Publicity in secured transactions law: Towards a European public notice filing system for non-possessory security rights in movable assets?

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Chapter 1

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A. Introducing the subject

1. The status quo: a fragmented European secured transactions law with regard to movable assets

In order to facilitate cross-border trade within the European Union, harmonization attempts have been undertaken in many areas of European private law. One of these areas is secured transactions law: an area of private law that facilitates trade by providing a legal framework for the funding of the trade concerned. Key to this legal framework is the possibility for lenders to take security interests in their borrowers' assets, in order to secure repayment in case borrowers default in repaying credit loans.

The design and organization of secured transactions law differ widely between countries. Each European jurisdiction provides for its own types of security rights, depending on the type of assets they rest on. The few harmonization attempts that can be seen in this field are less successful than those in other areas of the law, such as contract law, consumer law and competition law. This seems to be due to a number of factors. First of all, secured transactions law is closely related to the field of property law, which is characterized by restrictive mandatory rules. These restrictions are designed to protect the so-called 'closed' character of the system of proprietary rights. The system is closed in terms of both the nature of proprietary rights that may be created and the legal requirements and formalities prescribed for their creation (numerus clausus). Second, secured transactions law has the purpose of providing rules on debt collection, i.e. rules on how creditors recover their debts if their debtor defaults and of regulating the distribution of proceeds among creditors in accordance with their ranking when the debtor's assets are liquidated. Rules on this subject are highly complex and vary...
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1. The status quo: a fragmented European secured transactions law with regard to movable assets

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The design and organization of secured transactions law differ widely between countries. Each European jurisdiction provides for its own types of security rights, depending on the type of assets they rest on.\(^2\) The few harmonization attempts that can be seen in this field are less successful than those in other areas of the law, such as contract law, consumer law and competition law.\(^3\) This seems to be due to a number of factors. First of all, secured transactions law is closely related to the field of property law, which is characterized by restrictive mandatory rules. These restrictions are designed to protect the so-called 'closed' character of the system of proprietary rights.\(^4\) The system is closed in terms of both the nature of proprietary rights that may be created and the legal requirements and formalities prescribed for their creation (\textit{numerus clausus}).\(^5\) Second, secured transactions law has the purpose of providing rules on debt collection, \textit{i.e.} rules on how creditors recover their debts if their debtor defaults and of regulating the distribution of proceeds among creditors in accordance with their ranking when the debtor's assets are liquidated. Rules on this subject are highly complex and vary

\(^1\) According to the International Finance Corporation of the World Bank Group (IFC), the term 'secured transactions' refers to 'credit transactions where a creditor holds an interest in a debtor's movable property ('collateral') to secure a loan or a debt obligation'. See 'Secured Transactions and Collateral Registries Brochure' (Washington DC: IFC, 2012), p. 1. \textit{Cf.} Merrill & Smith 2007a, p. 830.

\(^2\) Legal literature on secured transactions law shows little consistency in terminology regarding whether a security interest (or right) exists 'in', 'over', or 'with respect to' particular collateral; these variations are often used interchangeably and I will therefore do likewise.

\(^3\) The harmonization attempts that have been made thus far have resulted in pure compromises. See \textit{e.g.} the \textit{European Insolvency Regulation} (1346/2000), which provides for mandatory and automatic recognition throughout the EU of the consequences and effects of eligible insolvency proceedings opened in one EU member state, although this recognition is subject to broadly defined exceptions in areas such as collateral security, set-off, claw back, etc.

\(^4\) \textit{Cf.} Van Erp & Akkermans 2012, p. 1012: "National property law systems are very closed; they are for a large part mandatory law with little room for party autonomy as it involves interests of third parties." Compare Van Erp & Akkermans 2011, p. 106: "Systems of property law are traditionally characterised by their closed nature and restriction of party autonomy" (translated). \textit{Cf.} Struycken 2007, p. 1 and Haentjens 2008, p. 376.

\(^5\) On the \textit{numerus clausus} concept, see \textit{e.g.} Struycken 2007, Akkermans 2008 and Hansmann & Kraakman 2002, p. 372 \textit{et seq.}
from country to country, partly because these rules are intertwined with legal tradition.\(^6\) Although most jurisdictions proceed from the *partitas creditorum* rule – equality among creditors – as a basic rule for distribution, the exceptions are numerous, even within jurisdictions. Therefore, these rules are often of a mandatory nature, since they are a reflection of how each country values the positions of – and the relationships between – the various stakeholders. In addition to their strong connection with legal tradition, these rules also impact a country’s balance sheet, and therefore its sovereignty. As long as European jurisdictions are unwilling to give up their autonomy, harmonization of secured transactions law and related rules appears to be a difficult task.\(^7\)

In spite of the foregoing, some of the developments in secured transactions are common to all European jurisdictions. The most important example is the adoption of a form of *non-possessory* security since the beginning of the 19th century. At that time, the Industrial Revolution was stretching into continental Europe, prompting a huge expansion of commercial trade and hence an enormous increase in the demand for credit. It turned out that security rights *in personam* and security rights in intangible assets and immovable property only accommodated a small portion of the aggregate need for secured credit, forcing national legislatures to think of new forms of security besides the ones they had already adopted.\(^9\) In relation to movable assets,\(^10\) most national laws until that time only provided for a form of *possessory pledge*, which required the debtor to surrender possession of those

\(^6\) Compare Cashin Ritaine 2012, p. 5-6: “(…) property law in Europe is deeply intertwined with national legal traditions and the concept has different meanings.” See also Ancel 2008, p. 272: “(…) because secured transactions law is complex and intertwined with other aspects of the law, especially insolvency, no serious reform can be achieved without close co-ordination with these areas” and ‘Secured Transactions Systems and Collateral Registries’ (Washington DC: IFC, 2010), p. 34: “Modern secured transactions law does not exist in a vacuum. Nor does it redefine all aspects of law relating to the relationships it encompasses. It functions in the context of, for example, basic property law, obligations law, bankruptcy law, negotiable instrument law and other areas of the law related to commercial relationships.” Cf. Akseli 2008, p. 4.

\(^7\) Cf. Van Erp & Akkermans 2012, p. 1012: “The diversity in these detailed mandatory property laws makes any effort of harmonization of property law of now 28 legal systems a very cumbersome task.”

\(^8\) When I use the term ‘possession’, I am referring solely to the factual situation in which a person has physical control over a movable asset, without intending to define such physical control in any legal sense. In Dutch law, for example, ‘possession’ tends to be used as the translation for ‘bezitting’, which is a legal term that connotes a situation in which a person holds a movable asset for itself. This is to be distinguished from the situation in which a person holds the asset for another, which in Dutch may be best translated by the neutral term ‘holder’ or ‘holdership’ (houder or houderschap). In European literature the latter situation is also sometimes referred to as ‘detention’. When I use the term ‘non-possessory security’, I am referring to the situation in which the debtor has given a security right to its lender, while at the same time the debtor has remained in possession – *i.e.* in physical control – of the assets.

\(^9\) See e.g. Drobnig 2003, p. 638; Kieninger 2004b, p. 6 et seq and Dalhuisen II 2013, p. 468.

\(^10\) When I use the term ‘movable assets’ in this thesis, I am referring solely to movable corporeal goods. The terminology I use is therefore more narrowly defined than the terminology typically used in various international model laws, for example Book IX of the DCFR, where the term ‘movable assets’ is often used for both movable corporeal and incorporeal (or intangible) assets.
assets to its lender or a third person.\textsuperscript{11} Notwithstanding the fact that lenders were obviously better secured by taking possession of the property against which they lent, this form of security was very inconvenient and costly.\textsuperscript{12} Without access to its equipment, stock and inventory, the debtor would not be able to continue its business and would also not be able to repay its lender from its operational cash flow. Hence, the possessory pledge was ill-equipped to satisfy the needs of commercial practice.\textsuperscript{13} In some European countries, methods of ‘field warehousing’ were designed to enable lenders to take possession of the collateral while at the same time allowing the debtor to continue to use it.\textsuperscript{14} Just the same, these methods were – and still are – costly and impractical and, moreover, non-tenable \textit{de jure} because difficult to reconcile with mandatory rules designed to protect the closed character of property law.

It was for these reasons that many European jurisdictions developed case law or were forced to change their national statutes to allow some form of ‘debtor-held security’ in addition to the existing forms of ‘creditor-held security’. Throughout Europe, ‘non-possessory pledges’ or similar devices were adopted between the early and late 1900s, which enabled the debtor to remain in possession of its assets and carry on its business, while at the same time lenders (\textit{i.e.} credit suppliers) could be paid from the income earned by the debtor from conducting its business.\textsuperscript{15} At approximately the same time as the introduction of the non-possessory pledge, the ‘retention of title’ made its entrance into several European jurisdictions, through both case law and the adoption of legal rules by legislatures. The retention of title makes the transfer of title to the buyer conditional upon full payment of the purchase price and is therefore an important instrument for suppliers of goods to secure payment. Both the non-possessory pledge and the retention of title are generally labeled ‘security rights’, as their purpose is to secure payment of the debtor’s creditor. Yet the requirements for creating these instruments and also the rules concerning the effect against third parties, differ widely among jurisdictions.\textsuperscript{16}

\begin{footnotesize}
\begin{enumerate}
\item See e.g. Van Erp 2009a, p. 6 and Dalhuisen III 2013, p. 24.
\item Not only in Europe but also in the U.S.; see e.g. LoPucki & Warren 2012, p. 135.
\item On field warehousing, see Comment B to IX. – 3:102 (DCFR). Field warehousing, commonly used in some European countries, also took root in the U.S.; see LoPucki & Warren 2012, p. 135 and Picker 2009, pp. 24-25.
\item See e.g. Comment A to IX. – 1:202 (DCFR), p. 5392.
\item See the European Commission’s ‘A More Coherent European Contract Law: An Action Plan’ (COM (2003) 68 final) (hereafter ‘Action Plan (2003)’), paragraph 42 \textit{et seq.}: “Reservation of title is regulated differently from jurisdiction to jurisdiction and the effectiveness of relevant contract clauses varies accordingly.” Cf. Von Bar & Drobnig 2004, p. 338, and Beale 2008, p. 96: “The field of security over moveable property is one in which the laws of the various Member States are so different that the pan-European picture is one of complete disarray.” Reinertsen Konow has mapped the similarities and differences
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2. A harmonization attempt to overcome the diversity: Book IX DCFR

In the past twenty years, there have been increasing calls to address the diversity between differing secured transactions laws, in the belief that this will facilitate cross-border trade. An all-encompassing proposal in this context is embodied in Book IX of the Draft Common Frame of Reference (‘Book IX DCFR’), first published in 2008 and later, in final form, in 2009. Book IX DCFR is titled ‘Proprietary Security Rights in Movable Assets’, and represents a comprehensive framework of rules for proprietary security in movable assets, including retention of title devices. It is one of the ten books of the DCFR: a text prepared by a group of academics in response to a call for development of a so-called ‘Common Frame of Reference’ (‘CFR’) by the European Commission in 2003 and 2004. It contains principles, definitions and model rules of European private law.

The CFR is to be a politically approved text, containing fundamental principles, definitions and model rules, and serving as a toolbox to improve the quality and coherence of the existing acquis.

between Germany, Norway, Denmark, Sweden, the United Kingdom and the United States with regard to non-possessory security. See Reinersten Konow 2006. Kieninger has performed a similar but even more comprehensive exercise, comparing secured transactions in almost all member states of the European Union. See Kieninger 2004a.

17 See e.g. Veneziano 2012, p. 125: “And yet, cross-border use of security devices in Europe is at present hindered by many factors, among which the marked differences still existing in the various national legal systems.”

18 The DCFR was presented to the European Commission at the end of 2008. See ‘DCFR (Interim Outline Edition) 2008’.

19 See ‘DCFR (Full Edition) 2009’.

20 Although ‘movable assets’ is not defined in Book IX, it follows from several definitions in the DCFR that this term includes all types of corporeal movable and incorporeal property. See the Annex of the DCFR (Interim Outline Edition) 2008 for the definitions of ‘assets’ (‘anything of economic value, including property; rights having a monetary value; and goodwill’; p. 546), ‘goods’ (‘corporeal movables. It includes ships, vessels, hovercraft or aircraft, space objects, animals, liquids and gases’; p. 555), and ‘movables’ (‘corporeal and incorporeal property other than immovable property’; p. 560). Hence, the term ‘movable assets’ has a broader meaning in Book IX, i.e. is more comprehensive, than the definition used in this thesis; see also supra footnote 10.

21 The DCFR was prepared by the Study Group on a European Civil Code (‘SGECC’ or the ‘Study Group’) and the Research Group on EC Private Law (often referred to as the ‘Acquis Group’) and funded under the 6th Framework Programme for Research. Both groups are part of the CoPECL Joint Network on European Private Law – Network of Excellence, which was established in 2005; <www.copecl.org> (last visited February 5, 2014). For more information on this, see Van Erp & Akkermans 2012, p. 1060.

22 The idea of a ‘political’ CFR was first launched in 2003; see ‘Action Plan (2003)’. This idea was further elaborated in the Commission’s ‘European Contract Law and the Revision of the Acquis: The Way Forward’ (COM (2004) 651 final) (hereafter ‘The Way Forward (2004)’).
coherence of the existing acquis and future legal instruments in the area of contract law." Although the Commission clearly intended that it should focus on contract law, the drafters of the DCFR presented a concrete text, elaborated in full detail, covering rules on specific contracts and tort law and three books on property law, including secured transactions law.

In July 2010, the European Commission published a Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (‘Green Paper 2010’), in which seven possible forms of a European instrument of contract law were formulated, ranging from the (very modest) idea of publishing the results of the Expert Group on the Commission’s website to the (far-reaching) adoption of a Regulation establishing a European Civil Code in option 7. At around the same time, the Commission established an Expert Group in the area of contract law to provide assistance in transforming the DCFR into one of the seven options, with the focus placed entirely on contract law. Property law received no attention whatsoever.

23 ‘Acquis’ is the abbreviation for acquis communautaire, a French term meaning “that which has been agreed upon in the community”. It therefore refers to the (constantly developing) accumulative body of European law applicable in the EU member states, including all the treaties, regulations and directives passed by European institutions, but also case law of the European Court of Justice (‘ECJ’).


25 More specifically, the DCFR contains the following 10 books: Book I (‘General provisions’), Book II (‘Contracts and other juridical acts’), Book III (‘Obligations and corresponding rights’), Book IV (‘Specific contracts and the rights and obligations arising from them’), Book V (‘Benevolent intervention in another’s affairs’), Book VI (‘Non-contractual liability arising out of damage caused to another’), Book VII (‘Unjustified enrichment’), Book VIII (‘Acquisition and loss of ownership of goods’), Book IX (‘Proprietary security rights in movable assets’), Book X (‘Trusts’). Books VIII, IX and X reflect the core topics of property law. Rules with regard to immovable property are explicitly excluded from the DCFR’s coverage. DCFR (Full Edition) 2009, p. 4207.

26 By covering areas other than contract law, the drafters went beyond their orders, as they also admitted. See DCFR (Interim Outline Edition) 2008, p. 24: “The coverage of the DCFR is thus considerably broader than what the European Commission seems to have in mind for the coverage of the CFR (…).” Cf. Cashin Ritaine 2012, p. 5. According to its drafters, the DCFR should serve as a building block of a possible CFR, as a tool that promotes knowledge of private law in the jurisdictions of the EU, and, hopefully, as a source of inspiration for higher courts or official bodies charged with the preparation of national contract law. The drafters of the DCFR also “nurture the hope that it will be seen also outside the academic world as a text from which inspiration can be gained for suitable solutions for private law questions”; see DCFR (Interim Outline Edition) 2008, pp. 6-8.


30 More specifically, the Expert Group had the task to help the Commission “in selecting those parts of the DCFR which are directly or indirectly related to contract law, and in restructuring, revising and supplementing the selected provisions”; see ‘Green Paper 2010’, section 2 on p. 4.
Soon thereafter, the debate centered on an option in the middle of the spectrum: the ‘Optional Instrument’ and eventually, in October 2011, precisely such an instrument was proposed in a document named Proposal for a Regulation on a common European Sales Law (‘CESL’). This proposes a comprehensive and self-standing set of contract law rules, that can be chosen by parties as the second national law regulating their (domestic and/or cross-border) contracts, and can therefore replace the substantive law rules otherwise applicable.

The aforementioned facts speak for themselves. The publication of the DCFR has been followed by various initiatives of the Commission towards European harmonization, but none of them deal with property law. While the Commission does seem to leave some room for the future extension of its scope, property law has clearly not been given a place in the current Optional Instrument.

Property lawyers anticipating this result, explain it by reference to the dogmatic and closed nature of property law and the politically sensitive position of third parties, which makes this area of law less suitable for ‘opting in’.

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51 Cf. Van Erp & Akkermans 2012, p. 1073: “The term ‘property’ does not appear in the Green Paper at all (…)” and Cashin Ritaine 2012, p. 16: “The European Commission 2004 CFR project did not intend to address the issue of property law at all, following in the steps of other transactional instruments such as the CISG, the Unidroit principles or even one of the latest Hague conventions relating to the law applicable to intermediate securities. In all of these instruments, it has been recognised that property law issues are so deeply linked to each national legal thinking, that it would be near impossible to harmonize the rules or even find a common terminology.”

52 COM (2011) 635, final.

53 See Art. 15(2) of the proposed Regulation: “By … [5 years after the date of application of this Regulation], the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a detailed report reviewing the operation of this Regulation, and taking account of, amongst others, the need to extend the scope in relation to business-to-business contracts, market and technological developments in respect of digital content and future developments of the Union acquis.”

54 Before the publication of the CESL, the option of including rules on property law was dismissed as not (yet) feasible by many experts, even by professors in the field of property law who consider themselves to be supporters of the Europeanization of property law. See e.g. Salomons 2011c, pp. 151-152, who is of the opinion that, by not (yet) including these subjects, the project is kept relatively manageable and clear-cut in terms of scope, and at the same time falls in line with the specific expertise of the present Expert Group. In this regard, Salomons considers that account should be taken of the importance of the choice for the integration process; he thinks that the adoption of a ‘light’ version could lead to gradual incorporation of doctrines other than general contract law, including and perhaps especially in the direction of property law/secure transactions law. Cf. Van Erp & Akkermans 2011, p. 106.
3. The trend towards adopting public (notice) filing for movable assets

In spite of the Commission’s current focus on contract law harmonization, European property lawyers seem to generally support the idea that there should be a genuinely European solution with respect to secured transactions law, which regulates cross-border security interests in goods located in a European jurisdiction, or in goods that move from one state to another. Mainly thanks to advances in electronic registration systems and positive examples from abroad, a general belief that European secured transactions law should be facilitated by a modern and efficient register for publishing security rights has come to the fore.

Book IX of the DCFR proposes the adoption of a uniform security right, which has to be publicly filed in a ‘European register’, that is organized for this purpose on the basis of notice filing, a method of filing in which only a limited amount of information is entered in a public register, to give subsequent creditors of the security provider a warning about (potential) existing security rights in an inexpensive and efficient manner. The Book IX DCFR proposal fits into a clear trend. In the field of secured transactions law, filing systems have been adopted by legislative bodies at national, continental and international levels. In Western Europe, public filing in various forms can already be found in e.g. the United Kingdom, France, Belgium, Denmark, Scotland, Finland, Spain, Sweden, Switzerland and Norway. Some of these filing systems have been based on the concept of notice filing from the outset; some others are in the process of adapting existing filing systems to a system of notice filing.

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33 See e.g. Van Erp & Akkermans 2012, p. 1142: “When it comes to dealing with property security rights at an international level, it seems that the unitary system of property security rights, modeled after the famous Article 9 of the US Uniform Commercial Code, seems to be favoured” and Stürmer 2008, p. 167.

34 Among many others, see e.g. Drobnig 2011, p. 1041 and Veneziano 2012, p. 130.

35 In France, a general non-possessory pledge was adopted in 2006, with the requirement of filing in a public filing system. The so-called ‘Grimaldi report’ recommended to the French legislator that it should introduce the ‘gage sans déposition’ modeled on Art. 9 UCC. See Groupe de travail relative à la reforme du droit des suretés, Paris, 2005. Cf. Dirix 2004, p. 84 on this.

36 Belgium reformed its secured transactions law last summer (July 2013), modeled almost entirely after Art. 9 UCC. See on this subject extensively Dirix 2014, p. 21 et seq.


38 See De La Campa 2012, pp. 11-12: “Spain (...) introduced an electronic registration system for movable collateral in 2002. But most registrants still submit paper registration because of burdensome documentation requirements, which makes the use of the online system as complex as a paper submission. As a result, fewer online registrations than expected occurred between 2003 and 2009, and the cost borne by government to maintain this feature was extremely high relative to the small number of online registrations.”


40 Norwegian law prescribes filing in a ‘National Register of Rights in Movable’, in which non-possessory security interests in business equipment or inventory are perfected. See Reinertsen Konow 2006, p. 647.

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In the United Kingdom, for example, so-called ‘transaction filing’ is in use, but the adoption of the notice filing system of Art. 9 UCC has been recommended several times since 1971 by various committees. In Belgian law, a notice filing was adopted in 2013, despite the fact that there is already some form of public filing in place. Some legal systems that are in the process of modernizing their secured transactions law are still very much in two minds about whether notice filing should be adopted and in what precise form, an example of which is Scotland.

The trend of (notice) filing for movable assets can also be found in central and eastern Europe, and parts of central Asia. 25 years ago none of the 29 countries served by the EBRD’s had any workable laws permitting non-possessory security over movable assets, but today many of them do and a majority of these countries have adopted a public filing system. According to several surveys conducted by the EBRD in each of these countries, these systems prove to function quite well. The development of these national laws has clearly been inspired by EBRD’s Model Law on Secured Transactions, which was published in 2004 and was designed to function as a guide and as a basis for national legislation, and to contribute to further harmonization.

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45 See supra footnote 38.
46 When the revision process first began, the Scottish Law Commission explicitly rejected notice filing because it believed it did not suit Scottish law. See the Scottish Law Commission’s Discussion Paper on Registration of Rights in Security by Companies (2002), p. 8: “A system of notice filing suited to English property law could not readily be modified or adapted to accommodate the very different structures and concepts of Scots property law.” As the revision process progresses, the Law Commission seems to be becoming less rigid in rejecting the U.S. example, although it still explicitly rejects a few main features of the U.S. system, e.g. the difference between ‘attachment’ and ‘perfection’ and the concept of recharacterization. See Greeton 2012, p. 266.
47 The EBRD is the European Bank of Reconstruction and Development, an international financial institution whose aim is to support projects from central Europe to central Asia, mainly by providing funding to private companies in these areas that are not able to get funding in the market themselves. The EBRD operates in 29 countries: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, Estonia, FYR Macedonia, Georgia, Hungary, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, Moldova, Mongolia, Montenegro, Poland, Romania, Russia, Serbia, Slovak Republic, Slovenia, Tajikistan, Turkey, Turkmenistan, Ukraine and Uzbekistan. See infra next footnote.
48 For a (quite up-to-date) overview of these 29 national secured transactions laws and a list of regional surveys on the operation of these laws in their respective jurisdictions (including a survey on the functioning of the public filing systems existing there), see <www.ebrd.com/pages/sector/legal/secured/facts.shtml> (last visited February 5, 2014). Related background information can also be found in e.g. ‘Publicity of Security Rights’ (London: EBRD, 2004), Simpson & Menze 2000, p. 21 and Spanogle 2009, p. 288.
49 Key to this model law was the adoption of a public notice filing system as inspired by Art. 9 UCC. See ‘Model Law on Secured Transactions’ (London: EBRD, 2004) on <www.ebrd.com/pages/sector/legal/secured/core/modellaw.shtml> (last visited February 5, 2014).
Some Asian countries not covered by the EBRD also have public filing systems for security rights in movable assets, e.g. Nepal, Cambodia, India, Singapore, Taiwan and Vietnam. Here too, many reforms seem to have been inspired by a model law, but in this case it is the Guide to Movables Registries, prepared by the Asian Development Bank (‘ADB’) in 2002. A similar development has taken place in Central and South America, where the Organization of American States (‘OAS’) produced the Inter-American Model Law on Secured Transactions in 2002. This model law provides for public disclosure of security interests in most types of collateral by means of the Registry of Movable Property Security Interests. The general purpose of this law is to induce lenders to provide credit at competitive rates in their local, regional or hemispheric markets, by protecting them through a modern secured transactions law. The Model Registry Regulations, which provide the legal foundation for implementing and operating the registry regime contemplated by the Model Law, were approved by the OAS General Assembly in 2009. Both the Model Law and the Regulations encourage the OAS member states to enact legislation that is consistent with these laws. Public filing systems for security rights in movable assets have also been adopted in Canada, New Zealand, South Africa and, quite recently, Australia.

In addition to the (many) national initiatives and the model laws mentioned above, public filing systems can be found in some important international regulatory frameworks. A significant example is the Unidroit Convention on International Interests in

52 See ‘A Guide to Movables Registries’ (Manila: ADB, 2002), p. 3: “The purpose of this Guide is to describe the functions and the key features, including possible variants, of such a registry. The target readership comprises legislators and policy makers in the Asian and Pacific region who are considering modernization of the registry infrastructure for secured financing in their home countries, as well as system designers, credit suppliers and other potential registry users.”
54 The independent states of the Americas are members of the Organization: Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica (Commonwealth of), Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, The Bahamas (Commonwealth of), Trinidad and Tobago, United States of America, Uruguay and Venezuela (Bolivarian Republic of). See <www.oas.org/en/member_states/default.asp> (last visited February 5, 2014).
55 For more in-depth information on the Canadian filing system(s), see e.g. McCormack 2002, p. 113 et seq.
56 The Australian Personal Property Securities Act 2009 (‘the PPS Act’) creates a comprehensive national regime for personal property securities and became law on 14 December 2009. The substantive provisions took effect in 2012. Part of the PPS Act is that the perfection of security interests requires registration in the new ‘PPS register’.
Mobile Equipment (‘Cape Town Convention’), spearheaded by the International Institute for the Unification of Private Law (‘Unidroit’) in 2001. This Convention provides an international legal framework regulating security rights – including reservation of title agreements and leasing – in expensive goods, such as airplanes, satellites, trucks etc. In the same year, the Protocol on Matters Specific to Aircraft Equipment was adopted, and in 2007, the Protocol on Matters Specific to Railway Rolling Stock.67 The international register (referred to as ‘The International Registry’) is asset-based and accessible online.68 Although focusing on receivables, in 2001 the United Nations Commission on International Trade Law (‘UNCITRAL’) adopted the United Nations Convention on the Assignment of Receivables in International Trade with the aim of harmonizing and modernizing law in the field of international trade and finance. In relation to movable assets, the Legislative Guide on Secured Transactions was produced by UNCITRAL’s ‘Working Group VI - Security Interests’59 in 2010. The main objective of this Guide is “to assist States in developing modern secured transactions laws (that is, laws related to transactions creating a security right in a movable asset) with a view to promoting the availability of secured credit.”60 A key element in the recommendations of the Legislative Guide is the establishment of a public register for notice filing, which closely resembles the U.S. notice filing system.61

4. Public filing: adhering to the principle of publicity

Although differing on a variety of topics, the above-mentioned national laws, model laws, conventions and protocols contemplate the establishment of a public filing system, with the purpose of giving public notice to third parties regarding security affecting a debtor’s property.62 The idea of giving third parties such public notice of

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58 See <www.internationalregistry.acro> (last visited February 5, 2014).
59 This working group is entrusted with the task of developing an efficient legal regime for security interests in goods involved in a commercial activity, including inventory. See the preface to ‘The UNCITRAL Legislative Guide on Secured Transactions’ (Vienna: UNCITRAL, 2010).
61 ‘The UNCITRAL Legislative Guide on Secured Transactions’ (Vienna: UNCITRAL, 2010), pp. 149-183.
62 See the Comments to Book IX of the DCFR: “The main objective of a system of publicity by registration is to provide information for prospective creditors and other third persons dealing with the security provider.” Comment B to IX. – 3:301 (DCFR). Cf. ‘A Guide to Movables Registries’ (Manila: ADB, 2002), p. iv and Grettan 2012, p. 264: “The main reason for registration is that what affects third parties should be discoverable by third parties; the point of security lies in its third party effect.” See also Kozolchyk & Furnish 2003, p. 31: “A functional and effective publicity of perfected security interests, easily discoverable by subsequent potential creditors, is at the heart of an effective secured transactions system” and De La Campa 2012, p. 3: “The main goals of collateral registries are to provide public notice of interests in movable assets and to establish priority in the assets described in the notice for secured creditors.” Cf. on p. 6: “The functions of registration are, or at least should be, to publicize a security interest and to perfect it against third parties.”
existing security interests stems from the principle of publicity, a principle that is fundamental to property law in the aforesaid jurisdictions. The principle of publicity is based on the assumption that enforceability of property rights against third parties can only be justified to the extent that they can be known by such third parties:

“Because property rights affect third parties, natural justice requires that such rights should only arise in circumstances where they are apparent to third parties. In other words, property rights should be public.”

As a result of this principle, all European countries require that encumbrances of immovable goods are registered in land registers. For encumbrance of movable assets, several methods of achieving publicity have been used, such as ‘marking the property’, but most traditionally the requirement of transferring physical possession from the debtor to its credit supplier – i.e. the so-called Faustpfand-Prinzip – has been (whether or not intentionally) based on the notion that the creation of property rights must be made public:

“It is one of the achievements of the classical model [of property law, DJYH] (…) that all property rights are public and not (…) completely hidden for third parties, especially creditors. This explains why a mortgage on immovable property has to be registered, why a pledge on movables can only be a possessory security right and why a pledge of claims can only be fully effective after notice of the pledge has been given to the debtor.”

This was why, although commercial practitioners and financiers welcomed it with open arms at the beginning of the 20th century, the introduction of non-possessory security rights was strongly criticized by several academics. They objected to the ‘silent’ or ‘non-disclosed’ nature of these rights. When several European jurisdictions introduced Civil Codes in the 19th century, non-possessory security was not permitted in any form, reflecting an explicit choice in favor of the publicity principle. Giving up the requirement of dispossession of the debtor in the early 20th century factually implied turning away from the principle of publicity. The need

63 The term ‘publicity’ is mostly used by civil lawyers. Outside civil law countries, references to terms such as ‘(public) notice’ are more common; see Cf Kozolchyk & Furnish 2003, p. 10 and infra footnote 1 of Chapter 2.
64 Among many others, see Kozolchyk & Furnish 2003, p. 12; “Since Roman days, public notice of secured or preferential rights encumbering the debtor’s estate, at a whole or on specific assets thereof, has become an inevitable feature of Western legal systems”, Beale 2012, p. 280; “The publicity principle is an important one (…)” and ‘Secured Transactions Systems and Collateral Registries’ (Washington DC: IFC, 2010), p. 19, which mentions ‘publicity’ as one of the 5 main aspects of a secured transactions system.
65 Benjamin 2000, pp. 105-106.
66 See e.g. Dirix 2004, p. 82.
67 Van Erp 2009a, p. 22.
68 See on this e.g. Salomons 1994, p. 1261.
to adopt non-possessory security therefore forced legislatures to deal with the question of whether (and if so, how) they should tackle this publicity issue:69

“In order to make up for the loss of the functions of (…) dispossession (…), all legislators have introduced some more or less effective substitute for publicity so as to inform interested persons about the existence of charges upon certain assets of their (potential) debtor.”70

While many European systems adopted national public filing systems, there were – and still are – a few important exceptions to the rule, namely the German, Dutch and Austrian legal systems. Germany has no register of security interests in movable assets at all, most probably inspired by the belief that legal practice works fine without such a system.71 In the Netherlands there is only a requirement for (non-public) filing of non-possessory pledge transactions with the tax authorities, merely for the purpose of creating ‘date certainty’. Although the adoption of a public filing system was proposed in 1953, during the preparation of the New Dutch Civil Code, the Dutch legislator rejected the idea.72 Its objections related to e.g. asserted costs and increased bureaucracy caused by the filing requirement. In addition, the Dutch Parliament was not persuaded by the ‘false appearance of wealth’ argument, which public filing was said to solve.73 The discussion on whether a form of public filing should be adopted in Dutch law was put back on the agenda in 2009, when the Dutch Association of Notarial Practitioners74 appointed a committee (the ‘Commissie Pandregister & Aandeelhoudersregister’) to (re)consider the desirability and feasibility of adopting a public filing system. This committee was short-lived, however, being dissolved later that same year due to a widely felt lack of interest in such a register.75 In Austria, an academic proposal for the adoption of an electronic Register für Mobiliarsicherheiten was put forward in 2006,76 but this has received very little follow up, mainly due to opposition from banks and businesses.77

69 It should be noted that this development is not unique to Europe; a development of this kind is described in most of the above-mentioned model laws.
70 Drobnig 2011, p. 1032. Compare Merrill & Smith 2007a: “Security interests present a basic informational problem that is at the heart of property: How can people figure out which assets are subject to security interests?”
71 See e.g. German author Lwowski 2008, p. 179: “(…) neither the German banking industry nor the business community see any benefit in a filing system for security interests.” Cf. Stürner 2008, p. 168: “German creditors and German economy survived without perfection and publicity.”
72 Salomons 2013, p. 324.
73 Ibidem.
74 In Dutch, this is the Koninklijke Notariële Beroepsoorganisatie (‘KNB’).
75 Chapter 3 of this thesis will discuss this matter in more detail.
76 The working group responsible for drafting this proposal was headed by Schauer; see Schauer 2007.
77 The main concern expressed was fear that businesses would become too transparent, i.e. that it would be (too) easy for third parties (including competing creditors) to discover the amount of their debts. The term “der gläserne Schuldner” was often used in this regard, referring to a ‘glass debtor’.
Many European legal scholars from other jurisdictions have expressed concern about these non-public legal systems or have dismissed them as being mere exceptions to the rule:

“(…) the fundamental reforms adopted in many European domestic law systems (starting from the Netherlands, more recently in Hungary, Poland, France), or the reform projects in other countries (i.e. Austria), while not showing the emergence of a truly common model, do contain some shared features, such as for example the rejection of the German silent transfer of property by way of security in the field of movable goods and – with the exception of the Netherlands in this respect – the increased importance of publicity through a generally accessible registry system.”78, 79

The Comments to Book IX of the DCFR take the need for a public filing system even a step further, by describing publicity by registration of security in movable assets as a principle of European private law.80

5. The development of European secured transactions law

As indicated in the previous subsection, many European jurisdictions have reacted to the perceived lack of publicity by introducing some form of registration of non-possessory security rights in movable assets. In some legal systems, the validity and enforceability of retention of title arrangements are also subjected to these filing requirements, but there is no uniform approach to this matter.81 By adopting filing allowing everyone to see through it. I thank Wolfgang Faber (Salzburg University, Austria) for providing me with this insight. For more information on the subject, see Faber 2012a, p. 354, Faber 2012b and Koch 2010, p. 212.

78 Veneziano 2012, p. 127. Cf. Van Erp 2009a, p. 22 and Comment A to IX. – 3:301 (DCFR): “Only a few national legal systems, notably the German and Austrian systems, have not yet introduced such a system of publicity by registration; also here, however, the modern legal development already appears to be directed to an approach that is more in line with international standards.”

79 Compare ‘Discussion Paper on Moveable Transactions (no. 151)’ (Edinburgh: The Scottish Law Commission, 2011), on the fact that, under current Scots law, certain types of floating charge are exempt from registration: “This promotion of secret security rights seems to us contrary to public policy.” In footnote 13, the Scottish Law Commission adds to this: “Another regrettable move away from the publicity principle has been the abolition of the registration requirement for agricultural charges.”

80 See Comment A to IX. – 3:301 (DCFR).

81 Cf. Von Bar & Drobnig 2004, p. 338 and Comment A to IX. – 3:301 (DCFR): “The details of such registration systems (…) vary to a considerable extent between the individual Member States. Firstly, there are
requirements, a significant number of legislators appear to have been inspired by the notice filing system of Art. 9 of the Uniform Commercial Code (‘UCC’).\(^{82}\)

The drafters of Book IX of the DCFR also shared this source of inspiration.\(^{83}\) This is mainly attributable to the belief that Art. 9 UCC manages to provide uniformity in business laws among the various states, and simultaneously includes an elaborate system of priority rules. Within this framework, Art. 9 UCC’s notice filing system is seen as a way to adhere to (the principle of) publicity cheaply and efficiently:

“One of the main virtues of the U.C.C. Article 9 absorption of all of the pre-existing security interest devices into a single, all-inclusive generic category is that it reduced to a minimum the pernicious effect of secret liens.”\(^{84}\)

And:

“Under this system, for a nominal fee and the few minutes it takes to provide minimal data, a secured party can gain with certainty the priority accorded to a filed security interest that may cover millions of dollars of credit secured by millions of dollars worth of present and/or future collateral over a long period of time.”\(^{85}\)

It is therefore not surprising that Book IX DCFR bears many similarities to Art. 9 UCC. A prominent Dutch scholar in the field even argues that ‘Book 9 = Article 9’.\(^{86}\) Considering the basic concepts provided in both model laws, there seems to be some truth in this statement: both codes adopt a ‘uniform’ security interest in differencing general approaches as to the precise manner of the operation of the registration systems (…). (…). Secondly, the role of registration itself is not identical in all Member States.”

\(^{82}\) Among many others, see Grettan 2012, p. 262: “Art. 9 of the UCC has had a great influence worldwide”, Von Wilmowski 1996, p. 155: “Zum Vorbild aller Registerrysteme ist das amerikanische under Art. 9 des Uniform Commercial Code avantiert” (footnote omitted) and McCormack 2004b, p. 3-4: “Where the United States has gone before, others have followed.”

\(^{83}\) Veneziano 2012, p. 129: “A key feature of the proposed regulation on secured transactions in the DCFR is represent by the publicity regime. (…). The proposed text, following the UCC model, has chosen a notice filing instead of a transaction filing (…)” Cf. Van Erp & Akkermans 2012, p. 1070: “[Book IX, DJYH] is inspired by the U.S. system of Article 9 of the Uniform Commercial Code (UCC) (…)” and “The system introduced by Book IX of the DCFR follows the US Article 9 UCC system.”


\(^{85}\) Sigman 2004, p. 77. For similar references see e.g. Simpson & Menze 2000, p. 21.

\(^{86}\) Struycken 2009, p. 171.
movable assets and embrace a ‘functional approach’, both make a distinction between the concepts of ‘creation’ of a security interest (making the security interest enforceable against the debtor) and its ‘effectiveness against third parties’ (under Art 9 UCC, ‘perfection’), and, last but not least: both adopt a trans-state registry that is based on the concept of notice filing.

B. Main question and brief outline of research

Although the Commission’s proposal for a CESL indicates that we are a long way from the harmonization of European property law (including secured transactions law), the rules proposed by Book IX DCFR that relies on the concept of notice filing give reason to carefully consider whether this is an approach that the EU would be wise to adopt. The main question of this thesis is the following:

Should a European notice filing system for security rights in movable assets be introduced, and if so, to what extent should Art. 9 UCC serve as an example?

First and foremost, this thesis aims to assist the EU in making informed decisions about whether or not to adopt a European public notice filing system at all. In evaluating this question, this thesis focuses on the interests of several types of parties that are typically involved in or exposed to secured transactions operating within the borders of the European Union. More specifically and as will be discussed in more detail in section D, this thesis proceeds from the proposition that it is worthwhile to strive for a public notice filing system if (i) it effectively addresses the legal risks the aforementioned parties are exposed to in the absence of public information on security interests and (ii) does so in a manner that is cost-efficient for the parties concerned, i.e. in accordance with a cost-benefit analysis. Social costs or other externalities that the adoption of a public filing system may entail for the society as a whole will not be taken into account.

\footnote{This means that what parties call a transaction is simply not decisive: if the substance gives rise to a security interest, it qualifies as such. Hence, if parties intend to circumvent Art. 9 UCC by entering into a transaction that allows them to avoid the term ‘security’ or ‘security interest’, they will not succeed. \textit{Cf.} Veneziano 2012, p. 128.}

\footnote{Maybe we are not so far away from harmonization of European secured transactions law, given that some European jurisdictions have absorbed the groundwork laid by the DCFR by already implementing parts of it in their own national legislation; see supra footnote 38 on Belgian law. In Austria, Faber is pleading for modernization of Austrian secured transactions law along the lines of Book IX; see Faber 2012a and Faber 2012b.}

\footnote{A survey conducted by IFC on registers of security interests for movable collateral, published in 2012, was the first empirical study on this subject. See: De La Campa 2012, p. 4.}
Second, if the EU were to adopt such a system, this thesis aims to provide insight into its costs and benefits for the aforementioned parties on the one hand, while providing assistance on the other in designing the public notice filing system in the most efficient way possible.

In brief, three parts are fundamental to answering the main research question:

a) In Part I the need for public information on non-possessory security interests will be examined by mapping the problems and risks that exist in relation to several types of parties that conduct trade in a system where public filing is not available (a ‘non-public filing system’).

b) Part II will evaluate whether Art. 9 UCC mitigates the risks that exist in a non-public filing system, and if so, at what cost for the parties that run these risks.

c) Part III will map the similarities and differences between Art. 9 UCC and Book IX DCFR. It will examine which model law succeeds best in solving the risks that exist in a non-public filing system in an effective and cost-efficient manner. Conclusions on this matter will be presented and evaluated in the light of a possible future European notice filing system. Additionally, recommendations on its possible design will be provided.

C. Overview of research: extended

1. Part I: Scrutinizing the need for publicity

Part I of this research scrutinizes the need for public information on security interests, by first identifying the problems that exist in relation to third parties and the risks to which they are exposed in the absence of such public information. This will be done in three steps, set out in as many chapters (Chapters 2, 3 and 4).

Chapter 2 (‘Introduction to the puzzling concepts of publicity and possession’) explores the subject of publicity, by scrutinizing the various arguments that are often put forward to justify the enhancement of publicity. In doing so, in this chapter I will analyze the purpose of publicity from a purely theoretical perspective. At the same time, I aim to clarify many ambiguities that

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90 The EU may feel inclined to adopt a European notice filing system for reasons other than as examined in this thesis, for example, to fit in with the clear trend towards public filing; see supra A.3. By fitting in with this trend, the Commission may take the view that adopting a public filing system would enhance cross-border trade, as it would clearly create a level playing field; see in this regard also infra subsection E.3.

91 Chapter 2 draws upon an article that has been published in European Property Law Journal (2012) 1(2), pp. 299-316, and in Dutch, in the Dutch journal Weekblad voor Privaatrecht, Notariaat en Registratie, 142(6874), pp. 133–140.
obfuscate the publicity issue, in particular with respect to the link between ‘possession’ and ‘publicity’.

The second step in scrutinizing the need for publicity has its basis in Chapter 3 (‘An example of non-public filing: Dutch secured transactions law’). This chapter will show what a system of non-public filing looks like, first of all by describing its legal rules. The aim of this description is to provide an illustration of a non-public filing system in a developed economy, especially for scholars who are not familiar with a system where public filing is not available. In addition, Chapter 3 will generally describe how parties that are involved in secured transactions deal with – and operate within the boundaries of – these rules. This serves an outright exploratory purpose: by describing how these parties operate in a non-public filing system, and what problems they encounter, we may get an idea of what problems a public filing system might be capable of solving, and if so, to what extent. In order to analyze the fate of third parties operating in a non-public filing system, three examples of a non-public filing system would have been available to serve as an exploratory case study: the Netherlands, Germany and Austria, given that all three are examples of a non-public filing system in a developed economy. I have chosen the Dutch legal system for two reasons. First, being a Dutch academic myself, I am most familiar with Dutch (secured transactions) law. No other compelling reason presents itself that it should not be Dutch, but either German or Austrian law that should be taken as a case study. Last but not least, the Dutch Civil Code is often referred to as the most modern Civil Code in Europe. I am inclined to believe that this minimizes the risk

92 The link between these seems to be presumed by many, but in legal literature little attention is given to the question of how ‘publicity’ or ‘making public’ should be understood, or how physical possession – or transferring physical possession when creating a possessory charge – may (have) assist(ed) attempts to ‘make public’. See infra Chapter 2.


94 Cf. Anderson & Biemans 2012, p. 25: “The most recent re-codification of private law in Western Europe, meanwhile, is Dutch law: not only did it adopt an entirely new civil code in 1992, it amended its assignation provisions in 2004.” In the course of writing this thesis, this was overtaken by the fact that France renewed its secured transactions law in 2006 and 2007 (see Civil Code Article 2355 et seq.). The Dutch Civil Code may nevertheless still be regarded as relatively modern. It is in any event the most modern Code in a system that has not adopted a public filing system for non-possessory security.
that the Code is not, or no longer, consistent with the needs of legal practice, in comparison with other non-public filing systems.

As the third step, the synthesis of the findings of Chapters 2 and 3 will be presented in Chapter 4 (‘Analysis of the consequences of a non-public filing system’), by identifying problems that exist in relation to parties involved in secured transactions in a system where public filing is not available.

2. Part II: An examination of the U.S. approach: Art. 9 UCC

Part II of this thesis evaluates if and to what extent Art. 9 UCC provides an effective solution for the problems and risks that were identified in Part I. More specifically, it will evaluate whether the Art. 9 UCC framework and rules mitigate the risks for parties operating in a non-public filing system, and if so, at what cost for these parties. To this end, a general description of U.S. secured transactions law will first be presented, in Chapter 5 (‘U.S. secured transactions law with regard to movable assets’). The examination of Art. 9 UCC’s ability to provide an effective solution for the problems and risks identified in Part I will be presented in Chapter 6 (‘Examination of the Art. 9 UCC notice filing system’).

In analyzing whether the adoption of a public notice filing system on a European scale would be useful and to whom, I have chosen to review and analyze the model law that influenced the Book IX DCFR drafters most, namely Art. 9 UCC. Prior to and during the preparation phase of (Book IX of) the DCFR, Art. 9 UCC was often cited as the prime example for future European secured transactions law. Book IX DCFR and Art. 9 UCC are comparable in many respects and share the same basic structure. I could have limited myself to researching the draft rules of Book IX DCFR only, but I have chosen not to, as Book IX DCFR is not currently operational in an existing market: any problems that might arise in operating this system may therefore not be easily identified.

3. Part III: Towards a European public notice filing system?

Part III will evaluate the research results of Part II in the light of a possible future notice filing system on a European scale. It will primarily consider the question:

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95 Earlier, slightly different parts of Chapter 4 have been published in the European Review of Private Law 19, 5 (2011), pp. 613-630, and in Dutch in the Dutch journal Tijdschrift voor Insolventierecht, 2011, 01, pp. 6-13.

96 Chapter 5 describes Art. 9 UCC in its totality, i.e. not only the Art. 9 UCC filing system. This is prompted by the belief that the operation of the Art. 9 UCC notice filing system cannot be understood without some idea of the legal rules that facilitate this system. See LoPucki 1995, p. 583 in this regard: “(…) the essentials of the design of a filing system are imbedded in law, principally Art. 9 UCC.” In addition to the official text of the UCC, the Official Comments that are set out for the provisions will be taken into account. The Official Comments do not override clear textual provisions but are often used to clarify and explain ambiguities in the text.

97 See supra footnotes 82 and 83.
should we head towards the adoption of a European public notice filing system, and if so, should this differ from Art. 9 UCC in any way? To this end, it will evaluate whether Book IX DCFR is designed in such a way that it mitigates the risks that exist in a non-public filing system, and if so, whether it does so more effectively and more efficiently than Art. 9 UCC. It will also present several proposals with the aim of further improving Book IX DCFR. Chapter 7 (‘From Art. 9 UCC to Book IX DCFR and beyond’) is in fact devoted to this analysis. Chapter 8 (‘Synopsis (summary)’) will provide an outline of the research.

D. Research approach
1. Object of research: ‘third parties’ and the debtor
In evaluating the desirability of a public notice filing system, this thesis takes into account the position of parties that are typically involved in or affected by secured transactions, categorized by the nature of their involvement. The following types of parties will be discussed:

i. Lenders: these are typically, but not necessarily,98 banks that are secured by a security interest over the debtor’s assets. I will discuss the position of both secured lenders and unsecured lenders.99

ii. (Selling) trade creditors: these are e.g. sellers of movable assets that have sold and supplied their assets to the debtor on credit terms. I will discuss the position of both secured and unsecured trade creditors, noting that the latter will be discussed under category v, below.

iii. Buyers: these are parties that have purchased movable assets from the debtor. Buyers can be divided into buyers in the ordinary course of business (of the seller)100 on the one hand and buyers not in the ordinary course of business (of the seller) on the other; both positions will be discussed in this thesis.

iv. Attaching unsecured creditors or execution creditors: creditors that have commenced enforcement action against (part of) the debtor’s assets to recover their trade debts.101,102

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98 Other creditors may hold security over the debtor’s property as well, for example a shareholder that extends a secured loan to the debtor. The same principles apply for these creditors as will be discussed in respect of secured lenders.

99 I have chosen to use the term ‘lender’ rather than ‘bank’, because this is more consistent with the jargon used in legal practice.

100 As will become clear in the following chapters, reference to ‘business’ here is reference to the business of the selling debtor.

101 Many scholars tend to classify the trustee in bankruptcy as a ‘third party’ against which proprietary interests may or may not have effect. I will leave this to an aside and will for purposes of my thesis consider the trustee in bankruptcy to be merely a representative of all the creditors that must be paid from the bankrupt estate, in practice mostly general unsecured creditors; I will therefore not treat the bankruptcy trustee as a separate category. Compare Livingston’s remark
v. General unsecured creditors: creditors that do not have the benefit of a security interest or any other preference.\textsuperscript{103}

vi. The debtor: the debtor is at the center of the above transactions, because it e.g. has borrowed funds from the lender, has bought from a trade creditor, has sold to a buyer or owes money to an (attaching) unsecured creditor.

In addition to these categories of parties, I will briefly address the position of credit rating agencies\textsuperscript{104} and non-contractual creditors.\textsuperscript{105}

The above selection has been made on the basis of my belief that the extent of a party’s need for public information on security rights is mainly influenced by the nature of that party’s business, resulting in particular market behavior, expectations and needs; its legal position – for example whether it is secured or unsecured – is just one aspect of this. The parties are therefore categorized by the nature of their business, such as whether they are in the business of ‘lending’ or ‘selling products’, and the nature of their relationship vis-à-vis the debtor, with due regard to the question of whether they are secured or not. A ‘lender’, for example, refers to a party that has actively lent and remitted funds to the debtor, thus drawing a distinction from parties that may have a money claim which has arisen in some when discussing the position of the bankruptcy trustee under U.S. law: “(…) the trustee is not a reliance creditor. In other words, the trustee did not lend against the debtor’s assets based on having viewed information in the public files.” Michelson Hillinger, Leipold & Livingston 2004, p. 680.

\textsuperscript{102} The category mentioned here may seem to overlap with the category of ‘general unsecured creditors’ mentioned under bullet v. I have decided to discuss both categories separately as in many legal unsecured creditors are treated differently for the purposes of law if they have commenced enforcement action against (part of) the debtor’s assets to recover their trade debts.

\textsuperscript{103} Although the term ‘general unsecured creditor’ usually refers to a trade creditor that simply never intended to reap the benefit of a security interest, or to non-contractual creditors that never had the possibility to stipulate security (such as the victims of tort), \textit{lenders or buyers} may also be covered by this term, so this category may overlap with other categories mentioned above. For example, an unsecured creditor can be a lender whose security interest has not attached (yet), or a lender that is only \textit{partly} secured – and thus partly unsecured – because the security interest does not cover the whole amount of the loan. In addition, an individual who has purchased an item from the debtor but has not yet received the asset may qualify as a general unsecured creditor.

\textsuperscript{104} The interest of credit rating agencies is in fact derived from those parties to which credit rating agencies provide information. Their position is nevertheless addressed in this thesis, because in the literature on the subject they are often described as parties that would (also) benefit from publicity provided by a public filing system. See infra Chapter 4.

\textsuperscript{105} Parties that may also have interests in respect of the same collateral include e.g. lessees and licensees and the tax authorities, but these positions will not be discussed in this thesis.
other way than through the lending and remittance of funds, such as a trade creditor that grants a term for payment for the goods sold.\textsuperscript{106}

Although this thesis will discuss the position of all the aforementioned parties, it will mainly focus on the position of creditors, \textit{i.e.} secured or unsecured lenders and secured or unsecured trade creditors; see categories i, ii, iv and v. Furthermore, the research is limited to non-possessory security over movable assets.\textsuperscript{107} Accordingly, my analysis will primarily focus on the rules applicable to creating security over inventory and equipment. Security over immovable and intangible assets falls outside the scope of this thesis. In fact, I chose to select the aforementioned parties on the basis of a simplified perspective on commercial trade, by looking at a typical manufacturer of goods who purchases parts from ‘trade creditors’, manufactures product and then sells this product to its customers and traders. That manufacturer is referred to as ‘the debtor’, since this thesis will concentrate on its relationship with the suppliers that are its trade creditors, and the ‘lenders’ that extend working capital to fund a manufacturing business. The following simplified business structure of the debtor will therefore be taken as a starting point for this research:

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\textsuperscript{106} Hence, the term ‘trade creditors’ is used to refer to the group of creditors whose business is to supply goods or services to the debtor; the term ‘lenders’ is used to refer to the group of creditors whose business is to supply credit, and only credit, to the debtor. The core activity of trade and general unsecured creditors is the sale of goods or services, and the claim of a trade creditor represents the consideration payable by the debtor for the goods or services purchased. Any extension of credit terms by the trade creditor in respect of the claim for payment is a by-product at best. The claim of a bank, on the contrary, will have its basis in the extension of credit itself.

\textsuperscript{107} See \textit{infra} footnote 10 of this Chapter.
2. Cost-benefit analysis (‘CBA’)
In evaluating the desirability of a public filing system, this thesis will adopt a cost-benefit approach. In a nutshell, I will try to find an answer to the question whether the selected parties will be “better off” in a system where a public filing system exists, measured by both its effectiveness and cost-efficiency. In so doing, I will address what I consider to be the constituent parts for such cost-benefit analysis, without going as far to put a money amount on each of those parts. The ultimate aim of this approach is to assess whether it is likely that the adoption of a public filing system on a European scale will be economically efficient for the parties that are typically involved in secured transactions and operate within the borders of the European Union.

The motivation for taking this approach is twofold. First, it is based on the belief that although providing ‘publicity’ seems a good idea in the abstract, generating it by means of a public filing system will be neither easy nor free; it will come at a price, and will present difficult logistical issues for the parties using and relying on the system. The question whether publicity is desirable or not cannot be answered solely by reference to what would be best in an ideal world, but largely by what is feasible in practice for these parties. This therefore raises the question

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108 On the use of a cost-benefit analysis, see e.g. Wittman 2006, p. 21 et seq. and Faure 2011.
109 Hence, I remind the reader that in making this cost-benefit analysis I will focus on the position of the selected parties only. I will not take account of social costs or other externalities that the adoption of a public filing system may entail for the society as a whole.
whether publicity is still so ‘convenient’ if it is provided in the form of a public filing system or, more specifically, in the form of a public notice filing system, as adopted in the U.S. In my view it is therefore only logical that whether or not it is in the interests of the investigated (third) parties to introduce a public filing register, ultimately depends on a cost-benefit analysis; the main question is whether the filing system solves the problems of a non-public filing system, and if so, how effectively it does this and at what cost for the parties involved. The second motivation for taking this approach is that it is in line with the assumption often made in legal literature that a public filing system would improve the position of secured and unsecured creditors in the aforesaid manner. It is generally assumed that businesses, in their capacity of ‘third party’, would benefit from the adoption of a (European) public filing system ‘U.S. style’, e.g. because it would reduce legal uncertainty and – as a result of that – costs. Depending on context, the term ‘third parties’ is used here to refer to all conceivable kinds of parties operating in the market that have a right or claim vis-à-vis the debtor of any nature whatsoever, including but not limited to buyers, lenders, trade creditors, victims of tort and so on:

“(...) registration in a movables registry (...) reduces legal risk in secured financing transactions by publicizing notice of a charge over assets in the possession of the debtor to interested third parties, such as subsequent buyers or the debtor’s other secured and unsecured creditors.”

The assumption that public filing would improve the position of lenders is presumed to translate to the position of debtors, since lenders are said to pass on to

110 I am not alone in this view. Cf. Smith 1995, p. 751: “(...) the cost/benefit analysis is key in judging the filing system (...)” and LoPucki 1995, p. 583: “(...) the filing system is a physical system composed of much more than law. The appropriate design for such a system depends on a series of cost-benefit analyses that depend in large part on how the system is actually used.”

111 Compare Plank 2013, p. 461, who points out that “(...) simplifying secured transactions and enabling parties to enter into secured transactions with lower transaction costs” is a policy goal of Art. 9 UCC.

112 These parties correspond to the parties mentioned in subsection D.1, categories i-v. It is perhaps for this reason, that these (and other) ‘third parties’ are also referred to as ‘the world at large’; see e.g. Goode 2004a, p. 648, Drobnig 2003, p. 644, Merrill & Smith 2007b, p. 1853 and Comment B to IX. – 2:201 (DCFR).

113 ‘A Guide to Movables Registries’ (Manila: ADB, 2002), p. 7. Cf. e.g. Harris & Mooney 2006, p. 193 on the U.S. notice filing system: “One generally acknowledged purpose of the Article 9 filing system is to provide information to third parties.” And on p. 170 of this source: “The filing system is designed to provide publicity about possible claims against a debtor’s property.” Likewise, Adams: “[By filing a financing statement, DJYH] (the secured party (...) puts the world on notice of her interest (i.e. cures the ostensible ownership problem) which is generally valid against persons who thereafter deal with the collateral.” Adams et al. 1995, pp. 880-881. See DCFR (Outline Edition) 2009, p. 83 on the filing system provided for in Book IX DCFR: “The whole objective [of Book IX DCFR, DJYH] is to enable parties to provide and obtain security for the proper performance of obligations. The rules are comprehensive and cover all types of proprietary security over movables assets, including retention of ownership devices. They aim at maximum certainty by recommending a registration system for the effectiveness of a proprietary security against third parties.”
their borrowers (i.e. ‘the debtor’) the risk that they run due to the absence of a public filing system. Debtors would therefore benefit from the adoption of a public filing system, as it would enable them to obtain credit more cheaply:

“(…) it allowed them [i.e. debtors, DJYH] to obtain access to credit at a cost lower and more expeditiously than in systems where information about the assets of the debtor was not readily available.”¹¹⁴

This thesis will thus discuss this assumption for both ‘third parties’ and ‘the debtor’: are they likely to be “better off” in a system where a public filing system is present, measured by effectiveness and cost-efficiency?

Last but not least, the focus on ‘efficiency’ seems to be in line with the objectives set by the European Commission in its Green Paper on policy options for progress towards a European Contract Law for consumers and businesses (“Green Paper 2010”) and preceding policy documents, drawing attention to the importance of reducing transactions costs and creating legal certainty.¹¹⁵

2.1. Yardstick I: effectiveness (problem-solving approach)

In evaluating whether a public notice filing is effective, a problem-solving approach is adopted: I will examine if and to what extent a public filing system solves the problems or mitigates the risks that exist in relation to the investigated parties in the absence of public information on the existence of non-possessory security. A certain situation is considered a problem or risk if the investigated parties incur, or are likely to incur, costs¹¹⁶ caused by the absence of public information on security interests.¹¹⁷ A certain legal rule represents a solution if it solves the problem, i.e. if it actually mitigates the risk.

¹¹⁴ See e.g. ‘Official Records of the General Assembly, Thirty-fifth session, Supplement A/CN.9/512’ (New York: United Nations Commission on International Trade Law 2002), para. 64. Compare E.-M Kieninger: “Usually, the creditor will therefore charge a lower interest or might extend credit more readily if the debtor is able to give collateral. Thus, a functioning system of security rights is not only beneficial for creditors but also for debtors, since it lowers the price of borrowing.” And: “In fact, all projects for a reform or harmonisation of the law on secured transactions invariably start from the proposition that a well-designed, harmonised or uniform law would enlarge the range of available low-cost credit and would therefore be economically beneficial to trade and industry in the individual jurisdiction or in the area where the harmonisation measure would be applicable.” Kieninger 2007, p. 7.


¹¹⁶ For purposes of this thesis, the term ‘costs’ has a broad meaning: it includes e.g. direct and indirect costs, damages, actual losses, effort. Cf. the remainder of this subsection on ‘deciding factors’.

¹¹⁷ With regard to the evaluation of what kind of risks third parties run, I have chosen to be guided by the common assumptions and assertions in contemporary legal literature and start the analysis from there.
2.2. Yardstick II: cost-efficiency
In addition to the investigation of whether a public filing system solves the problems that exist in relation to the investigated parties due to the lack of publicity, this thesis will investigate whether it does so at a lower cost than those parties would have incurred if no such filing system had been provided. In other words, the filing system that is presented as the solution should not only be effective (see previous subsection), but also cost-efficient. A filing system is ‘cost-efficient’ if it reduces the costs the investigated parties would incur in a system where it is absent, i.e. in a non-public filing system. The cost-efficiency aspects of the filing system will be addressed in mere conceptual terms and will be mapped on the basis of several ‘deciding factors’, e.g. the direct costs that are incurred to make use of the filing system (such as search and filing fees), but also the indirect costs such as its user-friendliness and effort that parties must make in order to use it. This includes the difficulties in practice of needing to check and monitor the filing system, as well as the time required for updating and the risk of potential errors. It will be left to empirical law and economics experts to put more precise figures to these elements.

Especially when the fate of various different parties is investigated, there could be different interpretations of what is ‘efficient’. In this thesis, a public filing system is considered to be ‘efficient’ – and hence desirable – if, on balance, its adoption is beneficial to the parties concerned, regardless how the benefits are allocated amongst them. This is in line with the most modern view regarding the term ‘efficiency’.

E. Methodology and scope
1. The role of comparative law
Where it comes to the role of comparative law in this thesis, it must be stressed that an outright comparison of the legal similarities between the EU and the U.S., or between the Dutch legal system and that of the U.S. has not been undertaken. The description of Dutch law, in Part I, has a purely illustrative and exploratory role within the analysis of the problems that exist in a legal system where a public filing system is not available. In adopting this approach, the starting point taken is that the Dutch case study has the potential to unfold the problems and risks faced by parties that are involved in and exposed to secured transactions and operate within the borders

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118 See e.g. Lawless, Robbennolt & Ulen 2010.
119 Economists often use the term ‘Kaldor-Hicks efficiency’ to refer to this efficiency concept; see e.g. Revesz & Stavins 2007, p. 505 et seq and Witman 2006, pp. 22 et seq for more detailed information on this subject. If the outcome of this research is that the adoption of a public filing system will be ‘efficient’ to the selected parties, it will be likely that it will also be beneficial to society as a whole, if only because it will reduce the burden on the judicial system. In this thesis, however, I will not give attention to this question.
of the European Union, because these parties have comparable commercial needs.120

Part III of this research does contain a legal comparison. In this part, an examination is made of whether Art. 9 UCC and Book IX DCFR respectively are designed in such a way that they provide an effective and cost-efficient solution to the problems encountered by the investigated parties operating in a non-public filing system. This is followed by an analysis of the question which model law succeeds best in solving these problems in an effective and cost-efficient manner.

2. The (limited) role of empirical research and source materials used
Several sources of information will be used to analyze the existence and nature of the problems in a system of non-public filing (see Part I). First, this analysis will be conducted by describing the legal rules that exist in the Dutch system of non-public filing (Chapter 3; section 2).121 In addition to describing the Dutch legal rules, I will provide a general description of how the investigated parties operate in the practice of the Dutch system of non-public filing (how these rules are used or maybe not used or even avoided) wherever that behavior seems relevant to the question of whether the absence of a public notice filing system influences their behavior.122 In these descriptions, I will focus on the position of creditors, i.e. (secured or unsecured) lenders and (secured or unsecured) trade creditors.123 Accordingly, I will provide a general description of the practical process of lending by banks and supplying on credit terms by trade creditors, in which I will concentrate on mapping the following four issues:

i. the process of entering into a credit relationship, with the focus on the most important considerations and deliberations that are made in this process

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120 Compare Zweigert & Kötz 1998, p. 26, who point out that in certain spheres of activity, such as wholesale trade in primary commodities or banking, there are general conditions or customs of business that are the same or similar in many countries.
121 Compare in this regard ‘Secured Transactions Systems and Collateral Registries’ (Washington DC: IFC, 2010), p. 31: “The foundation of any modern secured transactions system is the legal basis upon which it is designed, constructed and operated. The legal framework determines all elements of the secured transactions regime, including execution of the security agreement, the registration process, determination of the relative priorities among conflicting claims to collateral and the enforcement of such claims.” The underlying idea of this is that such rules can to some extent be seen as the repercussions of the needs of – and hence: problems experienced by – the market parties operating in practice. Now it may be, of course, that a civil code is too outdated to serve the needs of practice, but the Dutch Civil Code is regarded as one of the most modern civil codes in Continental (Western) Europe. See supra footnote 94.
122 The underlying idea of this is that a risk from the legal point of view can be resolved by all types of non-legal instruments or methods. Hence, mapping the legal risks encountered by third parties is not a sufficient basis for drawing conclusions, especially when we consider that the purpose of Art. 9 UCC is precisely to facilitate economic, i.e. business transactions.
123 See categories i, ii, iv and v in subsection D.1.
Main question, research approach and methodology

i. the decision to stipulate collateral security in movable assets, the extent to which this is done, and relevant factors in this

ii. the legal and non-legal tools to control the debtor in case of default, and finally

iii. the methods for covering shortfalls in the event of the debtor’s default.

These issues will be mapped on the basis of, in part, Dutch literature on Dutch financing practice, enhanced by other sources of information. With regard to mapping the behavior of lenders in particular, I examined the annual accounts of several leading banks. Furthermore, I interviewed 14 practitioners working in the banking industry, including bankruptcy trustees, lawyers but mainly bankers employed by leading banks. These bankers work in credit-related fields, ranging from account managers in the credit provision business to directors of such departments, as well as employees in the ‘Credit Risk’ and ‘Insolvency’ departments.124 With regard to mapping the behavior of trade suppliers, I examined the sales conditions of 25 randomly selected businesses in the SME segment. Furthermore, I examined large-scale surveys conducted by a major international trade credit insurer (Atradius).125

3. Matters of scope
Although the Commission says that the ultimate purpose of reducing transactions costs and creating legal certainty is to promote cross-border transactions,126 this thesis does not focus on whether the adoption of a European public filing system would improve cross-border trade as such. The justification for this is the belief that the adoption of a uniform approach to ‘publicity’ in secured transactions law – whether by adopting a European public filing system or by embracing a non-public approach – will always enhance cross-border trade, simply because uniformity creates a level playing field.127 Compare Veneziano, not so much on the adoption of a European filing system, but on the harmonization of European secured transactions law in itself:

“Even jurisdictions with a relatively functioning domestic regime, however (such as Germany or England) would gain from the introduction of a common European model.

124 Anonymized reports of these interviews are on file with author.
125 Taking into consideration that the Atradius reports, given Atradius’ interest of selling credit insurance, may be one-sided or potentially be biased, in drawing conclusions as to the behavior of trade creditors, I have relied on the other aforementioned sources of information and the available literature. See infra Chapter 4, subsection 2.2.
Chapter 1

Though the devices existing in such legal systems may be generally perceived as working in a satisfactory way within the national boundaries, it is a fact that the domestic security rights do not easily cross borders at present, while goods and account receivables do or should do so.\textsuperscript{128}

Hence, this thesis explores whether a public filing system on a European scale would, in addition to enhancing cross-border trade, be likely to produce efficiency benefits for parties that are generally involved in secured transactions and operate within the European Union.\textsuperscript{129}

\textsuperscript{128} Veneziano 2012, p. 125 (footnotes omitted).

\textsuperscript{129} More specifically, it will address the question: would parties that are generally involved in secured transactions and operate within the European Union be able to operate more efficiently if secured transactions law (which is harmonized within the EU) is facilitated by a public filing system (‘system A’), or if this is not the case (‘system B’). \textit{Cf.} Adler & Posner 1999, p. 177 on using such an approach.