty arises only if the request for additional information is made with the security provider's approval. This involves the second prong of the logic underlying the DCFR model: Whereas minimal information, which is not necessarily reliable, should be readily available to the general public, it should be up to the security provider to decide to whom detailed and valid information is to be disclosed. The security provider will approve a request if he has a vital interest in obtaining credit from this third person or entering into a business relationship with that person. If, on the other hand, approval is not given, a prospective business partner should be left suspicious.

In this way, Book IX provides a kind of midpoint in its solution regarding publicity. The extent to which the security provider becomes a 'debtor of glass' is reduced in comparison to registration regimes providing full publicity (such as that under the Austrian draft proposal of 2006/2007).^{*44} On the other hand, the DCFR system certainly provides more publicity than does the Dutch 'undisclosed pledge'^{*45} or the current Austrian solution addressing security assignments of claims^{*46} (in the latter, the information provided by bookkeeping entries is accessible only to those to whom the bookkeeping is disclosed, from which it follows that third parties are fully dependent on the security provider's approval of giving information). And, evidently, Book IX provides more publicity than the German and Estonian transfer of ownership for security purposes, which lacks any publicity if made by way of *constitutum possessorium*.

Fourthly and finally, further characteristics of the registration system^{*47} include that entries in the register are made directly by the secured creditor^{*48} and require the prior consent of the security provider. Such declarations of consent too are made directly in the register.^{*49} The register is to operate as a personal folio system; i.e., entries are filed against identified security providers.^{*50} The register operates electronically

multilingual European Union. – S. van Erp *et al.* (eds.). *The Future of European Property Law*. Munich: Sellier European Law Publishers 2012, pp. 153–163. – DOI: <http://dx.doi.org/10.1515/9783866539310.153>.

⁴² See H.-J. Lwowski. *Ökonomische und rechtliche Anforderungen an ein optimal funktionierendes Mobiliarkreditsicherungsrecht aus der Sicht der Praxis*. – J. Basedow *et al.* (eds.) (Note 8), pp. 173–181, on p. 178 *ff.* (in German).

⁴³ See IX.–3:319 DCFR. The information duty is sanctioned by liability rules and specific good-faith acquisition provisions; see IX.–3:322 and IX.–3:323 DCFR.

⁴⁴ See Note 39, above.

⁴⁵ The Netherlands have adopted a (constitutive) registration system not intended to serve publicity interests: Under Article 3:227 of the Dutch Civil Code, an 'undisclosed pledge' can be created by an entry in a register (not searchable by the public) maintained by the competent tax authority, which apparently has the purpose merely of avoiding the possibility of backdating security agreements. Alternatively, an undisclosed pledge can be created via establishment of an 'authentic deed' (in practical terms, a notarial deed). See, for instance, M. Veder. Netherlands. – H. Sigman, E.-M. Kieninger (eds). *Cross-Border Security over Tangibles*. Munich: Sellier European Law Publishers 2007, pp. 193–220, on p. 195 *ff.* – DOI: <http://dx.doi.org/10.1515/9783866537057>

⁴⁶ In Austria, the publicity requirement laid down for pledges (in §452 of the Austrian Civil Code) is applied by analogy to security assignments of claims. The law is considered to require either notice to the debtor (given by either the security provider or the secured creditor) or an entry in the bookkeeping program of the security provider that points at the creation of the security right. For a detailed account, see, for example, H. Wiesinger. *Kreditsicherung durch Forderungsabtretung*. Vienna: Manz 2010 (in German).

⁴⁷ On the following, see Comment C to IX.–3:301, DCFR Full Edition (Note 7), p. 5497 *ff.*

⁴⁸ See IX.–3:305(1) DCFR.

⁴⁹ See IX.–3:306(1)(d) and IX.–3:309 DCFR.

⁵⁰ See IX.–3:302(1) DCFR.

and is directly accessible to its users in online form;^{*51} that is, the filing and searching are executed online. Access to the register for search purposes is open to anyone (subject to the payment of—rather low—fees).^{*52} The register can be searched either for entries filed against an individual security provider or for entries pertaining to specifically defined assets,^{*53} provided that information sufficiently detailed for identifying individual assets was provided upon registration (e.g., the serial number of a machine). Entries are made directly by the parties, without involvement of a public registrar who might have to check the particulars of the security right and the content, let alone the validity of the registered facts. This should facilitate rapid or even immediate processing of filings, so that achievement of third-party effectiveness for security rights is not delayed or impeded.

5. Further features

Another aspect that should be spotlighted briefly is costs. The examples of countries operating notice-filing systems indicate that the registration system can be run, and be used, at considerably low cost.^{*54}

The final areas I want to touch on, at least briefly, are retention of title and functionally equivalent devices (so-called acquisition finance devices).^{*55} We have already mentioned one important aspect – namely, that acquisition finance devices are granted ‘superpriority’.^{*56} Such superpriority can be contractually extended to proceeds from the collateral goods in the case of resale.^{*57} Further aspects include, first and perhaps most notably, Book IX DCFR requiring acquisition finance devices to be registered in order for ‘effectiveness’ to be gained against third persons in the sense of Chapter 3.^{*58} This is a departure from the approach in many European countries and proves to be a major point of criticism^{*59}; however, the problem is mitigated by a grace period of 35 days from delivery^{*60} and by the fact that a single act of registration can, in effect, cover all future deliveries within a long-term business relationship.^{*61}

Secondly, it is noteworthy that Book IX accepts both the concept of a) ‘retention of ownership’ in a strict sense—i.e., retention of the full right of ownership, which is enforced by the seller (secured creditor) through termination of the contract and recovery of the goods—and that of b) retention of a mere security right, in which case the seller does not terminate the contract but enforces its secured claim and also does not recover possession of the goods but has a right to preferential payment from the collateral. Thirdly, I want to point out an innovative solution for situations wherein goods sold under retention of ownership (or a similar device) are used by the buyer to produce ‘new goods’ (called ‘production’ in the DCFR). Provided that the parties have concluded an agreement to this effect, the ‘producer’ (the buyer) acquires sole ownership of the products but the supplier of material is entitled against the producer to

⁵¹ See IX.–3:302(2) DCFR.

⁵² See IX.–3:317 DCFR.

⁵³ See IX.–3:318 DCFR.

⁵⁴ For example, as of January 2014, the fee for registering a security right (filing a ‘financial statement’) is 20.00 USD (if the registering is done electronically) and the fee for a search request is \$25.00, in New York (the corresponding fees in Ohio are \$12.00 and \$20.00, respectively, and those in Pennsylvania are \$84.00 and \$12.00).

⁵⁵ The concept of ‘acquisition finance devices’ is defined in IX.–1:201(3).

⁵⁶ See Section 3.3.

⁵⁷ Proceeds from a resale by the buyer under retention of ownership (or a similar device) are covered by IX.–2:306(3) DCFR (as ‘other proceeds’). In cases of these, extension of the security right requires agreement by the parties. Effectiveness is achieved by registration of the extension to proceeds. If registration is performed, proceeds from an acquisition finance device are also granted the superpriority of the original security interest. By means of this superpriority, the seller under retention of title trumps creditors of the buyer to whom the latter has previously granted a global security right in all future claims. See also Section 3.3 in the context of Note 33, above.

⁵⁸ See the general rule in IX.–3:107(1) DCFR.

⁵⁹ E. Dirix. Security rights in the DCFR from a Belgian perspective. – V. Sagaert *et al.* (eds). *The Draft Common Frame of Reference: national and comparative perspectives*. Cambridge, UK; Antwerp, Belgium; Portland, Oregon: Intersentia 2012, pp. 313–320, on p. 319. The Belgian legislator followed Dirix and in its recent reform did not adopt a registration requirement for retention of title devices (see Note 9).

⁶⁰ According to IX.–3:107(2) DCFR, if registration is effected within 35 days after delivery of the asset supplied, the acquisition finance device is effective from the date of creation.

⁶¹ See W. Faber (Note 7), p. 425*f.*

compensation for the value of the material, secured by a proprietary security right in the new goods.⁶² This solution takes care of the producer-buyer's sovereignty interests just as much as of the supplier's value interests.

6. Conclusions

In conclusion, I believe that Book IX DCFR offers several solutions that are both efficient and appropriate in their substance. I do not wish to argue for an uncritical wholesale adoption. Some of its concepts are particularly complex and different from the law seen today in many European countries. Difference, as we know, has some deterrent effect in the development of law. But if the overall results are significantly better, the force of arguments (or, rather, fears) grounded in issues of difference alone should decrease.

The crux of the matter, therefore, is to determine in detail and with care in what regard and to what extent the solutions offered by these model rules would actually be a step forward. This evaluation will actually be unique from each individual Member State's perspective and may again be different when one is focusing not on potential national reforms alone but on some kind of European integration in this area—in particular, encompassing a common European registration system. It is clear to me that such evaluations take their time, and this is good. Hasty decisions are usually not the best ones. Such evaluations may (and do), of course, reveal problems, which I hope will lead to attempts to modify or amend the model rules proposed in the DCFR and to re-evaluation of the issue in view of them. For example, the facilitating of global security rights evidently increases the 'risk' of one first-rank creditor absorbing the value of more or less all movable assets. Lower-ranked secured creditors and also unsecured creditors may be left with virtually nothing in the event of the debtor's insolvency. This requires some basic discussion as to the extent to which such an effect can be considered acceptable. On that basis, countermeasures should probably be adopted, such as 'carving out' a certain percentage in the eventuality of insolvency.

In any case, there is reason to hope that secured-transactions law in Europe can make considerable steps forward in the years to come.

⁶² See IX.–2:308(1) and (2)(a) DCFR. See also VIII.–5:201(1) DCFR, to which Book IX refers in this regard, along with comments C and D to VIII.–5:201, DCFR Full Edition (Note 7), p. 5067 *ff.* The security right in the product is effective on the condition that the extension agreement is registered (see Comment C to IX.–2:308, DCFR Full Edition, p. 5469 *ff.*). This can be handled at once when one is registering the original retention of ownership device. Finally, the (super-)priority of the security right is not affected, provided that the security right validly extends to the product – i.e., provided that this has been agreed upon by the parties; see IX.–4:103(1)(b) DCFR and Comment C to IX.–2:308, DCFR Full Edition, p. 5470.