

# Publicity of Security Rights

Guiding Principles for the Development of a Charges Registry



**European Bank**  
for Reconstruction and Development

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## **Guiding Principles for the Development of a Charges Registry**

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# Introduction

The European Bank for Reconstruction and Development (EBRD) was set up in 1991 to serve as a catalyst for change in the region of central and eastern Europe. Part of its mission is to encourage change to the legal regimes and institutions in its countries of operations to help them become better adapted to the needs of market economies.

In achieving this mission, the EBRD is convinced that it is most important to offer tools which explain the *why* and the *how* in practical and impartial terms so that those involved in reform are better equipped to undertake their work.

From the outset, the EBRD has placed particular emphasis on secured transactions and far-reaching progress has been made in this field. When the EBRD was established, none of its countries had a workable law for taking security over movables; today virtually all do. But the rules and practices concerning the publicity of security rights remain far from satisfactory. In many countries no viable means has been established to enable a third party to find out whether assets are encumbered by security. And in many countries where it does the system does not operate efficiently.

The *concept* of a registration system (whether called notice filing, public recording, or whatever) dedicated to publicising security rights created over movable assets by debtors has slowly gained prominence. However the diversity that exists between the systems that have been developed in the region, and the lack of reliable information about their efficacy, has led the EBRD to produce a set of principles on the *basic requirements* for such a system, together with guidelines for their implementation. This has been done by drawing on work already carried out in this field<sup>1</sup> and on the EBRD's own experience advising on such developments,<sup>2</sup> and more generally in assessing secured transactions regimes across the region.<sup>3</sup> It was also supported by an assessment carried out in 2003/2004 of the charges registries operating in six jurisdictions in the Balkans region.<sup>4</sup> The EBRD is grateful to the many people who have contributed views as this work has progressed.

The principles are proposed as a basis for designing or assessing a charges registry. They are 'guiding' principles and do not seek to impose any particular solution on a country. The principles concentrate on the result that should be achieved. Ways of achieving the result (and there may be many) are discussed under 'Implementing Guidelines and Recommendations', where the relative advantages of different options are presented, with illustrative examples in the notes of how such questions have been decided in the region. An Annex on the technical requirements of a charge register presents the most important aspects of the computer system which will have to be developed.<sup>5</sup>

By expressing in simple, impartial terms the qualities and features that a registration system should possess, the EBRD hopes to trigger a debate involving all participants – policy-makers, users, technical assistance providers – on what has been achieved to date, and to provide a practical basis from which improvements can be developed for the future.

*The EBRD wishes to acknowledge the generous support to this project by the government of Canada and the government of the United Kingdom.*

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<sup>1</sup> See in particular Asian Development Bank Guide to Movables Registries, *Law and Policy Reform at the Asian Development Bank*, 2002. The UNCITRAL Working Group VI is also currently working on a Legislative Guide on Security Interests, which will recommend publicity of security interests as a core element of a sound secured transactions regime. See [www.uncitral.org](http://www.uncitral.org).

<sup>2</sup> Especially in Hungary and Slovak Republic.

<sup>3</sup> See the Regional Survey on [www.ebrd.com/st](http://www.ebrd.com/st).

<sup>4</sup> The assessment covered Albania, Bulgaria, Kosovo, FYR Macedonia, Montenegro and Romania. It is published on EBRD's website at [www.ebrd.com/st](http://www.ebrd.com/st).

<sup>5</sup> The annex was developed with the technical expertise of the firm MacDonald, Dettwiler and Associates Ltd, British Columbia, Canada.

# Explanatory Note

## What is a charge?

### Quasi security and the functional approach

The expressions 'charge' and 'security right' are used interchangeably in this document to refer to a limited (ancillary) right in property which enables a creditor, upon default by the debtor, to recover his claim out of the charged assets. The substantive law of each country (either in the civil or commercial code or in a special law) will usually define what transactions are covered by the secured transactions law.<sup>6</sup>

Other transactions may have similar effect and may be used to give security, for example:

- *retention of title (or reservation of title)*, where the unpaid vendor retains title in the asset sold after delivery, the purchaser only becoming owner upon payment of the sale price.
- *conditional sale*, where the sale remains conditional upon full payment of the price, thus enabling the unpaid vendor to take back the asset sold.
- *transfer subject to retransfer (or fiduciary transfer)*, whereby the debtor transfers an asset to the creditor on terms that the creditor will transfer it back when the debt is paid.
- *assignment of accounts receivable*, whereby a debtor transfers to his creditor his claim for money against a third party, with or without notification to the third party.
- *financial leasing*, where movable assets are held on a lease, with the lessee having the right to acquire them from the lessor at the end of the lease term.
- *warehouse receipts*, where goods are deposited in a warehouse on terms that they will only be released upon production of the relevant certificate(s) issued by the warehouse keeper.
- *documentary receipts*, where documents entitling the holder to delivery of the assets (for example, shipping documents) are held by the creditor.

In some jurisdictions, notably the USA,<sup>7</sup> all transactions which have the effect of security are treated as a charge, regardless of their form. This so-called 'functional' approach has been followed by a few jurisdictions in central and eastern Europe.<sup>8</sup> Generally, however, countries in the region approach the subject formally, providing a specific regime for charges, with other transactions such as those listed above being subject to different rules.

When a functional approach is adopted, the consequence is that all transactions which have the effect of security (whether or not in the form of a charge) are treated as a charge and are thus subject to the rules that apply to publicity.

Where a functional approach is not adopted, it is necessary to address publicity for other forms of transaction used for security. If publicity is required for a charge it should not be possible to avoid it merely by choosing an alternative form for what is in effect a security transaction. The extent to which 'quasi-security' should be made subject to rules for publicity similar to those that apply to charges has to be decided in the particular context of each jurisdiction.<sup>9</sup>

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<sup>6</sup> See the relevant laws for all of the EBRD countries on the EBRD Secured Transactions Project website, at [www.ebrd.com/st](http://www.ebrd.com/st).

<sup>7</sup> See Article 9 US Uniform Commercial Code, subject to specific rules on certain transactions, for example, warehouse receipts.

<sup>8</sup> See in particular Albania, Kosovo, and Montenegro.

<sup>9</sup> In Bulgaria, for example, sales with retention of title and financial leasing must also be registered in the Central Pledge Registry. In Romania, assignments of accounts receivables, conditional sales, and financial leases must also be registered.

# Guiding principles

## 1. A regime for secured credit should provide for effective publicity of charges.

The development of a publicity system is essentially an economic exercise, not a legal one, where the ultimate objective is the reduction of risk.

- Charges are useful because they can reduce the risk attached to credit.
- Risk reduction is dependent upon certainty of the creditor's right in charged assets.
- Publicity enables third parties to discover that the creditor has a prior right in the asset.
- Publicity also enables the creditor to ascertain existing charges affecting charged assets.

Without publicity a creditor is unlikely to have sufficient certainty in his rights in the charged assets. The situation is different where he takes them into his possession or control, for example in the case of security over shares or bonds.

A publicity system can only operate *effectively* in a market economy if:

- it is simple, fast and easy for all parties to use;
- it supports the needs of the whole of the credit sector and does not, for example, restrict access to only a few privileged users (for example, large domestic banks);
- the market is willing to use the publicity system;
- the system actually enables the public to become aware that charges exist.

The willingness of the market to use the publicity system and the extent in practice to which the system actually enables the public to become aware that charges exist are key indicators of the effectiveness of the system.

## 2. As a result of publicity it should be possible to find out what charges are claimed over a person's assets and their chronological order of ranking.

The need for publicity derives from the desire to avoid the problems that arise when one person who has, or wishes to acquire, rights in an asset is not able to ascertain what rights others may have in the same asset. If this is to be achieved, the publicity system must not only identify the person who is giving the charge, but also give the means to identify the assets which are encumbered by describing them specifically or generally.

The publicity system also provides a convenient method for determining the order of ranking between competing rights claimed in the same asset.

- The order of ranking is normally determined by the chronological order of publication.
- A person with an existing charge should not find that his priority has been harmed without his consent.
- A person acquiring a right in the asset should not acquire it subject to a charge of which he had no notice.

## 3. Publicity is best achieved by registration, most often against the person granting the charge.

The publicity system should:

- make it possible to give notice of a charge over any asset belonging to any person; and
- render the information in the notice easily and universally accessible to the public.

The only means of publicity which permits this is some form of centrally held, publicly accessible register.<sup>10</sup> The register has to be designed in a way which enables it best to fulfil this function. In particular, it should be computer-based - this will greatly increase the simplicity, speed and efficiency of recording and retrieving information as compared to a paper-based system.

There has to be a basis for primary classification (and thus later recovery) of the information:

- In theory the choice is to classify by person (as in a company or commercial register) or by asset (as in a land register).
- It is relatively easy to construct a simple and uniform method for uniquely classifying and indexing all chargors, that is the persons (physical and legal) who create charges (by reference to name, ID or commercial registration number, address, date of birth, and so on).
- It is much more difficult to do so for assets. Some assets may have a unique identification number (vehicles, machines) or other unique identity feature (works of art), but for many assets unique identification is impractical (for example, stock in trade, small equipment, grain, oil).

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<sup>10</sup> The term 'register' is used to refer to the physical file or database that contains all the information that has been registered; 'registry' to the institution which fulfils the registration function; and 'registrar' to the person responsible for operating the registry. This term is used in practice to include the agent or the representative of the registrar with whom a user has contact.

- If a charge over the universality of the debtor's assets is to be possible, registration cannot be made against the assets.
- In practice classification by person is the only solution which can be of general application.

#### **4. Failure to publicise a charge makes it ineffective against third parties.**

In some legal systems publicity is a condition for the creation of a charge, or is even the act which creates the charge.

In others it is merely the means by which the chargeholder acquires prior ranking against other persons with a claim in the charged asset.

Whatever the approach adopted, the effect in practice of a failure to publicise should be the same: no charge in the register means no security right that can be effective against third parties.

This is essential for ensuring a sufficient level of certainty for assets to be freely bought and sold, or offered as collateral.

#### **5. The system for giving publicity and for accessing the publicised information should be simple.**

Simplicity is fundamental to any publicity method. Each element of unnecessary complexity for the user or the registrar (and its agents) reduces efficiency. Respect of the principle of simplicity should pervade every aspect of the design of the registry, for example:

- Rules governing registration should be defined in clear and simple terms, any instructions, guidelines, manuals should be fully consistent.
- Procedures for registration should be kept simple and easy to follow. Any temptation to supplement the procedures with unnecessary requirements (for example, production of documents to accompany registration) should be strongly resisted.
- The nature and amount of the information to be registered, and the form in which it is registered and retrieved, should remain simple (while being useful to the public).
- An entry in the register serves only to give notice that a security right may exist over certain assets of the chargor. There is no need for anyone other than the parties to check or confirm the validity of the security right or the accuracy of the information to be publicised. The fact that information appears in the register does not 'authenticate' it or validate the security right.
- The technical structure should be made simple for the registrar (within the constraints of cost effectiveness).

- The registration service should be widely available, to ensure easy access by all citizens and businesses.
- Immediately upon registration the person requesting registration should be able to obtain a print out of the information as entered into the register, confirming the entry that has been made.
- Procedures for searching should be kept simple, should be clearly explained and easy to follow. There should be no requirement to justify a search.

#### **6. The system for giving publicity and for accessing the publicised information should be fast and inexpensive.**

Any person should be able to make a registration or a search without unnecessary delay or cost.

Using modern technology it should be possible for a new entry to be available in the register within a few minutes of the registration request being made. Searches should be quasi instantaneous.

The costs of registering and searching should be kept to the minimum level that is feasible. Unless the registry is subsidised the fee will have to cover the capital and operating costs of providing the registration service but it should not include any element of taxation or excessive profit for the registrar.

The capital and maintenance costs of the computer system should be carefully assessed with a cost/benefit analysis for each feature.

It is desirable that the fees for the registration service are determined on a transparent basis and that the income and expenditure accounts of the registry are open to the public. This provides a means of control and also strengthens public confidence.

Ultimately the fees for registration should not deter the public from using the system, especially for smaller transactions where the role of collateral as a facilitator of credit is often at its greatest.

#### **7. The register should be accessible for all persons and all registered information should be public.**

There should be no restriction as to who can search the register. The purpose of registration is to provide information to the public, so neither the registrar nor any other person should be entitled to limit the right of access to any registered information.

The search procedures should be designed to facilitate retrieval of information. Current information in the register should be available immediately on screen and with the facility for any member of the public to obtain an immediate printout.

Searching points should be organised so that any person, wherever situated in the jurisdiction, can have easy access. The internet is likely to provide the most efficient and accessible search medium.

#### **8. The method of recording, storing and accessing information should protect against error, abuse and fraud.**

The computer system should be designed to avoid registration of incomplete, irrelevant or incompatible information and to minimise the possibility for human error (for example, by using drop down menus, compulsory fields, clear guidelines).

Search procedures should facilitate information retrieval (for example, by showing names with similar spellings, permitting the use of wild cards). The reliance placed on negative search results makes this especially important.

The computer system and its operating procedures should include adequate protection against loss or corruption of data in the registry database, whether through technical fault, unauthorised access or tampering, or occurrence of disaster. It should not be possible to register a charge over a person's assets without authorisation, which may come from the person himself or from a judicial or administrative decision. The registration procedure may require that evidence of such authorisation be produced to the registrar or his agent. If a charge is registered without authorisation, the person against whom it is registered should be able to obtain deletion through a fast and simple procedure and to obtain compensation.

Procedures for registration of amendments and cancellation (termination) should incorporate similar protection against error, abuse and fraud. It should not be possible to cancel a charge without the chargeholder's authorisation, or other appropriate safeguards.

Correction of factual errors directly by the registrar should be limitatively defined and duly documented.

#### **9. The registry should be operated and managed transparently as a public service.**

Operation may be delegated in whole or in part to persons in the public or private sector but the responsible government department should ensure that there is an effective system of supervision and that the registration system operates in the manner intended by the law and relevant regulations.

The ownership and licensing of the software, hardware and data must be clearly defined.

The general public should be made aware of the existence of the registry, the way it operates and the consequences of registration.

The registry should be reliable, available and operational during its defined service hours. Uncertainty as to the availability of the service, either for registering charges or searching, will quickly discourage potential users.

Standards of performance should be established, actual performance measured, and the results made publicly available.

The registrar should be required to report regularly to provide information to the supervising authority on all aspects of the operation of the registry, and to demonstrate that the registry is performing as required by law. The registry should be subject to a regular independent audit.

The duties of the registrar should be clearly defined. The rights of government to terminate the appointment of the registrar in the case of default and to take over the operation of the registry or appoint a new registrar should also be defined.

The registry should be established in a way which ensures the sustainability of the registration system and the finance required for its continued operation and periodic upgrade.

# Implementing Guidelines and Recommendations

The principles above set out the key features for a publicity system based on registration. There are many ways in which these principles can be implemented. The recommendations below give practical guidance to those involved in creating, reviewing or reforming a charge registration system.

## A. Achieving publicity

The purpose of publicity is to give the public the means to ascertain whether or not a charge exists (or is claimed) over a person's assets. Sometimes there are other ways that may achieve this and the question then arises whether these *alternatives* to registration in a dedicated collateral register are adequate, or whether registration in the charges register should be required *as well*.

### A.1 Physical dispossession and control

Possessory charges (pledges) have been in existence since Roman times and it is common for a legal system to provide for such security rights. Dispossession achieves the same risk reduction as publicity because it gives certainty to the creditor of his right in charged assets (the debtor will not be able to sell or create other rights in the assets without the creditor's consent).

When a charges register exists or is created, three alternative policies may be adopted towards possessory charges:

- possessory charges do not need to be registered and they obtain priority from their time of creation.<sup>11</sup> In this case it is necessary for the relevant rules to define the means for establishing the time of creation and also the effect of the chargor regaining possession; or
- possessory charges do not have to be registered but, if they are not, they rank behind any subsequent registered charge;<sup>12</sup> or
- possessory charges have to be registered in the same way as any other charge.<sup>13</sup> In this case there ceases to be any legal distinction between possessory and non-possessory charges, although there will still be the practical consequences of dispossession.

The choice between the various options has to take into account the existing uses that are made of possessory charges.

The same issue arises in relation to assets which are taken out of the debtor's control. The most frequent case is securities (shares, bonds, etc.) where a charge is obtained by placing the charged securities into a blocked account. In these cases, as the debtor has lost the ability to dispose of the securities, publicity by registration becomes superfluous. Moreover, in the case of securities traded on public exchanges, registration is impractical (both for the chargor who has to register and for any third party acquirer who would have to search the register). The use of a blocked account or similar system is now generally the preferred solution.<sup>14</sup>

### A.2 Registration in an asset register

Where the title to an asset is determined by an entry in a register (for example, a land register or a ship register) the register will also usually be used to record any charges granted over the asset. Two questions then arise:

- Should the charge be registered in the charges register *instead*? Requiring inspection of a separate register for charges is generally resisted as being inefficient and in conflict with the intention of the title register which is to show all rights existing in the asset.
- Should the charge be registered in the charges register *in addition*? Although there is a potential advantage in being able to find all charges in the same place, the burden of two separate registrations is usually considered disproportionate.<sup>15</sup>

Where details of an asset are recorded in a register which does not determine legal ownership or title (as is the case, for example, with some vehicle databases) the case for using that database to publicise charges is less compelling.

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<sup>11</sup> This is the most usual case; see, for example, FYR Macedonia, Hungary.

<sup>12</sup> For example, Slovak Republic.

<sup>13</sup> For example in Romania and Poland, although in Poland unregistered possessory pledges are still possible under the provisions of the Civil Code that existed before the introduction of the law on registered pledges.

<sup>14</sup> See the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements. The Directive aims to provide uniform arrangements when securities and cash are used as collateral. Taking collateral is made easier by requiring Member States to repeal laws which require, in relevant transactions, the performance of any formal act, other than a written collateral document, for taking collateral.

<sup>15</sup> In some countries, dual registration is made as a precaution, but this indicates lack of clarity in the requirements of the law or deficiencies in the asset registries. The case where a charge is taken on the whole enterprise is different: in this case, there may be a good case to require the registration of the enterprise charge in the charges register as well as registration of the charge over the specific asset which could be included into the enterprise charge. This is the case, for example, in Bulgaria and Slovak Republic. When the second registration can be achieved automatically between the different registers through an electronic link, this would represent the optimum situation.

### A.3 Other forms of publicity

Although other means may be used to publicise a charge, it is unlikely that they will provide sufficient certainty to the creditor as to his rights over the chargor's assets and can therefore replace the need for registration in the charges register. These other means can include:

*Tagging* - a label or tag is sometimes attached to the charged asset indicating that it is charged.<sup>16</sup> This is only appropriate for certain types of movables (for example, machinery, livestock) and can entail practical difficulties (the need to inspect each item, the risk of tag removal, and so on). Where a modern computerised charges register is put in operation there is little advantage in retaining tagging as a legal means to achieve publicity, although parties may agree to it contractually where the particular circumstances merit it.

*Advertising via newspaper or notice board* - these methods of publicity only reach a limited audience and give problems for subsequent searching.<sup>17</sup> They are normally superseded when a computerised charges register is in operation.

### A.4 Notice to the third party obligor

Where the charged asset is a receivable it is sometimes suggested that giving notice of the charge to the third party obligor serves as publicity. This is not correct. Notice to the third party obligor is needed to require him to make payment to the chargeholder (or as provided by the charge). However, it does not publicise the charge to a third party who intends to take an assignment of the receivables or to another potential chargeholder.

## B. Registration procedures

### B.1 Who can request registration?

The person entitled to request registration (the applicant) may be the chargor and/or the chargeholder (or an appointed representative).<sup>18</sup> Registration may also be requested by a person authorised by a judicial or administrative decision.

Whoever requests registration, the party not making the request will want to ensure that the form and content of the registration corresponds to what has been agreed. The chargeholder may do this by preparing the application form and/or by requesting registration on behalf of the chargor and/or by obtaining a printout of the entry in the register.

If the entry does not correspond to what has been agreed his remedy will normally derive from the charge agreement (for example, a right to refuse to make available the credit or to claim early repayment).

Where the chargeholder requests registration, there may be a requirement that evidence of the chargor's consent has to be produced to the registrar.<sup>19</sup> Alternatively the chargor may be given effective remedies against abusive registration (swift procedure before the courts, right to damages, etc.). Either way, any person should be given adequate protection against wrongful registration of a charge against his name.

Any representative (for example, the employee of a company) or agent (such as a lawyer) of the chargor or chargeholder who requests registration should produce evidence of his authority to the registrar.

### B.2 What should be registered?

As a minimum it is necessary for any charge that the register shows:

- the identity of the chargor; and
- the description of the charged asset.

Without that, the registration will not achieve its objective.<sup>20</sup>

The registry computer should also record automatically the time of registration and the identity of the person who generates the entry (the registrar or its agent) into the registry database.

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<sup>16</sup> This is expressly provided for in art. 338.2 of the Russian Civil Code.

<sup>17</sup> This technique is particularly used when the charge is created by a court decision. For example, in Croatia, a non-possessory charge can be created by the parties presenting themselves before a court with the charge agreement. Minutes will be established and signed by the parties before the court. The court will thus publish a notice about the existence of a "lien" over the charged assets in the Official Gazette and, where necessary, in other media. However, retrieving this information is hardly practical. For example, in Romania and Poland, although in Poland unregistered possessory pledges are still possible under the provisions of the Civil Code that existed before the introduction of the law on registered pledges.

<sup>18</sup> In Albania, only the chargeholder can request registration. In Slovak Republic and Hungary, only the chargor can request registration. In Bulgaria and Romania, either chargor or chargeholder can make such a request (with proper authorisation). In FYR Macedonia, both chargor and chargeholder make a joint request.

<sup>19</sup> For example, in Bulgaria. In Kosovo, the chargor or a person on behalf of the chargor has to sign the notification statement (the person acting on behalf of the chargor has to be independent of the chargeholder). In practice, however, no signature seems to be required.

<sup>20</sup> See guiding principle 1.

It is desirable that the register also shows:

- *the identity of the chargeholder*<sup>21</sup> - This determines the charge with greater certainty and gives a prima facie indication of the person who is entitled to enforce the charge. It also enables any interested third party to make direct enquiry of the chargeholder about the charge and/or secured claim.
- *the description of the secured claim*<sup>22</sup> - This enables any third party (such as the potential purchaser of charged assets or a creditor considering a lower ranking charge) to assess the extent of the charge and the nature of the liability secured.

Other information concerning the charge that may usefully be included in the register includes:

- *Commencement of enforcement* - Most charges are never enforced. When enforcement does commence it indicates a failure by the chargor (or debtor if different) to comply with his obligations and this is relevant information to a third party enquiring about the charge. Making public the fact that enforcement has occurred through the register ensures greater transparency and can also be an effective means of obtaining payment from a recalcitrant debtor.<sup>23</sup> Appropriate sanctions should be included against the chargeholder who registers commencement of enforcement without justification.
- *Changes in priority* - When chargeholders agree to change their respective priorities they may wish to publicise this information although it is not essential.<sup>24</sup>
- *Period for which the charge has been created, if the charge is created for a defined period of time.*

It is sometimes suggested that all registrations should be for a limited period, for example five years, after which they should automatically terminate unless extended.<sup>25</sup> Such a rule may have been justified for paper-based registries which risked becoming clogged with obsolete entries, but is not appropriate for modern electronic registries. It is also undesirable because of the inconvenience of renewal and the risk of unintended failure to renew.

The information to be included in the register should be defined limitatively and should be compatible with the objective of ensuring effective publicity of charges. The register should not become a repository for extraneous information which will tend to clog the register and render it less efficient.<sup>26</sup>

It is sometimes suggested that a negative pledge agreement (an agreement under which a person restricts his right to create charges) should be publicised via the register in order to make the negative pledge binding on third parties. This would enable a bank or other creditor to ensure that its debtor would not give security to any other party. This is not necessary for the effective publicity of a charge and it is a separate policy issue whether the register should be used to publicise, and even make binding on third parties, contractual obligations of the debtor.

It is also sometimes suggested that the insolvency of the person giving the charge should be shown on the register - it is likely to be relevant for any person enquiring about charges to know if the chargor is insolvent.<sup>27</sup> The practical difficulty is ensuring that this information is promptly and consistently recorded. It could be made a specific obligation of the liquidator or administrator. When electronic links between the charges register and the commercial or company register are established it should be possible to record this information automatically.

### B.3 Presentation of information

The charges register should provide accurate and concise information in a form that is standard, simple, and understandable to any person searching the register without reference to other documents.

- *Identification of persons* - The method of identification should provide a unique identifier for the person, thereby leaving no room for doubt as to who the person is and ensuring that all charges given by the same chargor are indexed together.<sup>28</sup> It should also ensure that a third party subsequently searching the register is able to find that person. Where the person already appears in another register (such as a commercial or company register) a compatible means of identification should be used for ease of reference and to enable subsequent electronic links between registers.
- *Description of charged assets:*
  - It may often not be practical or even desirable to give a specific identification of each charged asset (for example, where a pool of assets or future assets are charged). However, allowing vague general descriptions can lead to uncertainty

<sup>21</sup> For example, Albania, Bulgaria, FYR Macedonia, Kosovo, Montenegro and Romania all require this.

<sup>22</sup> See Bulgaria, Hungary, Kosovo, Slovak Republic. Other countries require only that the amount of the secured claim is shown, see Latvia and Poland.

<sup>23</sup> Registration of commencement of enforcement is required in Bulgaria, Hungary (when enforcement is through the court) and Slovak Republic.

<sup>24</sup> This is the case in Slovak Republic,

<sup>25</sup> In Romania and Bulgaria, for example, an entry automatically expires after five years.

<sup>26</sup> See guiding principle 5.

<sup>27</sup> This is the case in Bulgaria.

<sup>28</sup> In FYR Macedonia and Romania, physical persons are identified through their unique identification number. Such information is considered private in Hungary and Slovak Republic and cannot be disclosed to the public, hence the need to use date of birth and address for unique identification data.

(for example, 'machines', 'assets as described in the charging agreement'). The description should be designed to give a third party a clear and meaningful notice of what assets have been charged (for example, 'machinery used for the production of widgets at X location', 'all assets of the debtor, present and future').

- There should be no requirement to indicate the value of the charged assets.
- Where charged assets have a serial number or other unique identification which is used in another public database (for example, vehicles) it may be desirable that this is included in the description, in order to eliminate doubt, to permit searches against the asset ID and to permit subsequent electronic links between registers.<sup>29</sup>
- Where the law provides for an 'enterprise charge' as a specific type of charge, such charges should be clearly indicated as such.<sup>30</sup>
- There is danger of including too much information. Registering thirty pages of annexes from a legal agreement may satisfy lawyers but will make the register undesirably opaque for the public.<sup>31</sup> A concise summary of detailed provisions of the charge agreement will often achieve the objectives of publicity more effectively.
- It should not be necessary to refer to other sources of information (such as the charge agreement or the parties) in order to understand the information in the register. It is always open to a third party to request information from the parties, but the system should not rely on the parties' willingness to provide the public with the information they need to obtain a meaningful description of the charged assets.

- The description of the secured claim can be short. It should indicate the principal amount of the claim (excluding interest and costs). Where the principal amount may vary (for example, a financing facility or supplier credit) it should indicate the maximum principal amount.<sup>32</sup> It should identify the debtor, where this is not the chargor. The description may also include the nature of the claim and the due date. The rate of interest and information on other ancillary amounts secured may be included but any requirement to quantify them or give a detailed description should be avoided.

#### B.4 Registration process

To obtain registration a person will normally have to go to a registration office (unless direct electronic registration is possible - see below).<sup>33</sup> Some countries allow applications by post, fax or email,<sup>34</sup> but it may be preferable that the applicant is present to check the final entry and prove identity. It is desirable that registration offices are easily accessible in all main population centres. The register should be available to the public during defined office hours. Uncertainty or limitations as to the availability of the service will quickly discourage potential users.

At the registration office:

- The necessary information is presented to the registrar and the registrar checks that the minimum required information is included. The check should not comprise any verification of the information provided; it is not the role of the registrar to ensure the accuracy of information submitted for registration.
- The registrar checks and records the identity of the applicant. There should be a permanent record of who applied for registration. The name of the applicant may appear in the register and the evidence of identity is normally scanned or photocopied and kept by the registrar. The need to check identity is a reason to avoid applications by post, fax or email.

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<sup>29</sup> See A.2 on registration of charges over assets whose title is already registered in a title-based register. Registration of the asset serial number is compulsory in Kosovo, Albania, and Montenegro. Cross checks with the asset registers already exist in FYR Macedonia (motor vehicle and boat), although this is done manually by the clerk who registers the charge.

<sup>30</sup> As in Hungary, Slovak Republic, Romania, and also in Bulgaria where the appointment of an enterprise manager will also be registered.

<sup>31</sup> Slovak Republic and Hungary both limit the length of the charge description – in Slovak Republic, it must fit onto an A4 page. In FYR Macedonia, Bulgaria, Romania, there is no limit and cases of 200 or 500 pages of description are mentioned. In Bulgaria, the registrar would typically scan the document providing the charged asset description and attach the file to the application.

<sup>32</sup> This is the case in Hungary, Slovak Republic, Latvia, Poland, and, it seems, in FYR Macedonia.

<sup>33</sup> This is the case in Hungary and Slovak Republic where the registry is operated by the Chamber of Notaries. The applicant must visit the notary of his choice, who will proceed with the registration. In Romania, a number of entities act as operators (e.g. Chamber of Notaries, Law Society, etc) and the applicant must visit the office of one of the representatives of these entities (although in some cases the notary or lawyer is reported to come directly to the applicant's premises). In Albania and Bulgaria, the applicant goes to the registrar's office in, respectively, Tirana and Sofia.

<sup>34</sup> The system in Kosovo allows registered users to submit their application by email.

- The registrar converts the information provided by the applicant into the necessary format. The applicant should be required to submit the information in the appropriate form so that the conversion is limited to keying the information into the computer system. This work may be reduced by allowing the information to be presented in electronic form (on a diskette, for example).
- The applicant should check and approve the information in the final form to be registered. The simplest procedure is for the registrar to print out the information in the exact form that it is to be submitted to the register, and for the applicant to sign the print out. This is difficult if the application is made by post, fax or email.
- Where there is an electronic link between the charges register and other registers, checks should be made to conform the information between various registers. For example, where there is a link to the commercial register, entering the chargor's commercial registry ID number will automatically cause his other details (such as his address) to be entered in the charges register. (Where electronic links do not exist, a requirement to make such checks manually is likely to be cumbersome and the responsibility is best left with the applicant.)
- Where the chargor is not identified by a unique identifier (such as an ID or commercial registration number) the registrar should check whether the chargor has not already been entered into the register, for example under a slightly different identification such as different spelling.
- The information should be entered into the register, normally by electronic transmission from the registrar's computer to the central database.
- The registration system should record the identity of the registrar making the entry and refuse the entry if the registrar does not have the authority.<sup>35</sup>
- The registration system should record the time of the actual entry of the information on the register. Anyone searching the register from that precise moment onwards should be able to see the new entry.

The registrar should receive an electronic confirmation of the registration (usually in a matter of minutes) and should give a printout of the confirmation to the applicant. The confirmation should show the entry exactly as it appears in the register, and any earlier charges already registered, so that the chargeholder can be confident of his ranking order. Where a written confirmation of registration is required, the registrar may certify the printout.

Direct electronic registration by specifically authorised users may be permitted, particularly in the case of banks and financial institutions who are frequently taking security.<sup>36</sup> In that case the user will need an authorisation code and will be responsible for carrying out the tasks of the registrar. Safeguards will be needed to ensure that the user complies with appropriate registration procedures. Where direct registration by a chargeholder is allowed it is not possible to check the chargor's consent to the entry.

## **B.5 Registration of changes or cancellation**

The procedure for registering any changes to an entry in the register, or its cancellation, should be similar to that for the initial registration. The entry should be modified to reflect the change but a record should also be retained of the information as originally registered. During the life of a charge it will often be relevant for persons searching to know what changes have been made. Even after the charge is terminated and cancelled the entry should not be deleted from the database. It may be valuable to enable subsequent searches to show the information that was on the register on a specific date, in particular in the event of subsequent disputes. With modern computer systems the additional volume of information that this implies for the register is unlikely to present a major problem.

When a charge terminates it is usually the chargor who will want the registration to be cancelled, but in most cases he will not be able to do so without the consent of the chargeholder. It may be necessary for the procedures to put some pressure on the chargeholder to attend promptly to cancellation.<sup>37</sup>

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<sup>35</sup> See the Annex on roles and privileges.

<sup>36</sup> We do not know of any jurisdiction where this is currently possible (apart from maybe Montenegro). In one case in Romania, a large local bank was granted the licence to act as an operator for the registrar and is therefore able to register directly all the charges it takes in the context of its operations.

<sup>37</sup> In Romania, the chargeholder must by law submit a termination order to the register to cancel the charge within 40 days of the charge's termination.

## C. Search procedures

### C.1 Who can search the register?

It should be possible for any person to search the register.<sup>38</sup>

### C.2 What information is available?

All information that has been entered in the register should be available to a person searching. The information is submitted for registration with the intention that it be made public. Transparency is essential for the effectiveness of the system.

- In some jurisdictions certain personal information (for example, personal ID numbers) may be subject to confidentiality rules. Where such information is included on the register (for example, to guarantee that all entries are indexed against the same chargor), it may be necessary to screen the confidential elements from public view, but this should be done in a way which does not affect public access to any other information registered.

Confidentiality or privacy should not be used as a pretext to withhold information from the public.

### C.3 Presentation of information

The information on a charge should be shown in the register in a similar manner to that in which it was submitted for registration. It should not be abbreviated or edited. For example, it is important that a person searching sees the description of the charged assets exactly as it was registered.

When searching against a chargor, the list of all charges granted by him should be clearly shown and it should be possible to access easily the entries made in respect of each of them.<sup>39</sup>

Where there is no charge registered against a chargor, this should be clearly indicated in the search results (the so-called “negative publicity”), for example by such a message appearing on the screen as a search result.

Where an amendment has been made to the information registered, this should be apparent to the searcher and details of the amendment (nature, time, person requesting) should be easily available.

## C.4 Search Process

To make a search a person may go to a registration office but preferably will be able to access the register via the internet.<sup>40</sup> Where internet searching is not available, search points should be organised so that any person, wherever situated in the jurisdiction, can have easy access.<sup>41</sup> When making a search:

- The person requests the search either by completing a search form on the internet or by submitting a request form at a registration office/search point. It is not necessary for the searcher to be identified since any person is entitled to make a search.
- The search request will define the information to be searched. Most often this will be the identity of the chargor (in order to see what charges, if any, have been registered against a particular person), but it may also be, for example, the serial number of a registered asset (such as a motor vehicle).
- The search system should be designed to facilitate the task of the user who is seeking information, for example:
  - when the search is made against the name of the chargor, other names with similar spelling should be shown<sup>42</sup> and, where a name has been changed since original registration, the new name should be indicated;
  - when there are several identifiers attached to a person (name, date of birth, tax number), it should be possible for the searcher to search against one or several items as he chooses;
  - the search process should be simple and not require any particular expertise;
  - it should be possible to print the information as shown on the screen. It should also be possible to have search printouts certified by the registrar.

## C.5 Historic information

A person may want to find out what was, and what was not, registered at any particular time in the past. If the time of every entry made on the register is recorded, and modified or cancelled information is retained, it should be possible to do this. When a charge has been cancelled for some time the record may be archived and subject to search only on special request.

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<sup>38</sup> See guiding principle 7.

<sup>39</sup> In some systems, there is confusion for users due to various levels of searches that are made available: a first search may show only the list of existing charges, a second level may provide some details on the registered information, a third level more details, etc. This is unnecessarily confusing.

<sup>40</sup> This is possible in Romania, Slovak Republic and Montenegro.

<sup>41</sup> See guiding principle 7.

<sup>42</sup> This is the case in Hungary.

## D. Effects of registration

### D.1 Making charge effective against third parties

The basic tenet is that failure to publicise a charge makes it ineffective against third parties.<sup>43</sup> The substantive charges law may translate this principle in different ways, yet the practical result should always be the same.

There are two distinct approaches to the creation of a charge:

- scenario A: creation may be in a single step through the fulfilment of the necessary conditions (for example, conclusion of a charge agreement and registration in the charges register);<sup>44</sup> or
- scenario B: it may be in two steps, the first where there is agreement between the parties, and the second where the creation process is completed by fulfilling other requirements (for example, registration in the charges register). In US-based systems the first step is called 'attachment', and the second 'perfection'.<sup>45</sup>

When creation is divided into two steps:

- the first step gives the chargeholder a right in the charged asset but this right has no effect vis-à-vis other persons who may subsequently acquire rights in the same asset (subject to limited exceptions, especially for later non-completed charges);
- the charge is only effective against third parties if the second step aimed at publicising the charge is completed as well.

Thus the act of publicity may be a condition of creation of a charge (as in scenario A) or may be merely a condition of completion (as in scenario B). It does not matter which it is: the procedures and requirements for registration remain substantially the same. But it does change the effect of registration. In one case no registration means no valid charge, in the other it means a valid charge but without priority.

Where the two-step route (scenario B) is followed, certain issues have to be addressed:

- Is a non-completed charge effective against a third party who has notice (for example, actual knowledge)? Logically it could be argued that it should be, but the practical complexities and uncertainties involved in proving knowledge are likely to make it preferable to stick with a simple rule that the charge remains ineffective until completed, regardless of notice.

- Where there is more than one non-completed charge on the same asset, the relationship between the respective chargeholders has to be determined. The simplest solution is to give priority in the order of the charge agreements.
- In the case of insolvency of the chargor, it needs to be established that the rights of a chargeholder under a non-completed charge do not give preferential rights vis-à-vis unsecured creditors. It would be incongruous if a chargeholder who does not have priority over other claims prior to insolvency should have his position improved on insolvency.
- Should there be an obligation to complete (register) a charge? The non-completed charge is a secret charge, unknown to third parties, but the usual arguments against allowing secret charges do not apply: it is harmless to third parties since it gives no priority until completion (registration). An obligation to complete is therefore not essential. However, the validity of a last minute registration just before insolvency has to be considered.

### D.2 Using the register to determine a chargeholder's priority

Once a system of publicity is in place, it provides a convenient and simple means to determine the chronological ranking order of charges and also of other rights that are included on the charges register.<sup>46</sup> The time of registration (actual entry in the register) will usually be used as the determining factor for deciding the chronological order of ranking. If the determining factor is earlier than the time of registration (for example, the signature of the charge agreement), a person acquiring a right in the asset may find that his right is subject to a charge of which he had no notice.

However, it is not its function to publicise the definitive priority ranking order of charges. Priority is likely to depend primarily on the time of registration but it may be affected by other matters not shown in the register, for example:

- Where chargeholders agree on a change in their priority ranking. Such a change may not be publicised (although it would normally only affect the rights of those who are party to the agreement).<sup>47</sup>
- Possessory charges which may not be registered.<sup>48</sup>

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<sup>43</sup> See guiding principle 4.

<sup>44</sup> This is the case, for example, in Hungary, Slovak Republic, Bulgaria, FYR Macedonia, Czech Republic, Poland, Latvia and Lithuania.

<sup>45</sup> This is the case, for example, in Albania, Romania, Kosovo and Montenegro.

<sup>46</sup> See guiding principle 2.

<sup>47</sup> In some countries changes of priority are registered; see, for example, Albania, Latvia and Slovak Republic.

<sup>48</sup> In most countries possessory charges are either not registered at all (Bulgaria, Hungary and Lithuania) or registration is not obligatory (Albania and FYR Macedonia).

- Special priority may be given to charges securing the acquisition of new assets,<sup>49</sup> and this may not be apparent from the register.
- Judgement creditors may have a right to claim satisfaction from specific assets of a debtor (including those already charged). Any such right should also be subject to registration in the charges register, and should only acquire priority from the time of registration,<sup>50</sup> but regrettably this is not always the case.
- State creditors, such as the tax authorities, are sometimes given a right to recover their claims from specific assets of a debtor (including those already charged). Similarly, any such right should be subject to registration in the charges register, and should only acquire priority from the time of registration,<sup>51</sup> but again this is not always the case.
- Possessory liens may arise in favour of persons who have a claim against the debtor in respect of services rendered in relation to the charged assets (for example, a repairer's lien).
- Quasi security transactions which limit the debtor's right to his assets (for example, under financial leasing, fiduciary transfer or retention of title) will often not be shown in the register.<sup>52</sup>
- *Advance registration and pre-registration* - Some systems permit the registration of a charge in advance of the signature of the charge agreement. The chargeholder will not have a security right until the charge agreement is signed but priority will be from the time of registration.<sup>53</sup> They may permit, as well or instead, *pre-registration*, where a notice is registered of the *intention* to register a charge in the near future. If the charge is actually registered within a prescribed time, priority is from the time of pre-registration.<sup>54</sup> Advance or pre- registration may be useful where registration procedures are slow, and they may also be seen as an indication of the chargor's good faith during negotiations. However, since the introduction of rapid electronic registration systems the need for protecting priority in this way has largely disappeared. The advantages of allowing a potential creditor to take priority during the negotiations are debatable.
- *Single registration for multiple charges* - In jurisdictions where scenario B for the creation of charge applies,<sup>55</sup> publicity may be achieved by a single entry in the register which will protect priority for any charge (present or future) that may be granted by the chargor to the chargeholder.<sup>56</sup> Provided the charged assets are adequately described in the registration no further registration will be required for later charge agreements.

A person wanting to determine the priority of a charge is thus likely to have to make investigations beyond a mere search of the register.

### D.3 Advance registration

There are circumstances where registration may be made before the chargeholder has obtained a security right:

- *After-acquired assets* - The most common example is where a charge covers a future asset (an asset not yet owned by the chargor). In this case there has to be advance registration if the charge is to be of immediate effect upon acquisition of the asset by the chargor. The chargeholder will not have a security right until the chargor acquires the charged asset, but priority vis-à-vis other creditors registering a right against the chargor in the same asset will be from the time of registration.

### D.4 Reliance on information in register

An entry in the register gives notice that a security right may exist but, in contrast to a title register, the information in the charges register is not 'authentic'. That does not mean, however, that it cannot be relied on in specific circumstances defined by law, for example:

- The absence of registration (negative publicity) indicates to third parties that no charge exists which could have effect against them.
- Notices to other chargeholders can be validly made using the address published on the register.
- An insolvency administrator can base the review of existing charges on the register and can require confirmation of the existence of charges by reference to chargeholders shown in the register.

<sup>49</sup> In US-based systems, these are referred to as purchase money security. Albania, Bulgaria, Montenegro, Kosovo, Romania have all given priority to the purchase money security holder. There is no such priority in FYR Macedonia, Slovakia, Hungary or Poland.

<sup>50</sup> Bulgaria, for example, requires the registration of court orders creating a charge over the property.

<sup>51</sup> Poland, Slovak Republic, Bulgaria, Kosovo require tax liens to be registered.

<sup>52</sup> See Explanatory note and footnote 9 above.

<sup>53</sup> See, for example, in Albania and Montenegro.

<sup>54</sup> In Romania, it is possible (and widely used in practice) to register an intention to register, which will remain valid for two months and the charge registered within this period will have a priority date as of the day of pre-registration.

<sup>55</sup> See above D.1.

<sup>56</sup> This is possible in Albania.

Although registration may be necessary for the creation of a charge, it does not have 'constitutive effect' in the sense that it does not *per se* make the charge valid.

## E. Operation of the registry

### E.1 Selection and duties of the operator/ registrar

There may be a wide range of options open when selecting the person who is to act as registrar and operate the registry, both in the public and private sectors.<sup>57</sup> The single determinant factor is that the person or organisation appointed should have the ability and capacity to operate the system in a manner which meets the legal and regulatory requirements and which gives optimum support to the secured credit market.

Any potential registrar should demonstrate an ability to perform the duties incumbent on the registrar, and in particular to:

- operate the registration system in a reliable and efficient manner;
- safeguard the information in the register;
- ensure easy access to the registry for registrations and searches across the jurisdiction;
- guarantee the unrestricted availability of all registered information to the public;
- develop and enhance the registration system on an on-going basis;
- provide adequate finance to secure the continuing operation and enhancement of the registry; and
- inspire the trust and confidence of the potential users (without which the register will never be used to its full potential).

The registrar may be selected directly or through a tendering process. The appointment may be based on a contract or on a law or decree. If the appointment process lacks transparency and/or competition it is likely to be more difficult to inspire public confidence in the registration system.

The duration of appointment needs to be defined. It needs to be sufficiently long to enable the registrar to invest and commit fully to the task. At the same time an indefinite period of appointment may reduce the incentive for the registrar to excel in its performance and deprive the government of the necessary power to replace the registrar.

In any event the government should retain the right to terminate the appointment in certain circumstances (for example, serious breach of duty or financial failure) and should ensure that, in that case, it has the ability in practice to transfer operation of the registry to another person without undue disruption.

### E.2 Supervision of the registry

Whoever operates the registry it is essential that there is an adequate level of government supervision and control. The nature of supervision may be different according to whether the registry is part of a government department, or a separate government agency, or a private or semi-private entity. Yet the aims of supervision will be similar and will include:

- ensuring that the register is operated in compliance with legal and regulatory requirements and with the terms of the registrar's appointment;
- approving any changes to the specification of the registration system or to the operating procedures;
- providing a review of any complaint made concerning the registry and of the way it is handled;
- monitoring the financial operation and viability of the registry;
- monitoring the technical performance of the registration system;
- maintaining statistics of the register activity and performance for assisting in deciding future developments of the register, and more broadly in assessing trends in the secured credit market and the fulfilment by the register of its economic function; and
- maintaining an adequate back-up system to ensure that a reconstruction of the register at short notice would be possible in case of failure by the registrar.

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<sup>57</sup> There are a number of different examples: the Czech Republic, Hungary, Slovak Republic and Slovenia have all appointed by law the Chamber of Notaries for the operation of the charges register. The Ministry of Justice is in charge of supervision. In Poland, the register is operated by the commercial courts, whereas in Latvia, the registry is run by the Enterprises Registry. In Lithuania, the Hypothecary Register is operated by the state and registers security rights over movable assets as well as immovable assets. In Bulgaria, the Central Pledge Registry was created within the Ministry of Justice, as a separate but dependant entity. In Albania, the Registry for Securing Charges is part of the Ministry of Finance. In Montenegro, the Registry is a specific entity, whose director is appointed by the President of the Commercial Court. Romania and Kosovo have decided to appoint the register's operator via a tendering process. In Kosovo, the bid was won by the Kosovo Credit Information System (KCIS), a private credit bureau founded by a number of microfinance institutions and organisations. In Romania, the number of licences is unlimited as long as the conditions for operating the register are met: today there are six operators in Romania. In FYR Macedonia, the Central Registry (which includes the Register for Pledges) was inherited from the former Payment Bureau and is supervised by several ministries via a supervisory board.

The person or body empowered with supervision should receive adequate reports and information and should be given the necessary powers of investigation to enable efficient conduct of the supervisory role.

### E.3 Performance of the registry

Rules and procedures for the operation of the registry should be designed to achieve certainty and uniformity of practice. Public confidence will soon evaporate if there is a lack of consistency in the requirements for registration or in the way the registry operates. A number of ways can be used to assist in achieving a high level of clarity and uniformity, including:

- a manual available for all users providing a description of how the register works and answers to frequent questions;
- a manual for registry staff setting out detailed procedures and giving guidance on how to resolve specific issues;
- a technical manual for the computer hardware and software;
- help lines providing support to registry staff on both procedural and technical computer questions;
- a defined procedure for recording, tracking and resolving difficult or novel issues;
- a defined procedure for handling complaints from users and appeals against any decision of the registrar;
- regular reporting to all registry staff of issues raised and the way in which they were resolved;
- regular training; and
- periodic audit of procedures and IT systems.

### E.4 Costs of registration

The system for registering and searching should be inexpensive,<sup>58</sup> but fees have to be charged to recover the cost of the registry. Even if the cost is accepted as a direct cost of the state budget, the government is likely to want to recover some income from the registry. The essential criterion is to ensure that the registration fee is not dissuasive.

The costs to be taken into account include not just the operating costs, but the costs of initial setting up of the registry, financing costs and costs of future enhancement and development. Effective cost controls are needed at all stages, and especially at the time of initial establishment of the register when costs are at their highest and there may be limited experience in assessing them.

There can be many different options for the way the costs are reflected in the fees charged by the registrar,<sup>59</sup> but certain general guidelines can be set:

- The fees should enable recovery of costs, including (if appropriate) the reasonable remuneration of the registrar. The fees should not be used as a source of taxation by government, or as a source of fat profits by a private registrar. Against that, the fees should not be set so low as to prejudice the financial viability of the registry.
- Fees may be charged solely for making entries in the register (including amendments and cancellations) or for searches as well. Free searches would provide a positive image of the register and encourage its use. There are likely, however, to be a significantly greater number of searches than entries and they may thus represent a good potential source of income. In any event, the search fee should be kept sufficiently low that it does not present a barrier to public access to the register.
- The registration fee may be a flat fee for all transactions or on a degressive scale varying according to the amount secured. A fee scale allows larger transactions to subsidise smaller ones, which can bring important benefits for small and medium-sized enterprises. However the maximum fee should be capped and, at all levels, the fees should be designed to be reasonable in the context of the transaction and not to be dissuasive to taking security.
- The financial performance of the registry should be subject to regular audit review to enable revision when appropriate of the fees charged, and to ensure the transparency which is needed to maintain the confidence of the public (who will normally be predisposed to believe that fees are too high).<sup>60</sup>

### E.5 The need for public understanding

However good a registration system may be, its impact on the economy will be limited if the public (that is, potential users) do not have a good understanding of it. The public need to be aware that:

- the register is there to benefit them. The register should be seen as an institution that brings about greater and cheaper credit, rather than as a means used by lenders to obtain greater leverage over borrowers or as a new tool for taxation;
- the information in the register is readily accessible and useful to them; and

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<sup>58</sup> See guiding principle 6.

<sup>59</sup> Unfortunately, in no case is the information about the costs and revenues of the register available. The costs of registering varies a lot from jurisdiction to jurisdiction:

- A flat fee for all transactions is charged in Albania, Kosovo and Montenegro.
- In FYR Macedonia and Bulgaria, the fee depends on the length of the recorded information or on the number of charged assets.
- In Hungary and Slovak Republic, the fee is degressive based on the value of the secured debt.
- In Romania, the fee is freely fixed by the respective operator, although the state does charge a fixed fee per transaction.

<sup>60</sup> Such audit does not seem to take place commonly.

- in some circumstances it is necessary to consult the register, for example when acquiring an asset which may be subject to a charge.

Projecting a positive image of the register and educating the public as to its functions requires an actively managed process using a wide range of media channels (including press articles, radio and television, seminars and conferences, specialised publications and websites) and carefully adapted to local circumstances.

Increased public awareness and broadening of use of the register both for registrations and searches will be signs that the system is progressively taking roots. Monitoring is essential to measure the level of acceptance of the system and to respond to problems or limitations that may arise.

# Annex: Technical Requirements for a Charges Registry

## 1. Introduction

The effective operation of a charges registry requires the capture, storage, retrieval and display of significant quantities of information. The use of computers and data communications can greatly reduce the operational costs and delays associated with this, as well as providing a very responsive service to banks and other users.

A charges registry is operated by and for humans. To provide effective service, the IT infrastructure of the registry must be carefully designed to support the humans involved, both the users (borrowers, lenders, etc) and the registrar or its agents who operate the registry. The IT design of the registry should consider what tasks the humans need to accomplish, where and how they need to accomplish those tasks, and how quickly the tasks need to be completed.

## 2. Major roles in operation of the charges registry

The concept for a charge registry should define a set of roles for the people involved in or using the registry. Each role involves a set of tasks which require a similar set of privileges and knowledge. A single human may assume more than one role (but not at the same time). The concept of 'role' is quite important to the design of the IT system, because the IT system associates roles with specific sets of privileges and authority.

The main roles observed are:

- Central registry staff
  - registry management - policy changes, management of entry and search agents
  - registry operations - backups, recovery, monitoring, statistics
  - registry technical support - tuning, problem analysis/correction
- Entry and search agents
  - entry of new charges and amendment and cancellation of existing entries
  - searches of register and certificate generation
- Chargor/Chargeholder
  - submission of information for registration
- Public
  - searches of register.

These roles are task oriented, that is, based on what humans actually do, not what organisation they nominally belong to. The set of roles for a charges registry is largely consistent across most existing charges registries; however, the mapping of roles into organisations varies quite significantly. For example, in some jurisdictions, the entry and search agents and the central registry staff all belong to the same organisation, often a government body, while in other jurisdictions the

entry and search agents and the central registry staff are in quite distinctly different organisations. However, the tasks of an entry and search agent are similar across jurisdictions regardless of the organisation name on the office door.

## 3. Components of computer architecture

Although small "start-up" registries may operate from a single central computer, in most cases there is a strong need for geographically distributed registration services and multiple access points, in order to provide responsive service to many concurrent users across the whole country. This generally leads to the use of distributed computer architecture.

There are many options available when designing the computer system but the basic system elements include:

- Central database
  - this is used to process and store all entries in the register
  - it needs:
    - adequate processing power, storage and archive capacity, and memory;
    - the ability to communicate with registrar computers and public access points;
    - a stable operating environment;
    - a secure location
- Registrar computers
  - these are used by entry and search agents to make new entries, amendments and cancellations to the register and to make searches.
  - they need:
    - adequate processing power and storage capacity;
    - the ability to communicate with the central database;
    - a flexible configuration to enable adjustment and enhancement as the registration system develops.
- Public access points
  - these are used by any member of the public to search the register.
  - where internet is used, they may be any PC with internet access.
  - they are provided by the user, not the registrar.
- Communications Network
  - this is used for communication between (i) the central database and (ii) registrar computers and/or public access points.
  - it may be entirely via the internet or may use dedicated or leased line(s) for registrar computers.

- it needs to be fast and reliable.
- it needs adequate security for registrar computers.

The software used for the register may be either custom developed for the specific register or a commercial off-the-shelf product. Although many registries use custom software there can be significant cost and quality advantages in designing the software around a standard commercial product.

#### 4. Functional requirements for a charges registry

- Information organisation
  - Each registration of a charge is a ‘packet’ of information which links together the identity of the chargor, the identity of the chargeholder, the asset and debt descriptions and all other information included in the registration. This set of information, which may be spread across different information fields, is the charge ‘packet’.
  - All information in the charge ‘packet’ stays together and any changes to the charge attach to the ‘packet’.
  - When a charge is cancelled, the cancellation attaches to the charge ‘packet’ and the charge may be archived.
  - When you search against the identity of a chargor you will see all charge ‘packets’ registered against his name (except any cancelled packets that may have been archived).
  - Within each charge ‘packet’ you will see all information relating to the charge including any amendments or cancellation.
- Information entry
  - The IT system should be designed to record the information that is to be registered, following best practice for simplifying and facilitating user operation.<sup>61</sup>
  - Registered information can be used to compile statistics on secured credit and the method of information entry should take into account any requirements in this respect.

Once an entry has been made into the central database, the information should be immediately available for search and retrieval.

- Information retrieval and levels of search capability
  - Any member of the public should be able to retrieve any current information registered in the system by searching against chargor identity or any other specified search criteria (for example, a serial number or unique asset identifier).

- Generally the search algorithm should aim to return too many responses rather than too few.
- The registrar and authorised persons should also be able to retrieve any archived information.
- The registrar and authorised persons (such as the Central Bank or national statistics office) may be able to retrieve information by reference to other search criteria (the identity of chargeholder, amount of secured debt, place of registration and so on).<sup>62</sup>

- Specification of registry process
  - The register should ensure an efficient implementation of the charges law. The design of the computer system should be based on a detailed specification of the desired registration and search processes in accordance with the legal requirements.

#### 5. User interface design

The computer human interface should be designed to optimise human performance in each defined role in the operation of the charges registry:

- The user interface determines how users ‘feel’ about the system.
- It needs to be judged from the viewpoint, knowledge and experience of the typical user. Relying on computer experts to design registration forms, for example, is well known to lead to inadequate forms.
- The information needed for each role should be visible at the right time and presented in a user-friendly way.
- Information should be presented in a domain consistent fashion, with forms matching the information source.
- It should be designed to aid the entry agent to enter data accurately. For example, it should include provision of “default values” for frequently occurring elements (such as dates) and clear and explicit prompts for required elements.
- Where information is entered wrongly (for example, letters entered in a field designed for figures), it should be rejected immediately.
- Each field or element to be entered should include a “help” facility to provide information about the data to be entered.
- Information stored in the database should be searchable in more than one format so as to avoid a search failing because of small differences in the way information was recorded (upper/lower case, use or not of accents, and so on).

<sup>61</sup> See B.2 above.

<sup>62</sup> Where information is entered into the register by scanning, the scope for retrieval of information by other criteria will be restricted.

## 6. Computer security, integrity and reliability

All individuals must be authenticated each time they access the register to make any entry, amendment or cancellation.

- Authentication may be by user ID/password, smartcard or digital signature.
- When a viable digital signature system is available, this is likely to provide the best level of security.
- There should be a secure and foolproof audit trail by which it is possible to trace the originator of the change in the register.

The system should be configured to protect against undesirable and/or unauthorised access to the system from outside (for example, from viruses, or hackers).

A detailed log should be maintained to record all operations within the computer system in order to support subsequent recovery, identification and analysis of errors, unusual events or suspected fraud, and regular audit.

Both actual and perceived reliability should be high - the impact on users of twelve failures of ten minutes each is likely to be much greater than one failure of two hours.

A back-up system should be in place to ensure that, in case of system failure or physical damage or loss, all data in the register can be retrieved. Back-up data should be stored in a secure location physically remote from the central database.

In addition, there should be a disaster recovery strategy to ensure that the registration system can be reconstituted in case of damage, destruction or inaccessibility of any part of the computer system.

The registrar must also develop a 'people' process which ensures trained and knowledgeable staff, able to provide effective service to the public. The entry and search agents should be required to meet measurable standards of performance and should not introduce additional restrictions or process delays.

The IT system should be supported by full technical and operating manuals and all registry staff should receive regular training to enable them to carry out their respective roles.

## 7. Considerations for the future

The registry IT system will need to adapt to market changes and new technology and should therefore be designed to allow adequate flexibility for future development, including an increased demand for registry services.

The database design should follow best current practices, in order to support unanticipated growth in demand, as well as changes in types of database queries and searches.

The registry system design should take into account the possibility of future links between the charges register and other registers (for example, the land register, a commercial or company register) to conform the information between various registers.

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