

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



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**Cross Border Acquisitions
of Residential Property
in the EU: Problems
Encountered by Citizens**

STUDY FOR THE JURI COMMITTEE



DIRECTORATE GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT C: CITIZENS' RIGHTS AND

CONSTITUTIONAL AFFAIRS

LEGAL AFFAIRS

Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens

STUDY

Abstract

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI Committee. It identifies and analyses the legal and practical difficulties that an EU citizen faces when buying properties abroad and investigates what can be done to assist an EU citizen when buying residential immovable property in another Member State, making ten recommendations to improve their lot.

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LIST OF ABBREVIATIONS

BGB Bürgerliches Gesetzbuch (German Civil Code)

CC Civil Code (for Germany see 'BGB' above)

K Thousand(s)

LRAU Ley Reguladora de la Actividad Urbanística (Valencia)

M Million(s)

TFEU Treaty on the Functioning of the European Union

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EXECUTIVE SUMMARY

This study seeks to provide a 'working tool' to inform the work of MEPs with constituents and to facilitate discussion in the European Parliament of the problems encountered by EU citizens in acquiring homes — that is residential property — in cross border transactions within the EU.

After a statement of our methodology (ch 1), the first substantive chapter sets out a typology of cross border purchases. The pattern of purchases has to be deduced from migration flows within the EU, which support the conclusions (ch 2) that:

- Flows remain depressed in the aftermath of the Global Financial Crisis, but there are significant flows of cross border purchases calling for more than ad hoc solutions.
- There are large pools of potential buyers particularly in the United Kingdom and Germany.
- The strongest single flow is from Britain to Spain, followed by French, German and Italian citizens buying in Spain.
- Large numbers of people have moved from eastern former accession states to western Europe (especially Germany and the United Kingdom) with the Poles being by far the most adventurous migrants.
- Large population shifts have taken place across the Balkan states.

Flows are sufficient to generate significant problems, and to justify EU action based on a systemic approach.

Conveyancing systems are grouped into familial groupings reflecting legal traditions to simplify analysis of the current literature in English, French, German, Spanish, and Scandinavian languages. This should have produced an account reasonably representative of the 50 or so property systems operating within EU-28:

- common law systems (England and Wales, Northern Ireland, Republic of Ireland, and to a lesser extent in property law Cyprus and Malta);
- Germanic systems (Germany, Austria, and Greece plus applicant state Turkey and also Switzerland);
- Latin systems (France, Spain, Portugal, Italy, Belgium, Luxembourg and, in property law, the Netherlands);
- Nordic traditions (Denmark, Finland, Sweden, and the EEA states of Norway and Iceland); and
- post transition systems of Central and Eastern Europe (Poland being our example).

The EU lacks competence over the substantive law of Member States but the major problems that citizens encounter when buying residential property abroad stem from lack of information and the unexpectedness of particular rules more than the inherent nature of foreign property systems themselves.

Each chapter explores a particular aspect of cross border transactions that can go wrong, including:

- | | |
|------|---|
| ch 3 | access to register and cadastre; |
| ch 4 | identification of the property, its extent and condition; |
| ch 5 | title and burdens; |
| ch 6 | flats and new build property; |
| ch 7 | public rules; |
| ch 8 | price – deposit, balance and costs; |

ch 9	mortgage finance;
ch 10	professional assistance;
ch 11	the buying process; and
ch 12	the buyer's family

Access to register and cadastre

Once a particular property is identified, the buyer will need to make use of national resources to facilitate his or her purchase: the land register provides information on title and the cadastre on spatial details. European land register systems are divided between systems of title registration and of deeds registration:

- In systems that register titles, information is arranged by parcel of land and the system generates a snapshot of the current state of the title. This is usual in Germanic states, Britain and Ireland, Nordic states and much of Central and Eastern Europe, and the register is also arranged by parcels in Spain and Catalonia;
- In systems that register title deeds, information is recorded in notarial deeds which pass title from one owner to another in succession. The current state of the title can be discovered by tracing its history. This system operates in jurisdictions that belong to the Latin family, such as Italy, Portugal and the Netherlands (Latin as far as property law is concerned), and a few states in eastern Europe. The deeds are accessed from a names index and cross-referenced against the cadastral parcel number in France, and accessed purely by name in Italy.

Two thirds of EU-28 states integrate the land registration and cadastre functions within a single organisation. With deeds registration, a different institution using different graphical references operates in Spain and Portugal; by contrast, a single institution operates in Belgium, France, Italy and the Netherlands — so that in each case the spatial information used in the cadastre and the land register are coordinated.

The registration system adopted in each state is a matter for the Member State concerned, but purely from the point of view of a cross border purchaser, the register is likely to be most convenient if it records an up to date snapshot of the title or at least can generate such a snapshot (as has recently been introduced in the shape of a register extract, the *nota simple* in Spain). Great strides have been made over the past decade or so in the digital delivery of title information, and from the point of view of a cross border purchaser these steps are to be encouraged, and it is particularly advantageous to such a buyer to have the register readily accessible from an open portal at reasonable cost. It is perfectly legitimate for some information to be considered private, but this should not be used as an excuse to deny public access to all information about the title. Access arrangements in Britain and Ireland and Nordic states are particularly suitable for cross-border transactions. Many registers are organised on the assumption that they will be accessed exclusively by notaries, but the progress of a cross border transaction will be smoothed considerably if the buyer has access to the registered information and, where necessary, time to translate (or have translated) what is registered.

Digitised cadastres exist in most European countries. A public portal is available in many EU-28 states: Germanic states (Austria but not Germany), many states in Central and Eastern Europe (including Bulgaria and Hungary), the Baltics (Latvia and Lithuania have very modern plans), Nordic states (with Swedish plans being an exemplar), and Britain and Ireland. In Germany — where the registers are of excellent quality — cadastral and register information can only be requested in hardcopy by a paper form. Germany appears to be the main state with regionalised registers, which need to be connected to a nationwide portal. In France the cadastre had, until recently, to be accessed locally, but a government portal is now freely available, albeit that coverage remains somewhat patchy. In the

Netherlands, the web-based cadastre is effectively only an index to public records which have to be accessed non-digitally.

The European Land Information Service (EULIS) is providing a useful service but directed at professionals involved in commercial transactions rather than citizens. What is actually needed is to open up national land registers and cadastres so that they can be checked cheaply by citizens directly: thus, good models are Sweden, the United Kingdom, Ireland and the Spanish *nota simple*. There is no problem about states anonymising registered information if that is deemed to be desirable.

Identification of the property, its extent and condition

Spatial information about a property will be garnered from the cadastre and the land registry supplemented as necessary by information from title deeds and from the personal knowledge of the vendor. Coherent, comprehensive, up to date, comprehensible and reliable information is provided by registered titles — such as the German *Grundbuch*, the Swedish Real Property Register or the British land register.

One problem with the geospatial information in some systems is the possibility that the property may have been subjected to encroachment by squatters. In all states this is going to require expensive and difficult proceedings to secure vacant possession of the land. In common law systems, there remains the more drastic possibility of loss of title through adverse possession, so it is important for the physical extent of the land in the occupation of the vendor is checked. It is vitally important that the buyer is asked to check this, and of course a purchaser from a civilian state is most unlikely to be aware of the need to check for squatters. In Germany and many other civilian states, acquiring property through squatting is not possible, and a private buyer can rely on the registered extent.

By default a sale of land includes items which are fixed to the property (for example built in kitchen units) and excludes fittings (such as curtains). The principles of affixture — which determines what items are regarded as constituent parts of the immovable — are similar in all European systems though there may well be marginal differences. Regarding fittings, on the other hand, such as kitchen appliances what is or is not included in the purchase is a matter for negotiation between the parties. For example, in Germany, things such as kitchen appliances are often included in the sale, but this depends on the contract. In English practice, the basic legal position is invariably varied by express agreement. In order to avoid the uncertainty of the case law rules, the practice is that the seller completes a form detailing what is included and what will be left out and this is done before contracts are exchanged. Both parties will have a copy of the form. It does not appear that any civilian state follows the model of the English fixtures and fittings form (which appears to constitute best practice in seeking to minimise disputes arising after completion).

Practice diverges wildly as to surveys on the physical condition of the property: in some states a survey/valuation is routinely commissioned before contracting and certainly before a mortgage is granted; in others, reliance may be placed on the seller's duty of disclosure of defects. English law departs from the majority of civilian systems in applying the rule of *caveat emptor* (buyer beware — the seller is liable only for hidden material defects, which he knows) to purchases of existing homes. A seller is not required to disclose physical defects and so the buyer must satisfy him or herself as to the condition. This is invariably done through a survey conducted by a professional surveyor. Buyers often rely on the lender's valuation in order to save costs, but this is less than fully desirable. In Spain, the legal system does offer strong protection to the buyer since the seller is liable for hidden defects (even defects unknown to him) preventing the normal use of the property. It can be important, where necessary, to get an independent valuation of the property to uncover any problems such as subsidence and boundary disputes. Nonetheless, 75 per cent of

Britons buying in Spain have no survey. When the buyer applies for a mortgage, most banks in Spain suggest that clients request a period before completion to allow for a survey made by an independent expert company, the buyer paying the costs. The situation is rather similar in Poland, where it is very unusual to have a full survey, but reliance can be placed to some extent on the valuation commissioned by a lender at the borrower's expense. In Germany, primary reliance is placed on the duty of the vendor to disclose defects. It is not usual to obtain a survey. In relation to surveys, for a civilian buyer in a common law state, general information needs to be provided in the buyer's language to explain the options available to him or her about a survey. For a buyer from a common law state in a civilian state, a warning needs to be provided about the dangers of buying without a survey and information about how to secure access to surveying services if these are not generally available.

Title and burdens

A buyer of land is entitled to expect that he or she will acquire ownership unless the opposite is clearly signalled. All systems have some potentially confusing rights. In Germany, an important exception from the paradigm of ownership (*Eigentum*) is building lease (hereditary building right, *Erbbaurecht*). The object of sale is the ownership of building while the land where the property is located is rented. In Poland, likewise, although the right being sold is most often ownership, it may also be 'perpetual usufruct' — a transferable right, which is created on land owned by state or local governments, and where after the expiry of the right the land reverts back to the owner. Spain recognises the right to build (*derecho de superficie*), where only the building is transferred (not the land) and in Catalonia, since 2015, temporal ownership (similar to the common law leasehold) exists, which limits temporally (from 10 to 99 years) the ownership of the transferred land.

A foreign purchaser expects that the seller holds the authority to sell the immovable. Some problems may arise because, for example, Spanish, Catalan and Portuguese legal systems lay down rules aiming to protect the family home. The consent of both spouses or, as the case may be, judicial authorisation shall be required to dispose of rights over the marital home and the furniture ordinarily used by the family, even if such rights should belong to a single spouse. So, if one of the spouses sold the property without the authorisation of the other spouse, the spouse whose consent was lacking was entitled to request the nullity of the sale. The knowledge of this legal situation, which exists in Catalan law also regarding unmarried couples following an agreement or cohabitation, is difficult for the foreign buyer.

Many burdens (mortgages and hypothecs) will be redeemed by the vendor when selling, and it is up to the purchaser's conveyancer to ensure that this happens; but the buyer needs to know that this will happen. In most civilian states the notary does the land register search, and it is the duty of the notary to inform the buyer of the legal state of the property, including whether there is a mortgage; this is true for example in Germany, Poland and Spain.

The categories of burden are broadly similar across the continent, yet there are some variations. Not all the information is provided in foreign languages, so for example a buyer in the Netherlands would need to translate the register from Dutch, whereas in Spain an extract (*nota simple*) is provided to the interested party explained in plain English. Of course this still leaves many EU citizens facing a language barrier.

All systems (apart from Germany) have some interests which can be binding off the register. The conveyancer's job is to guard against liability, but there is a real risk that a foreign buyer might misunderstand the situation. We give just two examples. First, overriding interests in England are rights which bind off the register. These include the

rights of occupiers. Second, registered titles will generally not record short leases, even though they will bind purchasers (on the principle *emptio non tollit locatum*); examples are England (short leases of maximum 7 years, but with much detail), Italy (unregistered lease valid up to 9 years), Poland (protection of residential leases), Portugal, the Netherlands and France. Conveyancing practice should identify whether the property is tenanted. This is why inspection of the property by the buyer before the sale is strongly recommended.

Flats and new build property

A buyer familiar with one national property market is likely to encounter unfamiliar flat schemes when buying elsewhere in Europe, notably:

- schemes based on co-ownership of the entire building without a corporate management vehicle nor individual titles to units; the position originally in Belgium and France and still in the Netherlands and elsewhere;
- flats in house conversions in England, where each floor is commonly sold as a separate flat along with a co-ownership ('share') of the freehold;
- housing cooperatives, common in Scandinavia, Poland and elsewhere, that usually entail restrictions in disposition; the list of entitlements varies between different housing cooperative institutions and different countries;¹
- '*Société Civile Immobilière à vocation sociale*' in French law, by which third parties are only owners of the company shares that allow them to use the dwelling; this system is quite similar to the one used in housing cooperatives in Portugal;² and
- limited-liability housing company, which is the basic ownership arrangement for flats and semidetached houses in Finland; its shares confer full title to the specific unit while the company owns the land and the common parts of the building.

All Member States have introduced special condominium (apartment ownership) legislation. The de facto standard arrangement is to divide the ownership of units from the communal ownership of the block ('dualist' systems as opposed to the cruder unitary systems based on co-ownership). The basics are ownership of the individual flat, collective ownership of the block, and a collective management scheme. The management scheme will usually involve a management company charged with management of the block, and ideally under the control of the residents themselves. There may be a particular problem if management is conducted through meetings at which personal attendance is required.

The foreign buyer will require clear information about the block management scheme comprising:

- a flat management company or other management arrangement;
- individual and communal repairing obligations;
- a scheme for setting a service charge;
- obligations to pay service charge supported by default powers;
- a decision making structure; and
- information about the current state of repair and the state of accounts;
- possible existing limitations on the disposal of the unit; and
- possible limitation of the use of the unit due to the bylaws of the scheme.

Potential problems are management regimes imposed automatically without documentation (for example, France, Italy and Poland), failure to register individual flat titles, complex or

¹ For example, the Swedish housing cooperative has developed, since its inception in the 1930s, into an institution that is very close to ownership.

² In these cooperatives, the ownership of the units may be either individual (the members of the cooperative become homeowners of one specific unit built after the construction) or collective, in which case the cooperative remains the owner of the dwelling.

lengthy documentation that is not explained to the purchaser, excessive translation costs, and belated identification of pitfalls.

Flat blocks are legendary as a source of disputes which makes it apparent immediately that there are innumerable traps for purchasers, and so one must approach this topic with the pre-conception that cross border purchasers are extremely vulnerable. Block management poses many problems: the possibility of increases in service charges; disputes about the extent of services to be provided; complexity of ongoing management and participation rights; amendment of schemes; and service charge default. For instance, the buyer needs to be aware of the consequences of service charge default — fines, civil sanctions, a temporary takeover of the apartment by the company, or the possibility of sale of the apartment — and also alerted if there is an arrears problem in the block generally.

While most of the resale of a second hand property follows a consumer to consumer (C2C) trend, the sale of new build will often follow a trader to consumer (T2C) format. The element of new build introduces EU consumer competence since the developer is acting as a trader in a T2C contract.

New build documentation is inevitably complex because it mixes a sale contract, a construction contract, and block management arrangements. For example the contract may provide for stage payments, and when these become due will be linked to the stage that construction has reached. The job of the conveyancer/notary is to assess the documentation to see whether it is safe to advise a client to enter into the transaction (which does not require line by line explication of complex documentation) whereas the client also requires access to the documentation in a comprehensible language format in order to be able to make the decision to go ahead with a purchase and then to handle practical issues that arise during the construction work.

We feel that the complexity of the new build construction contract merits a similar approach as in the Mortgage Credit Directive which provides for consumers to receive comprehensive information about a mortgage offer in a standardised format (the European Standardised Information Sheet/ESIS). A format for a form of information should be formulated with the whole bundle of new build documentation being treated as a single package.

Problem sites have been created by developers going bust and failing to finish the development. The purchasers will often have paid in instalments and face a long and complex legal battle to recover their payments or face living in a ghost town with no amenities. Appropriate protections are to require funds to be deposited on a deposit account, to require a bank guarantee or to require a development bond with the local authority. Some banks in Spain have refused to honour a scheme of bank guarantees; either for technical reasons, such as the correct paperwork not being completed by the developer, or because they insist that the beneficiary obtains a court order before they will payout. The cost of litigation proceedings and legal advice will be recoverable in the end but many will not have the funds upfront, or the appetite, to take on litigation.

Public rules

This is the major issue within the scope of this report. A purchaser is entitled to know of any aspects of public land law that will affect the home he or she is buying and to have a guarantee that there are no unknown threats. Concerns would be very numerous and might include:

- development potential (for example, the extent to which the view from the property could be spoiled);

- soil contamination liability (among others, in Belgium and Spain);
- urban renewal (in Spain, for instance, the purchaser must ask the local authority for a certificate so as to see whether or not there is an urban charge that is not registered; in France, the sales of property in an urban regeneration area must be authorised by the prefect);
- coastal zone protection (for instance, Portuguese law protecting the natural environment around coastlines and inland waterways enables the government to reclaim land deemed to be public property); and
- statutory pre-emption rights of the state or local authorities (in many states and affecting many types of land, for example land of cultural interest, special urban areas or the harbour).

All Member States have rules for legal building construction and thus there is scope for illegals. In southern Italy, building was done in the past without permission on the basis that permission could be bought afterwards, but welcome steps have been taken to regularize the administrative procedures. The European market must be open to all EU citizens so a common approach to the legality of building is required. Problems have existed in parts of Spain. For example, in some cases during the housing boom houses have been built on land not zoned for building and unauthenticated permits have been revoked by court order. In an extreme case this could lead to demolition of the building. There are also many properties which infringe coastal zoning rules in Spain and elsewhere, the problem being a retrospective tightening of procedures without regard to the titles of purchasers who bought in good faith in accordance with the previous understanding of the law.

Few states, if any, have comprehensive one stop sources of public information, so knowledge of the public situation of land usually has to be stitched together from a range of sources. Information may be collected from:

- the land register;
- a local register;
- paper records at the *mairie* local to the property;
- enquiries of the relevant public authorities, for instance to check plans and procedures at the local or regional authorities;
- public undertakers for electricity, gas and other services;
- reliance on disclosure by the vendor;
- enquiry of the vendor; and
- specialised searches for instance for mine shafts.

Many restrictions will be entered in the land register but land registers are not comprehensive. Many systems have public claims that, even though they are unregistered, nevertheless secure priority over registered mortgages. These are restricted in France, Belgium and the Netherlands to the costs of the proceedings and necessary costs of administration; in Spain and Portugal property related taxes, public burdens and salary claims of employees within limits are included and in Spain liability to service charge contributions due to the condominium. Therefore, the foreign purchaser should check before the acquisition if there are some debts on the part of the seller that can lead to the creation of a mortgage by operation of law for the benefit of the state. This information may be obtained from the administration of the condominium or from the current owners.

A potential purchaser must know what information is available, where, how and by whom it is to be accessed, and whether there are any gaps in the provision of information. In England, compliance with relevant public requirements should be checked by a conveyancer who is responsible for inspecting necessary authorisations. Restrictions imposed by

planning and environmental law are a matter for the purchaser under the *caveat emptor* (buyer beware) principle, so enquiry has to be made of the seller and this needs to be supplemented by searches and enquiries of the local authority (commonly called a 'local search'). It is up to the conveyancer to assess whether other checks are needed.

In continental systems, checks appear to be much more random. In Poland, for instance, the notary does not perform all checks in this matter, however the notary will enquire about various matters that are pertinent to a given sale (such as development plans, past building permissions, possible pre-emption rights of the state, undisclosed burdens, outstanding inheritance and donation taxes). In practice, provisions about informing parties may be applied by notaries in a very restricted manner and they will not engage in a lengthy explanation of legal institutions, however there is a detectable move towards a more comprehensive approach by the notaries (in Spain and elsewhere) who increasingly require and check information to ensure the parties are making a well informed decision concerning the transaction. Still the main problems have arisen because notaries in some Latin systems do not see it as their duty to advise on the public aspects of land purchase.

Price: deposit, balance and costs

Because conveyancing procedures vary so widely across Europe, a citizen buying away from his or her home state will have assumptions about the financial aspects of a purchase. We consider cash payments first, then mortgage financing.

The procedures for payment of a deposit and the price differ widely. The stage of a transaction at which it is necessary to pay a deposit varies (a preliminary contract as in most civilian states, exchange of contracts in Anglo-Celtic systems, or deposits are not part of the practice in Germany). At the outset, a purchaser needs to be made aware of when he or she will be required to produce funds. The purchaser should be able to recover the deposit freely if the seller withdraws from the transaction. In a cross border transaction it should be a requirement that the deposit is held in a separate account. Proper safekeeping of a deposit is a very simple alternative to the enormous difficulty of taking court action in a foreign state for its recovery.

Transaction costs vary widely from Member State to Member State. Concerning the level of costs, prior research suggests that costs are lower if fewer parties are involved in the process. For the purposes of this study, the main issue is transparency, that is awareness of the costs at the outset. A prudent buyer will require generic guidance about the structure of costs before even beginning to view properties and a detailed and itemised budget at the start of a transaction and before becoming committed to any obligation.

Before the purchase, a buyer needs access to generic information that is reliable and up to date from which he or she could assess the likely ongoing costs of managing the property. After the purchase, a single point of contact with local bureaucracy could greatly reduce the burden on buyers unfamiliar with the language of their host state in meeting all the administrative formalities.

Mortgage finance

EU citizens looking for acquiring a property in another member State face additional difficulties if they need to finance its acquisition. Thus, mortgages follow the universal rule of *lex rei sitae* which means that they have to be created according the rules where the property is located. This means that the buyer/borrower probably does not know the rules about creating a mortgage and its legal and economic consequences, especially in case of default. In addition, he cannot benefit from taking the loan from the local branch of his

usual bank (who know his credit score, which might have more tolerance in case of arrears, etc.) will not risk granting a mortgage in a foreign country (it has been affirmed that only 1% of mortgages are cross-border). He is then deemed to take the loan and the mortgage from a bank that he does not know and which does not know him and his financial behaviour in the past (thus, more expensive and with worse conditions) and ignoring the legal and economic consequences of taking them (eg evictions, seizure of other assets, no waiting time before enforcement, different rules for consumer protection, etc).

To overcome these constraints for cross-border operations with immovables, for more than 50 years, authors have developed the concept of a common mortgage instrument for Europe (the "Eurohypothec") on the basis of a secure, flexible and pan-European instrument.

The recent Mortgage Credit Directive has focused on the provision of information in the interests of consumer protection. No further steps should be taken in relation to residential mortgage finance until the Mortgage Credit Directive has bedded in.

Professional assistance

A person employed on behalf of a seller and/or a buyer to conduct the legal aspects of the transfer of residential property from seller to buyer is described in this report as a 'conveyancer'. The services offered by conveyancers are compartmentalised on national and regional lines. Notaries commonly enjoy a monopoly over transactions with land, for which the involvement of a notary is frequently mandatory. In contrast to the Latin notary systems especially, the cheapest systems in Europe are the deregulated Dutch notary system, the dual conveyancing profession involving solicitors and licensed conveyancers in the United Kingdom and Ireland, and the Scandinavian system in which land transactions are handled by licensed real estate agents without legal involvement. The organisation of the notarial profession is a matter for each Member State, but the EU has an interest in the legal representation of cross border purchasers. The report makes recommendations that would ensure that cross border buyers receive advice that is:

- independent of any developer and of the seller;
- comprehensive – covering property law, private obligation and public law aspects;
- competent – this covering a knowledge of both property systems and language fluency; and
- timely – before the buyer becomes subject to any personal obligation.

Few matters are stressed as consistently through the literature on buying property abroad as the importance of choosing a lawyer who is independent of other interested parties. Given the regularity with which the same advice is issued it seems appropriate to legislate to protect consumers of legal services by requiring, among other things, a conveyancer accept instructions to certify that he or she is acting independently of the vendor and any developer and is otherwise free to advise the buyer. If a buyer is to be encouraged to appoint his or her own independent conveyancer to provide advice, it is necessary that there is an easy method of selecting a suitably qualified conveyancer.

In all states known to the authors it is permissible for the buyer to appoint his or her own lawyer to advise in the transaction. Thus, any cross border transaction could be divided as follows: a notary acting for the seller and carrying out public duties (checking the identity of the parties and ensuring that tax due is declared properly); and a conveyancer representing the buyer giving advice on the title, property law in the destination state; and general financial advice. This would solve the problem of cross border transactions neatly, respecting the notarial monopoly over conveyancing, ensuring that the state has a

guarantee of consensus of the parties, and leaving the EU free to regulate the activities of the person advising the buyer in the interests of proper consumer protection.

Buying process

In practice, on-line advertisement has opened the market to non-native buyers. Once a particular target property is identified, most cross border purchasers will negotiate through agents. Once the parties have come to a consensus that they wish to sell and to buy at a particular price, conveyancing procedures generally have the same three stages:

- entry into an obligational contract;
- execution of a transfer of the property; and
- registration of the transfer.

Variant terminology is a real problem here and in particular the words 'contract' and its qualifier 'preliminary' and also 'transfer'. A buyer needs to understand fully the manner in which his or her transaction will proceed, which is the first dimension of transparency. Transparency requires not only that the buyer should be aware of the procedure, but also that the buyer is alerted to crucial differences from his or her native experience.

The first step after conclusion of the negotiation is very different in different parts of the continent; negotiation will lead to:

- signature of a preliminary contract – in most of continental Europe (but preparation of a combined obligational contract and transfer deed in Germany); or
- a 'subject to contract' agreement – in the Anglo-Celtic tradition.

A preliminary contract is prepared by the agent using a standard form and signed by the purchaser, usually without legal advice. The matter will then be passed to a notary to prepare the purchase deed (for instance, in France, Italy, the Netherlands, Portugal and Spain). Buyers of immovables are denied the consumer rights of buyers of movables on the basis that people buying land receive legal advice. This, however, is not expressed in terms of conditionality. This reasoning breaks down in states adopting the preliminary contract since the buyer accepts obligations long before he or she receives legal advice. There is a good case for mandatory information and withdrawal rights. These rights might be withdrawn for any obligation incurred under a contract on which the buyer has had legal advice before signing the contract. (However, some buyers in Spain have not been able to recover their reservation fees when a sale fell through despite having legal support.)

Personal attendance at completion is general in Latin notary systems, including Germany, France and Spain. English buyers encountering the continental system are not used to being required to attend in person at completion. The notarial completion needs to be appraised for utility. Although the buyer may appoint a delegate to act for him or her by a power of attorney, the procedure can be inconvenient. The document needs to be drawn carefully to limit the power of the attorney to a specific property at a particular price. In order for it to be effective abroad it may need to be notarised and then legalised for use outside the state where it is executed. Less inconvenient is the German practice where signature in the document can be authenticated in any German consulate (the document need not be drafted by notary). Generally speaking, inconvenient formalities are unnecessary.

When a transaction is completed, there is inevitably a period during which the register does not reflect the transaction that has recently taken place. It does not within reason matter how long it takes to register a title so long as the priority of the mortgage and purchase are protected throughout.

The buyer's family

Anyone buying a property abroad will need to make a series of decisions affecting the entitlements of his or her family. Differences between matrimonial systems in different states can cause hesitation for foreign buyers. According to German notaries and discussions among potential buyers, the matrimonial system presents a dilemma for foreigners, and a potential source of confusion if the regime differs from that with which they are familiar in their own states.

A proposal for a Regulation governing matrimonial property regimes has been put forward, but its enactment has been delayed. The Succession Regulation of 2015 applies in all Member States except Denmark, Republic of Ireland and the United Kingdom. The main concern is to ensure that buyers on the continent have an awareness of the terms of the EU Regulations.

When an habitual resident of a civilian state buys in a common law state or a person domiciled in a common law state buys in a civilian state, the transaction crosses the civilian-common law divide, a factor which adds greatly to the complexity of the family planning aspect of conveyancing. If a civilian moves permanently to a common law state, so that habitual residence is established within a common law jurisdiction, the move risks upsetting existing succession arrangements and requires full advice to be given about its effects. Undoubtedly the most serious problems in cross border acquisitions will be encountered by a buyer from a common law state seeking to buy elsewhere on the continent of Europe. The archetype is an English couple with children buying a home together in France. Habitual residence in France (or any other Regulation state) will result in a succession being civilian and unitary. Anecdotal evidence suggests that, in France, *notaires* very often fail to advise English couples sufficiently, or, to put it another way, do not regard it as part of their function to advise in a conveyancing transaction on future succession issues.

Taxation

Non-national buyers will also be catapulted into a world with an unfamiliar taxation regime. The real issue given the wide divergences in taxation rules is to ensure that:

- buyers are made aware in a timely fashion of rules that may cause problems; and
- legal advisors have sufficient understanding of the divergences between the two systems to understand when the buyer may be induced to act under a misconception.

Anecdotal evidence suggests that these desiderata are often not met in practice so that, for example, real estate taxation elsewhere in Europe is one recurrent problem for Finnish buyers. The conveyancer should be required to point the client towards accurate and up to date information about taxation regimes.

EU competence and recommendations

The final two chapters explain EU competence to act in relation to the property law of Member States, formulate criteria for framing our recommendations and summarise our recommendations to resolve the difficulties encountered by EU citizens in purchasing property in other EU Member States.

1. METHODOLOGY

1.1. Objective

EU citizens frequently encounter problems when seeking to acquire a home elsewhere in Europe. The situation was aptly summarised by Diana Wallis MEP:

Many constituents and other European citizens have enthusiastically taken up the offer of 'freedom of movement' of people; many have chosen on the basis of this freedom offered by all European governments, to study, work or retire in another country. Others have chosen by virtue of the parallel 'freedom of movement of capital' to invest in second homes in another EU country, maybe as a holiday home, a retirement prospect or for holiday let. Many sadly have found themselves entangled in impossible legal nightmares; lost deposits, buildings not built, or built in breach of local planning legislation; every possible permutation has crossed my desk at some point or other.³

Some problems recur often whilst other problems that are rarer can cause exceptional difficulty when they do occur. This report sets out to provide a comprehensive catalogue of legal, administrative, fiscal, and practical problems which EU citizens encounter when buying immovable properties in another Member State, the various chapters following a typical purchase from the initial search to and beyond completion. MEPs will rarely be involved at the stage of acquisition, but rather will be asked to 'pick up the pieces' after a purchase has turned sour. This study seeks to provide a 'working tool' to inform the work of MEPs with constituents and to facilitate discussion in the European Parliament of the problems encountered.

1.2. Our approach

Conveyancing authors generally address their accounts to lawyers acquainted with the language and skills of the trade. Comparative accounts usually have a statement of each national system written in legal jargon. Neither is addressed to buyers and sellers, since it is assumed that the parties will appoint a lawyer able to conduct affairs in their own language. This may be so in a purely internal transaction in which the transaction is conducted in the language of the clients. When, however, conveyancing is conducted in a foreign language, the possibility of misunderstanding is exacerbated by the gulf between the experience of a native and a foreign buyer. This report seeks to understand the experience of the buyer who crosses a national boundary in order to buy a house. Most cultures in northern Europe have an expanding literature of 'How to' books explaining how one should go about buying a home or a holiday home elsewhere in Europe, and although here we will undoubtedly find legal issues, they prove to be a very small part of the concerns of the cross border home buyer. These practical guides are supplemented by a burgeoning genre of literary descriptions of the 'Good Life in Europe'. Rich Brits long ago began to colonise Provence and the Riviera, as exemplified by memoirs by Lady Fortescue and Dirk Bogarde, a lifestyle aspiration now summed up in Peter Mayle's *A Year in Provence* and Carol Drinkwater's *Olive Farm* series.⁴ In Andalucía the bible in the glove compartment

³ Diana Wallis & Sara Allanson, *European Property - Rights and Wrongs* (Brussels, www.dianawallis.org, 2011), p 5.

⁴ Winifred Fortescue, *Perfume from Provence* (Edinburgh: William Blackwood, 1935); Dirk Bogarde, *An Orderly Man* (London: Chatto & Windus, 1983); Peter Mayle, *A Year in Provence* (London: Hamish Hamilton, 1989) - the

is *Driving Over Lemons*⁵ and in Italy Lisa St Aubin de T  ran's *A Valley in Italy*.⁶ The report attempts to address the concerns of an ordinary citizen, one who is less well heeled, less literate, and taking a major risk.

Chapter 2 seeks to identify the types of cross border purchasers and to attach some provisional numbers to the volume of cross border transactions. It identifies the target of this report: citizens moving to buy residential property – excluding timeshare units – and creates a typology of buyers. Thereafter each chapter explores a particular aspect of matters that can go wrong. The issues are primarily transactional, the major problems being lack of information and the unexpectedness of particular rules, more so than the inherent nature of foreign property systems themselves.⁷ The best way to create a useful working tool is to break the conveyancing process down into a number of component parts. These arise in roughly chronological order as follows:

- register and cadastre;
- the property, its extent and condition;
- title and burdens;
- flats and new build property;
- public rules;
- finance;
- professional assistance;
- process; and
- the buyer's family.

The table of contents gives a detailed structure and is designed so that chapter headings should be self-explanatory and it should be relatively easy to isolate the part of the report that deals with a particular problem.

Each chapter begins with an explanation of the particular stage of the transaction and how it fits into the overall purchase. This is usually followed by national reports written from the perspective of the buyer, especially where national traditions differ. These reports are then analysed to identify problems that would be experienced by native buyers and additional problems likely to be experienced by transnational buyers. The text is illuminated with case studies wherever possible. Where the EU has already intervened, the existing *acquis* is analysed, as are any 'soft' law developments or initiatives designed to develop practical tools. Recommendations are made to address issues which have been identified.

The authors sincerely hope that MEPs and other readers will find this useful.

1.3. Specimen conveyancing systems

Consortium members have identified from their wide ranging experience, practical expertise and work on numerous comparative surveys the issues which appear to them to be most pressing. A complete statement of the many conveyancing systems operating within EU-28 would be unwieldy and would generate so much detail as to obscure rather

legal aspects of the buying process took place in 'April'; Carol Drinkwater, *The Olive Farm: A Memoir of Life, Love and Olive Oil in the South of France* (London: Little Brown, 2003) – the first of a series of seven.

⁵ Chris Stewart (London: Sort of Books, 1999).

⁶ London: Penguin, 1995.

⁷ Transparency needs to be context-sensitive: Sylwia Lindqvist, 'Transaction cost and Transparency in the Owner-occupied Housing Market: An International Comparison', Doctoral Thesis, (Stockholm: Royal Institute of Technology, 2011), Essay 4.

than illuminate the issues. Instead, systems are grouped into familial groupings and one representative system is described. This report is based on detailed analysis of the current literature in English, French, German, Spanish, and Scandinavian languages. The team writing this report was selected with this characteristic in mind, so as to create a report reasonably representative of the fifty or so property systems operating within EU-28:⁸

- common law systems (England and Wales,⁹ Northern Ireland, Republic of Ireland, and to a lesser extent in property law Cyprus and Malta) – represented by England;
- Germanic systems (Germany, Austria, and Greece as well as Switzerland and Turkey) – represented by Germany;
- Latin systems (France, Spain,¹⁰ Portugal, Italy, Belgium, Luxembourg and, in property law, the Netherlands) – represented by Spain but with France and other countries also considered comparatively;
- Nordic traditions (Denmark, Finland, Sweden, and in the EEA Norway and Iceland) – represented by Finland and to a lesser extent Sweden;
- post transition systems of Eastern Europe (Poland being our example).

Practical conveyancing is much dictated by methods of registration, with two systems which cut across all other classifications,

- title registration (Germany, Ireland, the United Kingdom, etc); there is also considerable variation in the relationship between the land register and the cadastre; and
- deeds registration (eg Belgium, France, Italy, etc).

In title registration systems the register gives a current snapshot of the state of the title so the registrar plays an important role in checking and validating the ownership. A register of deeds, on the other hand, consists of a series of sale contracts and other title deeds, a system which is much more difficult for a non-lawyer to understand. Registration is considered in a subsequent chapter.¹¹ Cutting across all these divisions are the practical conveyancing systems.

1.4. Authorship

The lead author who has edited the whole text is Professor Peter Sparkes of the University of Southampton (England). He would be interested to hear of any practical issues that arise (whilst being unable to give advice).¹² The authors take collective responsibility for the whole, but primary drafting was divided as follows:

Dr Dilsen Bulut, ZERP, University of Bremen (German report; statistics and typology; Executive Summary);
Professor Magdalena Haddas, University of Silesia (Polish report);
Mark Jordan, Southampton Law School (English report, Irish analogies; EU competence);

⁸ The existing comparative literature in English is noted briefly below at point 5.8.

⁹ Welsh law is only just beginning to diverge from English law, so this report focuses on England alone; Scottish law is quite different since it is civilian in character.

¹⁰ Spain has a regionalised system, with a distinct Civil Code in Catalonia.

¹¹ See below chs 3 and 5.

¹² Professor Peter Sparkes, ps1@soton.ac.uk.

Dr Héctor Simón Moreno, University Rovira i Virgili, Tarragona (Spanish report and comparison of other Latin systems);
Professor Sergio Nasarre Aznar, University Rovira i Virgili, Tarragona (mortgage law and appraisal of existing tools and projects);
Dr Tommi Ralli, ZERP, University of Bremen (Finland and Nordic states and German report; statistics and typology; Executive Summary);
Professor Christoph Schmid, ZERP, University of Bremen (supervision and editing).

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- Diana Wallis & Sara Allanson, *European Property: Rights and Wrongs* (Brussels, www.dianawallis.org.uk, 2011)

2. CROSS BORDER PURCHASERS

KEY FINDINGS

- Categories of cross border purchasers are related to EU free movement categories.
- Potential volumes are large and justify an EU framework.
- Statistics are found to be inadequate.

In this chapter we set out a typology of cross border acquisitions drawing on Peter Sparkes' *European Land Law*¹³ and Christoph Schmid's study of the *Conveyancing Services Market*.¹⁴

2.1. The European market in land

Before the formation of the EEC, the land markets across Europe remained essentially feudal in that they were compartmentalised and closed to foreigners, following the theory that a land owner once owed a personal allegiance to a lord. From this emerged the modern conception of the territorial jurisdiction of a state. It was common for foreigners to need permission before buying land, and separate permission was needed to import the money needed to pay for it. After the signature of the Treaty of Rome, the EEC quickly established a single market in goods and services, but the market in land and capital lagged behind. Effective capital freedom dates from implementation of the Maastricht Treaty. What was then freed was not only the movement of capital in the conventional sense but also movements of funds used to pay for transactions. Hence, the purchase of land (which is immovable) will involve a movement of capital. This falls into the purview of the EU when a cross border element is attached. From 1994, EU citizens have been free both to buy land in other EU states and to move the funds needed to complete the acquisition across internal borders.¹⁵

Very limited controls on alien acquisition are compatible with the EU treaty freedoms, meaning particularly limits on the acquisition of second homes in high pressure areas such as the Austrian Alps. Lingering traces of the old feudal conception also survive in border zones with military significance where purchases by 'aliens' are limited.¹⁶

These matters apart, full capital freedom can now be exercised across EU-28. Because the rights under investigation in this report derive from the single market in capital, much the same will apply to EU citizens buying within EEA-3 - that is in Iceland, Liechtenstein and Norway - and to nationals of EEA-3 states buying across EEA-31. Special and complex rules apply to Switzerland and capital movement rights may apply in a diluted form in associated states such as Turkey. However, the focus of this study is upon the citizens of full EU members, since those are the people whom MEPs represent - allowing citation of treaty provisions to be minimised.

Land is immovable, so it cannot itself cross national boundaries. Since a cross border element is a pre-requisite for EU competence, the primary subject of this study is when a buyer connected with state A (usually through nationality but at least through residence)

¹³ Oxford: Hart, 2007.

¹⁴ CU Schmid et al, *Study of the Conveyancing Services Market* (Bremen: ZERP, COMP/2006/D3/003, ec.europa.eu, 2007).

¹⁵ TFEU arts 63-66.

¹⁶ Sparkes *European Land Law* (n 1) ch 2; see below at point 7.2.

purchases a residential property situated in state B from a citizen connected with state B. This chapter develops a typology of cross border acquisitions readily enough, but it proves to be harder than one would expect to attach numbers to the categories identified.¹⁷

2.2. The scale of cross border acquisition

No one can doubt that the cross border flows of house sales and purchases are large enough to generate problems in some cases. During 2012 alone, 1.7 million people moved from one EU Member State to another, while the same number were immigrants into the EU.¹⁸ This must indicate a large potential for cross border acquisitions. An introductory question is whether, outside Spain, the scale of cross border acquisition is large enough to justify intervention. Detailed statistics of individual transactions are readily available from the largest market in Spain. These are in marked contrast to the woolly evidence derived from immigrant and emigrant populations elsewhere, figures which are difficult to correlate with individual purchases because of the large groups that have to be stripped out (students, private renters, short term workers) before the potential pool of individuals interested in purchasing a home can be identified; even then there is a problem of translating from individuals to households, and thus to individual purchases.

2.2.1. The conveyancing market in Europe

Schmid estimated the overall turnover of land in 2005 within EU-27 as EUR 1,800 (short scale) billions.¹⁹ No doubt it has fallen back since, but it still represents a very significant slice of the European economy. Schmid indicates that cross border activity may amount to 1 or 2% of this total, but even then it constitutes somewhere between EUR 1-2 billions. It is not easy to estimate the size of the residential sector, but again it must be very substantial.

2.2.2. Foreign buyers in Spain

The Spanish land registry collects detailed information about the national origin of people buying homes in Spain. The figures quoted above for 2010-2012 are well below the numbers before the Global Financial Crisis and in absolute terms rather small.

Table 1 Buyers in Spain 2010-2012

Origin	No	%	Foreign origins	No	%
			UK	13K	20%
			EU-28 (ex UK)	5K	8%
			EEA-3/EFTA	5K	8%
			Outside EEA-31	15K	24%
			All Europe	38K	100%
Foreign	64K	6%			
Spanish	1.006M	94%			
Total	1.070M	100%			

Source Spanish Land Registry (2014)²⁰

(Since then there has been a strong growth.) This very specific market is skewed towards

¹⁷ D Aspden 'Methodological Improvements to UK Foreign Property Investment Statistics' (2005) 619 *Economic Trends* 54-60; D Srisakendrarajah & C Drew 'Brits Abroad: Mapping the Scale' (London: Institute of Public Policy Research, 2006).

¹⁸ Regulation 862/2007 on migration statistics, (EC) No 862/2007, OJ 2007 199/23; Migration and migrant population statistics <http://ec.europa.eu/statistics-explained> (EU-27).

¹⁹ Schmid, *Conveyancing Services*, (n 2) paras 51, 63-71.

²⁰ 'Bienes Muebles y Mercantiles de España' in *Estadística Registral Inmobiliaria. Anuario 2014* (Madrid: Colegio de Registradores de la Propiedad, www.registradores.org/portal-estadistico-registral/estadisticas-de-propiedad/estadistica-registral-inmobiliaria/2014), p 68.

UK expats, with roughly 6% of purchases in Spain made by non-Spaniards. Clearly the volume of cross border transactions in many of the pairings found within EU-28 may be relatively small. If there were only 13 thousand or so British buyers in Spain over three years, the number of Estonians buying in Croatia must have been minute. Many cross border flows will never be detected unless specific effort is directed to collecting information through the land registries.

Clearly the approach to alleviating difficulties in cross border acquisitions must first establish whether there are substantial volumes of flows in all possible pairings. Our projection from the small snapshot above (and particularly the figures in point 2.2.1) is that the overall volume of cross border acquisition of homes within the EU is large enough to require EU wide action, but that individual flows are mainly on a very small scale. Existing practice addresses language barriers on an ad hoc basis (that is to add a translator to a normal conveyancing process). However, we consider that the small flows one might project from the snapshot above need correction to reflect the potential for growth when European economies emerge from the Global Financial Crisis and also that the absence of a framework for cross border acquisition must inhibit the growth of cross border flows. There does appear to be a strong case, therefore, for putting in place a framework that has the potential to unlock the economic potentiality of the single market.

2.2.3. 'Pull' factors reflected in mobility of EU citizens

Figures for emigrant populations paint a quite different picture. Scales can be estimated from the most comprehensive and recent statistics – those of the United Nations - though a caution is needed at the outset that these differ considerably from the more limited Eurostat-based figures.²¹ Indeed, all statistics based on official registrations must be unreliable since non-compliance is widespread.

Most movement of citizens within the EU is motivated by the attractiveness of the destination rather than the negative feelings towards the home country, by 'pull' rather than 'push'. A fifth of British buyers apparently experience the 'pull' of a film or television show, though larger numbers consider more rational factors such as the cost of living, crime rates, weather and tax rates.²² 'Pull' is reflected by the numbers of EU citizens moving to other EU destinations and reflects a likely pattern of cross border acquisition. The largest immigrant populations in 2013 were apparently:

²¹ The Eurostat Census (2011) did not report the national origin of immigrants and did not cover all EU-28 states: Migration and migrant population statistic (Brussels: Eurostat, May 2014) Table 4 (Non-national population by group of citizenship and foreign-born population by country of birth 1 January 2013) (migr_pop1ctz and migr_pop3ctb). Cumulative figures differ widely from the UN statistics used here (n 12 below), as do *Housing Statistics in the EU 2003* (Copenhagen: National Agency for Enterprise and Housing, 2004) and K Dol & M Haffner *Housing Statistics in the EU* (The Hague: OTB Research Institute for the Built Environment, 2010) pp 34-38. Better figures should emerge as the Regulation on migration statistics (n 6) is implemented.

²² Foreign Currency Direct survey (YouGov, April 2008) reported in the *Independent* March 3rd 2008. These can of course also be push factors.

Table 2 EU immigrant populations

Part A EU host states with immigrant populations exceeding one million

Host state	Germany ²³	UK	France	Spain	Italy
World total	9.8M	7.8M	7.4M	6.5M	5.7M
EU-27 total	3.7M	2.7M	2.2M	2.3M	1.9M
Immigrant populations by origin:					
1M +	PL				RO
500K +		PL	PT	RO	
300K +	IT; RO	IE; DE	IT	UK	
200K +	GR; BH; AT		ES	DE; FR	DE
150K +			FR; BE	BG	FR; PT
100K +	FR; CZ; PO; HU	FR; IT; LT; RO	NL; PL	PT	
50K +	ES; BU; SL	UK	SE; RO	IT; PL; NL	UK; BG, BE

Part B. EU immigrant populations between 1M and 250K with largest sub-groups

EU immigrants	Host EU-28 state	Larger immigrant groups	
		100K +	50K +
800K	Belgium	IT, FR, NL	ES
600K+			
500K+	Austria	DE	RO, PL, CZ
	Ireland	UK, PL	
	Sweden	FI	PL, DE
400K+	Netherlands	DE	PL, BE
300K+	Hungary	RO	
250K+	Poland		DE, LT

Part C. EU states with immigrant populations below 250K

Population	Host state
200K +	Portugal, Luxembourg
150K+	Denmark, Greece
100K+	Czech Republic, Slovakia, Finland
50K+	Cyprus, Romania, Slovenia, Croatia
50K-	Latvia, Bulgaria, Malta, Lithuania, Estonia

Source: United Nations (2013).²⁴

British statistics also suggest widespread mobility, since 6.5 million people living in the UK (one in nine of the population) were born abroad, Poles forming the second largest group (in excess of 450K).²⁵ The UK's 'pull' is such that it may become the most populous EU state by 2050.²⁶ All these figures give some idea of the relative impact of migration but, even if some way could be found to extrapolate from individuals to family units, it would be necessary to strip out students, children and renters before arriving at a figure for those likely to become home buyers.

2.2.4. 'Push' factors reflected in EU emigration

Much EU migration is caused by push factors within the home state; particularly lack of job opportunities post-crunch (a problem even for highly skilled employees moving to Germany from the south and east), low earnings in eastern states and the unaffordability of houses in western states. Moving to a new host state may be more attractive as a lifestyle choice

²³ Larger numbers of immigrants from outside EU-28 came from Turkey (1M+), the Ukraine, Serbia and Bosnia Herzegovina.

²⁴ 'Trends in International Migrant Stock: Migrants by Destination and Origin' (New York: UN, Department of Economic and Social Affairs, 2013), POP/DB/MIG/Stock/Rev.2013.

²⁵ *Population Trends Data* (London: Office for National Statistics, 2008) as interpreted in '1.8m Foreigners Move to Capital as Britons Leave' *Guardian* January 5th 2009. The largest group is from the Indian sub-continent.

²⁶ 'Germany Shrinks, France Grows but UK Population Booms' *Guardian* August 27th 2008.

than moving to a less desirable region in the home state. Seven EU-28 states have produced more than one million or more emigrants to other EU-28 states as the following table shows.

Table 3 EU-28 emigrants numbering at least one million in other EU-28 states

State of origin	Emigrants to EU-28	Major destinations		
		1M+	500K+	200K +:
Romania	2.8M	IT	ES	DE, HU
Poland	2.6M	DE	UK	DE
Germany	1.7M			UK, ES, IT, FR, AT
Italy	1.4M			DE, FR
UK	1.3M			ES, IE
Portugal	1.1M		FR	
France	1.0M			ES

Source United Nations (2013).²⁷

2.2.5. EU citizens crossing language boundaries

Unfamiliar property laws are much more of a burden if the conveyancing transaction has to be conducted in an unfamiliar language. Much cross border activity is confined within monoglot blocks, since EU citizens on the move naturally wish to be able to participate freely in conversations. Britons emigrate in numbers to Australia, New Zealand, the United States, (English speaking ghettos in) Spain and Ireland,²⁸ but much smaller numbers move to countries requiring new language skills, such as France and Germany. There is effectively no cross border element when a person moves from London to Dublin, and neither should a move from London to Edinburgh be seriously problematic despite the huge shift (unique within a single EU-28 state) from common law to civilian property law. A considerable interchange of populations occurs within the German speaking area of Germany-Austria-Switzerland, where property systems are also much the same. Many German emigrants moved to states where the language and the property system would be understood.²⁹ German emigration flows have been running at around 140,000 per year, but are now declining slightly.³⁰

Citizens of Nordic states rarely seem to move except to another Nordic state. Many pairs of states elsewhere interchange residents as a reflection of shared cultural traditions eg Romania to France and Greece to Germany; often a shared culture is accompanied by language competence, leaving a minority of purchasers facing a significant language barrier. In short, if language is the predominant barrier in cross border transactions, there are very many transactions which cross national boundaries where the buyer will in fact be proficient in the language of the destination state.

Cross-translation in Brussels and Strasbourg has created problems because of the innumerable pairings, and, in just the same way, cross border acquisitions may occur in innumerable pairings many of them with very low volumes of transactions. Any proposals made by this report must be realistic in the context of likely transactional flows.

²⁷ 'Trends in International Migrant Stock' (n 12).

²⁸ 'Trends in International Migrant Stock' (n 12).

²⁹ 'Trends in International Migrant Stock' (n 12); 'More than 3 million German emigrants in OECD countries', OECD 01/06/2015 www.oecd.org/migration/more-than-3-million-german-emigrants-in-oecd-countries.htm; Die Fallstricke für den Ruhestand im Ausland' *Die Welt*, April 22nd 2014, www.welt.de/finanzen/altersvorsorge/article127162571/Die-Fallstricke-fuer-den-Ruhestand-im-Ausland.html

³⁰ 'Recent trends in the geographical mobility of workers in the EU', Supplement to the *EU Employment and Social Situation Quarterly Review* (Brussels: EC Commission, June 2014) p 15.

2.2.6. Summary of flows of people moving within the EU

In summary:

- Even while flows remain depressed in the aftermath of the Global Financial Crisis, there are significant flows of cross border purchases calling for more than ad hoc solutions.
- Inflows of potential buyers are strongest to the United Kingdom, where prices rise rapidly creating an imperative to buy, and to Germany, where prices are more stable.
- The strongest single flow is from Britain to Spain, followed at some distance by French, German and Italian citizens buying in Spain. Other host states in Mediterranean Europe are experiencing similar but smaller flows. Because Spain is the major host, there may be scope for alleviating problems with ad hoc measures targeted at the Iberian Peninsula specifically.
- Large numbers of people have moved from eastern former accession states to western Europe (especially Germany and the United Kingdom) with the Poles being by far the most adventurous migrants, evidenced by populations exceeding 50K in eleven EU states.
- Large population shifts have taken place between Balkan states (both within and without the EU).

Flows are sufficient to generate significant problems, and to justify EU action based on a systemic approach, even though flows between many pairings of EU-28 states are small.

2.3. Economically active purchasers

2.3.1. Residential purchase by economic actors

The purchase and use of land in another EU state involves the interplay of economic freedoms with movement and residence rights. The latter categories overlap substantially and furthermore are not static; a worker may invite his family for holidays, and plan to retire abroad when his or her working life is over. Nevertheless a typology is useful because it links together the standing to buy abroad and the right of the owner to use the property he has bought.

Any EU citizen may buy property in another EU/EEA state with a view to establishing a business or service provision, but commercial acquisition lies outside the remit of this study.

Many citizens choose to buy a home in another EU state, exercising their right to move their savings across state boundaries to pay the price outright or to find the necessary deposit and borrowing from any lender in the EU to finance any balance. All citizens enjoy the right to acquire ownership of a house in another EU state. This will usually, but not invariably, go hand in hand with the right of free movement of the owner and family within Europe. As the EU Citizenship Report states:

EU citizenship brings citizens new rights and opportunities. Moving and living freely within the EU is the right they associate most closely with EU citizenship.³¹

A visitor is likely to take a hotel room or rent short term holiday accommodation, whereas students and those employed on medium term contracts are more likely to rent an

³¹ *EU Citizens Your Rights, Your Future*, COM(2013) 269 final, p 2.

apartment. European rental markets have recently been explored by the Tenlaw project.³² Only citizens residing in another EU country on a longer term basis are likely to consider buying accommodation in the state of destination. These are the focus of this study. Mobile EU citizens in this category need to rely on EEA economic freedoms to reside in the host state.³³ Economically active people may be establishers or service providers, like many of the people moving to Spain (and, no doubt, elsewhere in Europe) in order to set up small businesses. Nevertheless, the most numerous category of migrants must be workers. Implicit in an internal market is the freedom for labour to move freely within the market, which in turn implies unrestricted residence rights for workers, and thus for ex-workers and related categories. These rights have the potency to overcome controls on foreign ownership in, for example, the *Greek Border Regions*,³⁴ but also much more generally.

2.3.2. Categories and sub-categories of economically active purchasers

Since citizens who are economically active need a place to live they must not be discouraged from moving by national rules. Those likely to aspire to buy with their families are people establishing a business or acting as a service provider and workers whereas job seekers and students may be content to rent. Workers and other categories of economic migrants (such as those establishing a business or providing services) may be divided between those:

- moving to another country to work;
- commuting across borders between a main residence and a secondary home; and
- living and working on either side of a border.

In the latter category there is a long established cross over from southern Belgium into France and also to Luxembourg where well-paid employment is available to commuters from the three neighbouring countries, where average housing costs are typically half as much. Mobility of commuters here is increasing - around six thousand people commute from the German city of Trier (a doubling since 2002) with larger daily flows from the north of France - but the market still lacks full transparency.³⁵ Here in a nutshell are some of the concerns underpinning this report; costs operating as 'push' factor, language competence acting as a major determinant of destinations and the distortion of markets to the detriment of migrants.

2.3.3. Numbers of economically active purchasers

Official statistics measure individual workers and retirees, but they do not provide a convenient measure of how many emigrant workers establish a home in another state by purchase. Even without clear figures it is plain that a diaspora is taking place.

EU statistics provide accurate counts of the movement of citizens who are economically active. The chart below demonstrates the composition of the labour force in most of the EU states,³⁶ though it has been necessary to cut off the column for mobile labour in

³² www.tenlaw.uni-bremen.de/

³³ Directive on Movement and Residence by EU Citizens and their Family Members, 2004/38/EC, OJ 2004 L229/35, art 1.

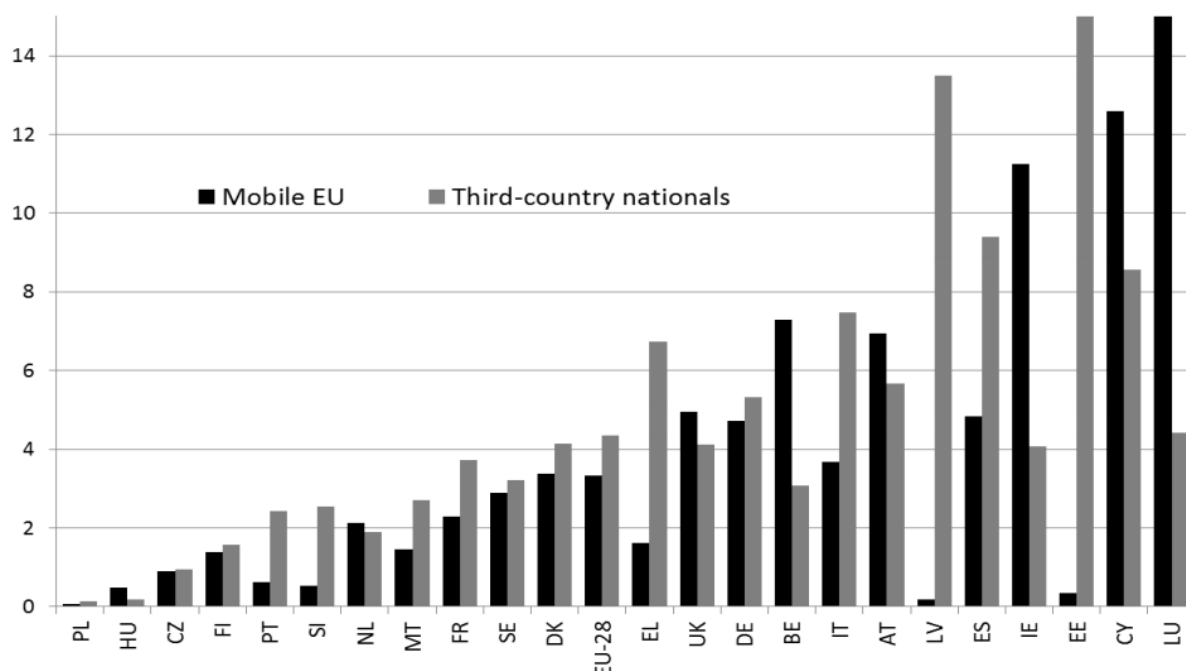
³⁴ Case 305/87 *Commission EC v Greece* [1989] ECR 1461, ECJ, at paras 13–19.

³⁵ Nathalie Christmann 'Dwelling in Border Regions – Discourse Modes' (ENHR, Lisbon, arbilu.unilux/handle/10993/21573) citing data from the Euro regional map (Eurographics, www.eurographics.org, 2010).

³⁶ 'Mobile EU citizens and third-country nationals as a percentage of the total labour force, by country of residence, 2013' (Luxembourg: Eurostat, 2013). Figures for BG, HR, LT, RO and SK are too small to be reliable, and the reliability of data for EE, LV, MT and PL is limited.

Luxembourg well short of its true value of almost half (or more precisely 46.7%). On average between two and three per cent of the workforce have moved between EU-28 states.

Table 4 Mobile EU workers as percentage of EU-28 workforce



Source: EU³⁷

English workers who move abroad **are** often responding to the pull of a job offer abroad, this being one of the major 'push' factors from Britain (and surely also elsewhere), especially for professionals and managers; workers have often been confronted recently by a choice between a job abroad or no job at all. Many workers wanted more help when moving, but two thirds were happy once the move had taken place.³⁸ Emigrants often prefer to retain a UK base, operating between a pad near their work and a family home back in the UK. The Census taken in England and Wales in 2011 was the first to include information about second addresses, a measure which provides some idea of scale (of individuals rather than properties). A second address may be indicative of people commuting to work but it also includes holiday home owners, the children of parents live apart and students. Some 2.8% of the respondent population (821 thousand individuals) had a second address which they occupied for at least 30 days. Of these, roughly half (that is 1.5% of the population) had addresses outside the UK, as follows:

³⁷ 'Recent trends in the geographical mobility of workers in the EU' (n 18), p 5.

³⁸ Survey by Freshminds (London, September 2012) for Lloyds TSB International, reported in the *Independent* September 25th 2012.

Table 5 Citizens of England and Wales with second addresses

	UK	France	Spain	Other European	Non-European
No by country	365K	90K	83K	125K	78K
% by country of those overseas		24%	22%	33%	21%
Workers		10.8K	10.0K	15K	
Holiday homes		9.9K	9.1K	13.8K	

Source: UK Census 2011³⁹

People identified by this question divided roughly evenly between those working overseas (12%) and those having holiday homes (11%).⁴⁰ Many workers may choose to rent so the figures cannot be equated to cross border acquisitions and in the holiday homes category respondents may have been visiting properties owned by relatives or friends. The figures appear very low when compared with, for example, the 750 thousand Britons said to live part of the year in Spain, perhaps because 30 days was a high threshold of use⁴¹ but more likely because of underreporting by those anxious to avoid the attentions of the taxation authorities.

Almost two million **German citizens** work abroad, often in higher-skilled occupations than those remaining in Germany. The education level of German emigrants is high and keeps rising: 1.4 M possess an upper secondary or vocational education, 1.2 M hold a university degree, and almost 50K hold a doctorate. Moreover, among the OECD countries, Germany has the most students studying abroad, in absolute terms. The number of students increased by 14 per cent between 2010 and 2012, reaching 140,000. The primary destination is Austria (31 thousand), followed by the Netherlands, the United Kingdom and Switzerland.⁴² Research by the OECD shows that a range of push and pull factors are at play to explain why Germany is a very large origin of emigrants,⁴³ though the scale declines significantly if emigration to German speaking countries is excluded.⁴⁴ Employment is a major cause of mobility, which affects particularly well educated, relatively young Germans and disproportionately young women.⁴⁵

In terms of **demographics**, people moving across Europe for work were, as expected, much younger on average than the existing population of their destination state, the majority being of student age or young working adults.⁴⁶ A new wave of young British owners in France and Spain are setting up as entrepreneurs. All this is a response to a lack of job opportunities and rising house prices. Half of Britons in the 16-24 age bracket would consider buying abroad.⁴⁷

Clearly, there is a huge and growing pool of migrant workers who are potential cross border purchasers.

³⁹ '2011 Census, Second Address Estimates for Local Authorities in England and Wales' (London: Office for National Statistics, 2012); see also: 'Recent trends in the geographical mobility of workers in the EU' (n 18), pp 24-28.

⁴⁰ Men predominated in the 'working' category (naturally clustered between 16 and 64) whereas women were slightly more likely than men to have a holiday address abroad.

⁴¹ A typical buyer in Spain is an executive who aims to spend 60 days there: *Independent on Sunday* August 15th 2010.

⁴² 'More than 3 million German emigrants in OECD countries' (n 17).

⁴³ *Talent Abroad: A Review of German Emigrants* (Paris: OECD Publishing, www.oecd.org/publications/talent-abroad-a-review-of-german-emigrants-9789264231702-en.htm, 2015).

⁴⁴ *Talent Abroad* (n 31) pp 24-26.

⁴⁵ *Talent Abroad* (n 31) pp 38-62.

⁴⁶ 'Age structure of the national and non-national populations EU-27 1 January 2013', Fig 6, migr_pop2ctz (Luxembourg: Eurostat, 2013).

⁴⁷ *Independent* February 12th 2005; *Guardian* May 30th 2005

2.4. Properties bought to let

The 'buy to let' investor buys an investment property in their home state intending to let out the property to tenants without ever occupying it themselves, their interest being in the rents derived from lettings achieved by professional managers,⁴⁸ along with any capital appreciation. When this activity is carried out by a Briton abroad it is described as 'jet to let', but it is open to any EU citizen to invest his capital elsewhere in the single market. This report does not consider investment through funds or trust vehicles. There are two distinct markets.

One is for property made available for short term holiday lets, which merges into the market for holiday homes (considered immediately below) since many owners will exploit their foreign home both for their own holidays and to achieve a rental stream to help with mortgage costs. Income may well not cover mortgage instalments in full. There are many problems in this market, not least the saturation of many parts of Europe, such as the many *gîtes* in *la France profonde*. The buyer needs to be clear about the local season, use realistic estimates of achievable rentals, be prepared to invest in costly advertising and be prepared to meet ever rising expectations about the quality of accommodation. Local rules may affect how long properties can be used and a tourist licence is often needed under local or regional rules. Taxation rules in both countries need to be understood clearly and how they interact.

A second market is for property bought by a foreign owner to rent out to native residential tenants. In Britain the buy to let market has developed since the 1990s in response to the removal of most security from private sector residential tenants and the introduction of shortholds, which shifted the balance in rentals a long way towards residential landlords and the growth of a market for buy to let mortgage loans. The buyer needs to be clear whether vacant possession will be delivered on completion or whether the property is bought with a sitting tenant. The investor needs to understand the tax position, since in some states a return of income will be required even if the property is not being let. Superficially there is a shortage of residential accommodation in many EU-28 states and therefore scope for a development of the rental market in many corners of the continent of Europe. The number of cross border landlords is unknown and perhaps unknowable.

2.5. Holiday homes

2.5.1. Holiday home owners

An EU citizen will almost always have the right to buy an immovable property in another EU-28 state, though there are some controls on holiday home purchase.⁴⁹ A person who buys a holiday home in order to visit it periodically can rely on entry and exit rights as an EEA national which permit residence in another European state for up to three months at a time.⁵⁰ This right for all EU-28 citizens is free from the need for administrative formality apart from possession of a home state ID card or passport.⁵¹ It is of course possible for a second home owner to move between categories after the purchase.

⁴⁸ Within the scope of this report are citizens who intend to spend their own holidays in a home bought in another EU country, letting out the property at other times to offset partially the cost of mortgage payments.

⁴⁹ On controls see point 7.2 below.

⁵⁰ Residence Directive (n 21) art 6.

⁵¹ Residence Directive (n 21) art 5.

Those with a main residence in an EU state buying a holiday home in another EU state may use the property exclusively as a holiday home for their family or may rent out the home when not in use for family holidays in order to generate an income. Roughly equal numbers fall into these categories, according to agents and property journalists, though in an ideal world a holiday home works better. Given that overseas property has a value equivalent to 2 per cent of net housing wealth, the income reported from rental in Spain to UK tax authorities is a paltry GBP 70 million annually.⁵² Admittedly running costs and maintenance are often more expensive than expected.

2.5.2. Volume

No official statistics are available of holiday home owners, so one has to work with the estimates of agents or lenders, recognising that these are likely to involve a degree of positive spin.⁵³ Undoubtedly the market boomed from the middle of the 1990s until 2006, at which time most established homeowners in Britain could afford to add a property abroad. Since 2006 the credit crunch has placed severe limits on the availability of finance for purchases overseas. Price falls associated with the crisis will have left some buyers badly burned in financial terms, at least in the short term. The second homes market is inevitably volatile since demand is discretionary and so prices will reflect the number of holiday makers wishing to buy.

The market has not yet (2015) picked up to a significant degree but prices appear to have reached rock bottom and the market will be attractive once more when the constraints on mortgage loans are lifted. Signs are now appearing of renewed activity in the market. According to the web-based Rightmove estate agency, locations favoured by British buyers in Europe were:

- 2014 - France; Spain; Cyprus; Portugal; Turkey; Greece; Italy; Bulgaria;
- 2015 - Spain, France, Portugal, Italy.⁵⁴

The attractions of the western Mediterranean increased as the Greek crisis unfolded. Research by one lender produced corresponding result for actual buyers:

- Spain 30%; France 16%; Italy 9.5%; followed by Portugal, Greece and Cyprus.⁵⁵

It is difficult to attach absolute figures to these flows. Official figures recognised 230K **British** owned boltholes overseas in 2005,⁵⁶ figures revised upwards at the time⁵⁷ but nowhere near enough. Census figures are even more suspect. The census in England and Wales in 2011 produced the following results:

Table 6 Citizens of England and Wales with holiday addresses in Europe

	France	Spain	Other European
Holiday homes	9.9K	9.1K	13.8K

Source Office for National Statistics, London, 2011.

These figures would need to be reduced to a half or even a third to move from individuals to family ownerships. Compare one lender's estimate that there were 600 thousand British

⁵² Aspden 'Methodological Improvements' (n 5) 54.

⁵³ Official registrations in Spain may need to be trebled to account for people not registered.

⁵⁴ *Observer* February 22nd 2015.

⁵⁵ Survey by Opinion Matters reported at 'More Retirees to Look for Holiday Homes Abroad as Property Becomes More Affordable' (London, HSBC, www.hsbc.co.uk, July 29th 2013).

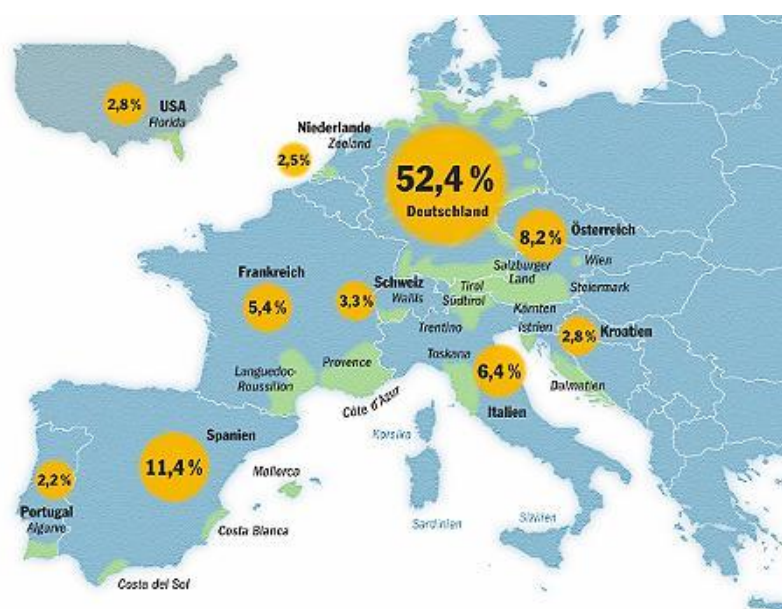
⁵⁶ *Times* May 16th 2005 citing official registrations with tax authorities (on which see n 39).

⁵⁷ Aspden 'Methodological Improvements' (n 5) 54–60.

owned homes overseas, and possibly up to 2 million.⁵⁸ The average paid for a home in Europe at the time was said to be GBP 109 thousand.⁵⁹

Another nation of large scale consumers of holiday homes is **Germany**. Purchasing a vacation property abroad, particularly in southern Europe, is not only considered a ticket to a desirable retirement lifestyle, but also a means of investment for Germans who are not yet retired. Indeed, Germans have 'discovered' vacation property (especially on the Mediterranean coast) as financial investment, in the wake of the euro crisis. By 2013, just short of half of all holiday homes were abroad. The map below demonstrates that eight of the top ten destinations are within EU-28 (Switzerland and the USA being the only exceptions and these among the lower-ranking countries). Spain has the highest number of German-owned holiday homes abroad, at 11.4 per cent, followed by Austria, Italy and France, with smaller numbers in Croatia, the Netherlands and Portugal.

Table 7 German owned holiday homes in Europe



Source: FOCUS Magazine, 2013.⁶⁰

Just outside the top ten is Greece – where perhaps 15,000 German citizens own holiday homes, most of them bought under laxer administrative and taxation arrangements in the 1980s and 1990s.⁶¹

2.6. Self-supporters and pensioners

Self-supporters are an important category of those moving within the EU because the Movement and Residence Directive confers upon them the right to reside in a host EU-28 state indefinitely, so long as they can maintain financial independence from the host state. The category includes very wealthy buyers who can afford to employ extensive professional

⁵⁸ *Observer* November 2nd 2008.

⁵⁹ *Guardian* June 16th 2005.

⁶⁰ 'Erfüllter Traum' FOCUS Magazin, August 23rd 2013; Fewo-Direkt and Engel & Völkers: *Marktstudie Ferienimmobilien 2013* (Bremen, 2013).

⁶¹ 'Wer hat (k)ein Ferienhaus in Griechenland?' Diablog.eu, <http://diablog.eu/ratgeber/wer-hat-ein-ferienhaus-in-griechenland/>, August 22nd 2014

advice and many ordinary people who do require help and protection because to inform themselves through professional advice would be prohibitively expensive for them. There appear to be no statistics about non-economically active buyers, nor any means of obtaining statistics.

There is a small group of **wealthy individuals** who can afford to live overseas, in many cases with multiple properties and no need to rely on a regular income. Doors always swing wide open to let in those who are well off. In the nineteenth centuries emigrés from northern Europe bought up large tracts of the Côte d'Azur and Tuscany whereas today's 'safe haven flows' may involve Russian billionaires buy up residential properties in central London or Paris. These people are likely to employ professional advice to secure a level of detailed knowledge beyond any minimum level of information requirements that the EU could enact and so will not in practice require help in mastering local property markets.

The main issue of fairness is the possibility in some Member States of 'buying' nationality of (or residence rights) and thereby acquiring EU citizenship (or residence at least residence) by purchase. Citizenship-through-investment schemes have been criticized by representatives of the European Union.⁶² In Malta⁶³ the value of the land bought must be at least EUR 350,000 whereas the 'Scheme for Naturalisation of Investors' in Cyprus does not require a land purchase to be included in the investment,⁶⁴ as has also been the case in Bulgaria since 2013.⁶⁵ Spain is an example of an EU country having a scheme for granting 'golden visas',⁶⁶ that is residence permits intended to promote the internationalization of Spanish economy. Foreign nationals who intend to enter or reside in Spain will be allowed to secure a residence permit for themselves and their relatives using a special procedure, after making an being investment in Spanish land. A visa (for one year) or residence permit (for renewable periods of two years) requires an investment of EUR 500,000 or more in one or more properties in Spain. Early indications are that the introduction of the law late in 2013 has not had a dramatic effect on the Spanish property market, despite the offer of unrestricted access to the Schengen travel area.

Table 8: Proportion of purchases in Spain exceeding EUR 500,000 by foreigners

Year	Percentage of high value property in Spain bought by foreigners
2012	5.21%
2013	4.72%
2014	5.20%

Source: Spanish Land Registry Association⁶⁷

Other countries with accelerated procedures for the grant of residence permits to investors⁶⁸ include:

⁶² Speech by Viviane Reding, ex EU Commissioner of Justice, http://europa.eu/rapid/press-release_SPEECH-14-18_en.htm.

⁶³ Maltese Citizenship Act, cap 188, and Legal Notice 47 of 2014; <http://iip.gov.mt/wp-content/uploads/2014/02/LN-47-2014.pdf>.

⁶⁴ Council of Ministers, May 24th 2013, www.moi.gov.cy/moi/moi.nsf/All/36DB428D50A58C00C2257C1B00218CAB.

⁶⁵ Source: www.artoncapital.com/global-citizen-programs/bulgaria/.

⁶⁶ Act 14/2013, of September 27th 2013, on support for entrepreneurs. The same measure was introduced in Portugal in 2012 by the Act 29/2012, dated August 9th.

⁶⁷ Spanish Land Registry Association: www.registradores.org/estadisticas_propiedad_1682.jsp.

⁶⁸ Sergio Carrera Núñez & Guayasén Marrero González, 'La ciudadanía Europea en venta. El programa de venta de la nacionalidad maltesa: ¿una brecha en el principio de cooperación leal en el ámbito de ciudadanía de la Unión?', *Revista de Derecho Comunitario* (49) (2014), 847 ff.

- Greece (land worth EUR 250,000⁶⁹);
- Hungary (purchase of bonds⁷⁰);
- Latvia (land worth EUR 250,000⁷¹); and
- UK (Tier 1 -Investor- visa⁷²).

Many others capable of **self-support** in the judgement of the EEA are far from rich. Europeans are free to move anywhere within EU-28⁷³ (and indeed in EEA-3 and even in Switzerland) and to stay, provided only that they have the means for their own support. This applies to citizens deemed unlikely to seek recourse to social security benefits, a bar set so low as to include many EU citizens who choose to move. Many of these will lack the resources to afford legal advice comfortably. Such a person may remain and live in a host state in the longer term, that is up to five years, after which the residence of an EEA citizen will become permanent. In order to cover the interim period, a declaration of self-sufficiency is required, showing sufficient resources to ensure that the incomer will not become a burden on the social assistance system of the host state, and comprehensive sickness insurance cover⁷⁴ for all family members. The level of financial safeguards required is essentially set at the pension level, though lower for students.

Retirement from employment is a likely moment for major life decisions, including a decision to move to another EU state. Many people move their main residence abroad when they no longer need to work, intending to live off their pension. Retirees subdivide into two categories according to whether the residence established in a new EU state is (a) a sole or (b) a main residence, the latter supported by a property retained in their state of origin. This can be seen as a division between those making an all or nothing commitment to a new lifestyle and those (perhaps wiser households?) retaining an escape route back to their home country. Of registered British expats in Spain at start of 2008 (of whom there were in excess of 350 thousand) only a third were aged over 55.⁷⁵ However, Spain is, according to the annual report of the British consulates around the world, the country outside the UK where more Brits die⁷⁶, supporting the stereotype of many British retirees retiring in Spain. Nevertheless, pensioner households are only a small subsector of the totality of second home ownership. Numbers of overseas retirees can be estimated from those receiving their pension abroad. Many pensioners who are categorised as self-supporting are in fact living hand to mouth.

This study is confined to the problems associated with the purchase of a retirement home, a very small part of the overall concerns of someone contemplating retirement abroad.⁷⁷ Many pensioners will have relatively small assets and a high proportion of these may be committed to the acquisition of their retirement home, so the usual concern of conveyancing to secure a valid and unarguable title to the property being acquired is particularly pressing.

Retirement is widely considered in Germany as the right time to start a new life in a new place. Nearly 40 per cent of Germans conceive spending their retirement years beyond the

⁶⁹ Act 4146/2013; www.mfa.gr/.

⁷⁰ www.residency-bond.eu/index.html.

⁷¹ www.padv.lv/en/residence-permit/.

⁷² www.gov.uk/tier-1-investor.

⁷³ Residence Directive (n 21) art 27.

⁷⁴ Residence Directive (n 21) art 7.

⁷⁵ *Guardian* December 31st 2008.

⁷⁶ www.theguardian.com/world/2011/mar/29/europe-news.

⁷⁷ A special concern is healthcare. Where this has been provided free for expats to encourage investment in property, as in Valencia and France, there is the worry that it may prove to be unaffordable and so withdrawn.

German borders, though not all of them fulfil their dreams when faced with financial pitfalls concerning taxes, pensions and healthcare expenses. Among the roughly 130 thousand Germans who emigrate each year, about one tenth are pensioners. In all, 220 thousand pensions are paid to expatriate Germans.⁷⁸ Pensioners are advised not to cut all ties with Germany but to acquire a secondary residence abroad, a course which minimises problems with health insurance and pensions.

Pensioners can be broken down into:

- former workers in the host state with a local pension and established residence;
- those retiring to a sole residence in an EU host, relying on a home state pension;
- those retiring abroad but retaining a residence back home (a large category).

2.7. Cross border ownership, purchasing and borrowing

This chapter concludes with a review of the very limited available data about owners and purchases. Statistics are very patchy. We are informed, for example, that data is not available about foreign purchasers in Germany. Eurostat is beginning to collect information on population and housing,⁷⁹ but this will not isolate transactions with cross border elements. Total ownership is very difficult to establish as no statistics are collected when acquisitions were made.

2.7.1. Britons abroad

Estimates of Britons abroad are widely circulated. Apparently, 3 per cent of the land area of France is owned by Britons, the full time population of Britons in France is 120 thousand but the total number of British owned properties is half a million. These figures are, however, difficult to verify. In Spain around 350 thousand Britons are registered officially as resident in Spain but there is an unofficial consensus that the true figure is around one million. One presumes that ownership is the predominant tenure among expatriates. In Italy a widely accepted figure is that there are 50 thousand British owned holiday homes.⁸⁰

2.7.2. Cyprus

In Cyprus a boom in foreign investment took place after accession to the EU in 2004, especially from Britons given the historical links between the two nations, and although the absolute number of transactions was reduced by the Global Financial Crisis, the proportion of foreign buyers registered at the Land Registry increased to more than one fifth.⁸¹

2.7.3. Finland

Since 2000, all foreigners have been able to buy land without restrictions. The domestic debate on land acquisitions has since then concentrated entirely on the large number, and sometimes perceived strategic location, of properties acquired by Russian buyers.

⁷⁸ 'Die Fallstricke für den Ruhestand im Ausland', *Die Welt*, April 22nd 2014, www.welt.de/finanzen/altersvorsorge/article127162571/Die-Fallstricke-fuer-den-Ruhestand-im-Ausland.html

⁷⁹ Regulation on Population and Housing Censuses, (EC) No 763/2008, OJ 2008 L218/14, annex

⁸⁰ *Guardian* February 7th 2009; *Guardian* November 8th 2007; *Observer* August 4th 2002.

⁸¹ Diana Wallis 'What Can the EU Do?' in D Wallis & S Allanson, *European Property Rights and Wrongs* (Brussels, www.dianawallis.org, 2011), pp 11-12.

Table 9 Land purchases by foreigners, Finland, 2010–2014

Buyer	2010	2011	2012	2013	2014
Nordic	44	22	38	25	45
Other EU	62	67	96	118	131
Russia	413	468	427	363	254
Other foreign	36	57	46	62	62

Source: National Land Survey of Finland⁸²

Apartments (shares in limited-liability housing companies) are sold independent of land and would need to be added to get complete figures.⁸³

2.7.4. Sweden

The Swedish sales price register does not have statistics over the nationality of buyers, but it records people living in other countries than Sweden at the time the transfer of ownership took place. These figures do not say anything about nationality, only about where the buyer lived at the time of the transaction. For instance, it may be Swedes living in Portugal who bought the property.

Table 10 Property purchases by people living in other EU states, Sweden, 2011–2015

Buyer	2011	2012	2013	2014	2015
Austria	25	47	26	32	44
Belgium	53	47	59	80	139
Croatia	5	0	3	0	0
Cyprus	13	23	31	15	38
Czech Republic	13	16	20	16	24
Denmark	882	658	293	478	644
Estonia	8	4	10	0	2
Finland	164	96	108	88	110
France	172	180	203	182	178
Germany	569	543	403	387	768
Gibraltar	2	0	2	0	0
Greece	8	12	2	12	0
Hungary	4	9	2	2	4
Ireland	17	14	10	14	15
Italy	41	16	31	30	37
Lithuania	9	0	2	0	4
Luxembourg	72	61	89	84	92
Malta	27	32	33	49	53
The Netherlands	136	86	35	62	99
Poland	31	7	0	2	8
Portugal	82	51	188	90	79
Romania	0	0	0	2	4
Slovakia	0	0	0	0	3
Slovenia	0	0	0	0	3
Spain	121	186	122	117	145
United Kingdom	339	357	418	323	573

Source: The Swedish Mapping, Cadastral and Land Registration Authority (*Lantmäteriet*)⁸⁴

⁸² 'Purchase Price Statistics of Land', 2010–2014 (Helsinki: www.maanmittauslaitos.fi/kauppahintatilastot).

⁸³ Since 1993, it has been illegal to limit sales to foreigners in the Articles of Association.

⁸⁴ The Sales Price Register at The Swedish Mapping, Cadastral and Land Registration Authority (www.lantmateriet.se).

2.7.5. Spain

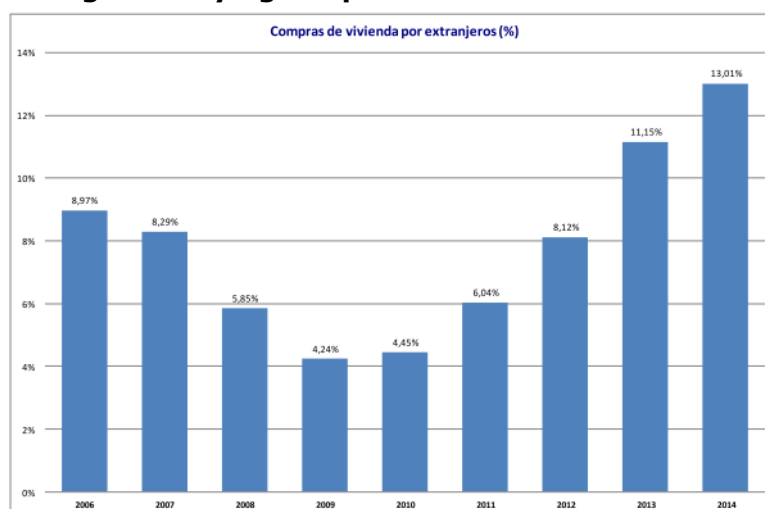
The Spanish land registry collects detailed information about the nationality of purchasers of property. The graph below shows that almost one in ten purchases was made by foreign buyers before the Global Financial Crisis, that this fell back to fewer than one in twenty in as the crunch really took hold, but activity by foreign buyers has recovered more quickly than for native buyers.

Table 11 Buyers in Spain 2010-2012

Larger nos	2010-12	Smaller nos	2010-12	Totals	2010-12
UK	12,505	Sweden	3,148	Foreign	64,434
France	5,977	Netherlands	2,313	Domestic	1,006,266
Germany	5,110	Belgium	3,479	Total	1,070,700
Italy	3,474	Romania	1,888		
		Ireland	987		
		Denmark	911		
		Finland	715		
		Poland	186		
		Portugal	200		

Source Spanish Land Registry (2014)⁸⁵

Table 12 Foreigners buying in Spain 2006-2014



Source: Spanish Land Registry (2014).⁸⁶

2.8. Recommendation

There is already a very substantial volume of cross border activity in the housing market, but it is impossible to quantify these volumes since statistics in almost all Member States are unreliable. At present flows are very uneven, the largest single category apparently being Britons buying in Spain, but the European market will evolve in unpredictable ways. Cross border purchases in central and eastern Europe appear to be few, though this will change over time. It is much easier to count purchases rather than persons, and it seems that this information could be collected without great cost and is essential for the future.

⁸⁵ Ibid.

⁸⁶ 'Bienes Muebles y Mercantiles de España', (n 8), p 68.

With accurate figures about current flows it would be possible to estimate the potential for significant future growth in the market, due allowance being made for the depressed state of the current market in the aftermath of the Global Financial Crisis. More accurate predictions of future trends would be a vital prop to proper planning of land markets at a national and European level.

The main types of activity under consideration are purchases by:

- economically active buyers;
- buy to let investors;
- holiday home buyers and
- self-supporters (including pensioners).

These categories – which overlap – are derived from EU movement and residence rights. Some attempt has been made to ascribe sizes to them, but available statistics are unreliable even on EU internal migration and it has been impossible to assign cross border acquisitions of residential property by EU citizens to these categories with any degree of accuracy. This demographic information would be invaluable to national legislators.

Our first recommendation is prompted by these thoughts.

Recommendation 2-A – the EU Regulations covering the collection of statistics should be amended to ensure that when a purchase of property is registered, Member States collect information about whether the transaction is purely domestic or involves a cross border element, and ideally also the category of mobile citizen into which the buyer falls.

The easiest way to facilitate this in those states in which a foreign buyer requires a tax number is for this to be included in the form to be completed with the application for registration. This will have the benefit that foreign purchasers can be integrated into the taxation and administrative systems of the host Member State.

References

- ‘Bienes Muebles y Mercantiles de España’, in *Estadística Registral Inmobiliaria, Anuario 2014*, (Madrid: Colegio de Registradores de la Propiedad, 2014), p 68
- Directive on Movement and Residence by EU Citizens and their Family Members, 2004/38/EC, OJ 2004 L229/35
- *EU Citizens Your Rights, Your Future*, COM(2013) 269 final
- C Schmid et al, *Study of the Conveyancing Services Market* (ZERP, Bremen: COMP/2006/D3/003, 2007)
- P Sparkes *European Land Law* (Oxford: Hart, 2007), ch 1
- ‘Recent trends in the geographical mobility of workers in the EU’ EU Employment and Social Situation Quarterly Review Supplement (Brussels: EC Commission, June 2014) p 15.
- ‘Trends in International Migrant Stock: Migrants by Destination and Origin’ (New York: UN, Department of Economic and Social Affairs, 2013), POP/DB/MIG/Stock/Rev.2013.

3. ACCESS TO PROPERTY INFORMATION

KEY FINDINGS

- Ready access to the information in cadastres and land registers would greatly facilitate cross border transactions.
- In states as diverse as England, Spain and Sweden, existing provision is close of the ideal, but there are many other states which have still to catch up with technological innovations, for example France, Germany and Italy.
- European initiatives (such as EULIS) are not particularly directed to helping individual citizens engaged in a cross border purchase.

3.1. Concerns of a buyer

The World Bank pointed out in 2015 that a reliable land administration system is of paramount importance when *Doing Business* in a foreign country.⁸⁷ Europe has high standards of land administration when compared to the developing world, yet even within EU-28 the provision is patchy. The best practice provides cheap and straightforward electronic access to the cadastre (which provides spatial information about land) and coordinates this with the content of the land register (which records title to land) so that that content can also be accessed cheaply and quickly. Progress is rapid, but access to land information has not always caught up with the technological revolution of the past twenty years. Technology can help to correct the disadvantage suffered by buyers when crossing internal boundaries.

An EU citizen moving abroad is likely to find it much more convenient to garner information electronically. According to Diana Wallis MEP:

If the purchaser is from another Member State, they are placed at a disadvantage without the backup of an accessible Land Registry. The variety of local sources of information that must be consulted, the lack of a single up-to-date map to consult, the lack of transparency of money charges over property or the misrepresentation of ownership have all caused widespread problems for foreign buyers.⁸⁸

In the search phase, online agents will make ample information readily available, but once the range of search has been narrowed, whether to a shortlist of possibilities or to a single target property, there remains a large financial benefit to a buyer being able to filter properties at a distance to identify any defects that render them unsuitable. Conventional conveyancing delays title checks until after an agreement has been reached between the parties to the transaction, in order to save search fees and the cost of professional time to assess search results, but this may lead to a transaction being aborted late in the process. A cross border purchaser will probably consider it sensible to commit resources at an earlier

⁸⁷ *Doing Business 2015, Going Beyond Efficiency* (Washington DC: International Bank for Reconstruction and Development, 12th edn, 2014), p 61 ff.

⁸⁸ 'Linking Up National Land Law Systems across the EU – Some Practical Steps' in D Wallis MEP & S Allanson *European Property Rights & Wrongs* (Brussels: www.dianawallis.org.uk, 2011), pp 65-66.

than usual stage of a transaction to a rigorous assessment of the suitability of possible purchases.

In the United Kingdom an experiment was made with Home Information Packs which collected together all information relevant to a purchaser before a property could be put on the market. This idea was misconceived, because it required information that was not readily available and, by requiring a seller to incur significant cost before property could be marketed, it discouraged speculative marketing of property for sale, and was soon abandoned. It is much better to concentrate on ensuring that information is already available, and in digitised format, when a platform can be provided to deliver the information at minimal cost. One day, it will be possible to read text that is in digitised form in any language, thus eliminating problems of translation, but even before reliable translation software is available, it is desirable for all documents to be digitised.

Increasingly, therefore, mobile European citizens will wish to gain access to property information through electronic portals, conducting searches of available property from the comfort of their own home, possibly thousands of kilometres away from where they are looking to buy. Technology needs to cope with the very precise target area of an employee holding a job offer at a specific location and the very wide search range of someone seeking a holiday home anywhere in the sun.

This chapter considers sources of information in relation to:

- property search (sales particulars and generalised locational information);
- spatial details (the Cadastre);
- title (the Land Register); and
- public requirements (land information, often divided between several authorities);

Commercial sources dominate the early stages of a transaction at the top of the list (on-line property for sale searchers, estate agents, Google Earth etc), so it is little surprise that the resources available are of high functionality. Once a particular property is identified the focus will shift to national resources (cadastre and land registry) supplemented to a very limited extent by European initiatives (EULIS). Citizens buying in some EU-28 states will encounter pillars of excellence but in others buyers will be amazed at the backwardness of the systems for delivering land information. However, rapid progress is occurring.

3.2. Property search

3.2.1. Setting the parameters

House purchases are often made on the spur of the moment. Many people, apparently, take longer to buy clothes than they take to buy a property.⁸⁹ A more rational approach is to begin with a series of questions framing the parameters of the search, which might look something like this:

- Why do you want to move abroad?
- How much can you afford?
- What are the tax implications?
- Where do you wish to buy?
- On what basis are you going to use the property?
- What size of home do you require?

⁸⁹ T Leven, 'Would You Invest in this Ski Resort?' [2007] December 15th *Guardian Money*, p 5.

- What age of property are you looking for?

Once a buyer has some rational answers to those questions, the conventional advice to research the area in detail, not forgetting to find out what a holiday area is like out of season. Very many buyers omit the next stage which is to ask what they need to adapt themselves to their new environment; a new language may well be needed either for work or at least to develop a social network. Sadly, many British buyers achieve little integration; in Spain half never read a local newspaper and less than a fifth can hold a conversation in Spanish, which may explain why few bother to vote.⁹⁰ No wonder that local regulations are little known and many buyers do not engage with the buying process. No doubt the same applies to other nationalities to a lesser degree. It is necessary to point out firmly at the very beginning that cross border purchasers often bring troubles upon themselves by cutting corners at the time of purchase. European law should seek to ensure that buyers are sufficiently knowledgeable to make informed decisions, but no more. Buyers have a responsibility to behave responsibly.

3.2.2. Estate agents' particulars

No doubt some people who buy a holiday home start looking on the spur of the moment, drawn by the 'pull' factor of their holiday location, and they may simply approach estate agents in their holiday destination directly. It remains possible to identify a property to buy in the traditional way by visiting estate agents and then to gather information about it by appointing a lawyer to conduct conveyancing searches. The ZERP Study of Conveyancing Services concluded (eight years ago) that around 70 per cent of transactions were facilitated by estate agents, more in urban and affluent areas and less in rural and poor areas.⁹¹ This approach will not unlock access to all properties on the market, because reliance is placed on word of mouth in many parts of Europe to advertise property for sale. Considering the size and value of agency business, it is surprising that agents are so little regulated.⁹²

Conventional marketing of land involved word of mouth, local newspaper advertisement, estate agency, or press advertising campaigns for commercial developments. The internet has transformed how land is marketed, so as greatly to increase the likelihood of a cross border element entering into a transaction, include:

- e-mail or messaging of specific buyers;
- use of internet search engines by potential buyers; and
- online property websites and estate agents.

EU citizens exercising their capital freedom across national barriers are likely to prefer a web portal as a primary means of accessing estate agents' particulars, especially buyers who are overcoming a language barrier and those who are living away from the search site. Most cross border purchasers will place heavy reliance on the internet at the initial stage. This has the potential to transform the market. An electronic search engine allows a national search or a regional search and could potentially allow a single search across multiple EU Member States. A search for a holiday home close to the sea with three bedrooms could throw up hits in, say, Finland, France, Portugal, Spain, Croatia and Cyprus,

⁹⁰ K O'Reilly, 'Intra-European migration and social cohesion: The extent and nature of integration of British migrants in Spain' in T Mazon, R Huete, and A Mantecon *Turismo, urbanisacion y estilos de vida* (Barcelona: Icaria, 2009); A Huber & K O'Reilly 'The construction of Heimat under conditions of individualised modernity: Swiss and British elderly migrants in Spain', (2004) 24(3) *Ageing and Society* 327-352.

⁹¹ CU Schmid et al, *Study of the Conveyancing Services Market* (ZERP, Bremen: COMP/2006/D3/003, 2007), para 79.

⁹² Schmid, *Conveyancing Services* (n 5) paras 98-101.

so web-based browsing has eliminated the previous practical limits to national markets.

In some locations a potential purchaser will be overwhelmed by potentially suitable property and would face a major problem of shortlisting property to view, but web-based agents would be equally convenient for a buyer restricted to a very specific location by an offer of work.

Figures quoted below show the range of choice available to British buyers serviced by two on-line providers.

Table 13 Properties in EU-28 listed for UK buyers with two internet agents

Number of properties	Rightmove	Zoopla
100-125K	EU-28	EU-28
50-75K	ES	ES
30-50K	FR	FR
10-30K	PT, RO, IT	PT
5-10K	CY, IE	CY, IT
1-5K	EG, BG	
500-1K	AT, MT	EL, CH, MT

Source Rightmove and Zoopla (2015)⁹³

3.2.3. Generalised locational information

A purchaser will almost inevitably turn to web-based search engines to research the locales surrounding the property or properties under consideration. This might include:

- aerial photographs;
- the appearance at ground level of the property, the condominium and the locale;⁹⁴
- price records of neighbouring properties;
- schools, hospitals and other facilities; and
- transport links.

All this information should be readily available, and the experience of using it will create a high level of expectation about the level of service to be expected from official portals.

3.3. Access to the cadastre

Most European states base their land information systems around a cadastre, which may be defined as 'an official geographical information system which identifies geographical objects within a country, or more precisely, within a jurisdiction. Just like a land registry, it records attributes concerning pieces of land based on measurements and other renderings of the location, size, and value of units of property'.⁹⁵ Across EU-28 there is little agreement about the primary function of the cadastre, which may be directed to taxation (as in France), to environmental issues (Portugal) or to land use planning and public management of land. Cadastres designed for public administration have often been adapted as the provider of

⁹³ Agents' websites: www.rightmove.co.uk and www.zoopla.co.uk (October and December 2015 respectively).

⁹⁴ Details of the coverage of 'Google Street View in Europe' can be found on the Wikipedia page of that name.

⁹⁵ E. Stubkjer, 'Cadastre', in S Shekhar & H Xiong, *Encyclopaedia of Geographical Information Systems (GIS)* (New York: Springer, 2008) p 65. This, in his opinion, 'accommodates the various practices within continental Europe, the British Commonwealth, and elsewhere'.

spatial information for the registration of land, and in general European titles are registered by reference to cadastral parcels. Most European countries have digitised their cadastres. In around two thirds of EU-28 states, responsibility for the cadastre and for land registration lies with the same authority. Britain and Ireland have no cadastres since the mapping and title registration functions are combined within the UK land registries (serving respectively England and Wales, Scotland, and Northern Ireland) or the Irish Property Registration Authority.

Our criteria for assessing cadastres are adopted and adapted from the findings of a Spanish team, as follows:⁹⁶

- plots of land should be recorded on a cadastre coordinated with the land register;
- the cadastre should be open to inspection by all and accessible via an open portal;
- relevant extracts should be easy to find, download and print out; and
- fees should be low enough to make it feasible to research several properties.

Around two thirds of EU-28 states integrate the cadastre and land registration functions within a single organisation.⁹⁷ Since most cadastres and land registers are digitised that single organisation generally has the potential to deliver cadastre and register details through a web-based portal. This will help a cross border purchaser who can access information about a property in the host state from his home, especially if the interface is in the language of the buyer. Nevertheless even if information is only available in the national language of the provider, this will greatly help purchasers overcome the language barrier since information printed off the internet can be translated and digested at leisure. A public portal is available in many EU-28 states:

- Germanic states (AT but not DE);
- central and eastern Europe (many states including BG, HU);
- the Baltics (LV and LT have very modern plans);
- Nordic states (DK, FI, SE - with Swedish plans being an exemplar⁹⁸); and
- Britain and Ireland.

Any fee charged is trivial in the context of a property purchase.⁹⁹

Thus, to take England as an example, at the start of a transaction when instructions are being taken, the buyer's conveyancer will print off a copy of the register and filed plan. The client will be provided with a copy or, if not, the land register is open and any title can be obtained by anyone from an open portal. Usually the extent is indicated by the filed plan (the verbal description often being no more than the postal address) which can be checked by the client, if necessary on the ground. It will be checked against the estate agent's particulars; which now often include a site plan and a floor plan of the home.

Member States moving with the times include Belgium, where the General Administration of the Patrimonial Documentation has launched a new service that enables on-line visualization of the cadastral map.¹⁰⁰ Spain also provides cadastral information electronically.¹⁰¹ Citizens have free access to the cartography, cadastral data and cadastral

⁹⁶ P de Pablo Contreras, I de la Iglesia Monje, & FJ Orduña Moreno, 'Anexo. La Convergencia de los Sistemas Registrales Europeos: Una Propuesta de Armonización', in FJ Orduña Moreno & F De La Puente Alfaro, *Los Sistemas de Transmisión de la Propiedad Inmobiliaria en el Derecho Europeo* (Madrid: Civitas, 2009) p 633.

⁹⁷ 'Cadastres and Land Registers: Source of Information, Round 2' (Marne La Vallée: Eurogeographics, 2010).

⁹⁸ The Swedish land register also includes aerial photographs. The substantive quality of the spatial information is considered in the following chapter, see below point 4.2.

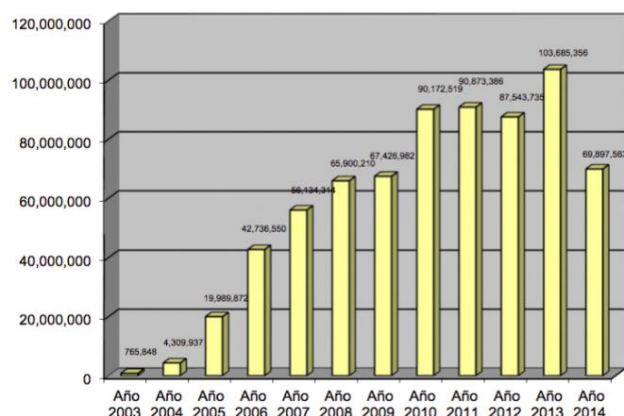
⁹⁹ A set of register entries and filed plan for any property in England or Wales costs GBP 8 (EUR 10) through www.landregistry.gov.uk. The cost of on line views in Ireland is comparable at www.landdirect.ie.

¹⁰⁰ http://ccff02.minfin.fgov.be/cadgisweb/?local=nl_BE.

¹⁰¹ www.sedecatastro.gob.es/.

reference, but a digital certificate is required so as to access more detailed information about, for example, to some data and contents of the cadastre, e.g. to download the cartography and alphanumeric information of municipal types. As can be seen from the graph below, use of the system has flourished at a time when the market has been depressed by the financial crisis (very likely simply because of increased knowledge of its availability).

Table 14 Electronic access to open cadastral data in Spain, 2003-14



Source: Spanish Cadastre Electronic Site¹⁰²

France is an important example where, until recently, the cadastre had to be accessed locally, but where a government portal <www.cadastre.gouv.fr> is now both freely available and free via French, English and Spanish interfaces. However, coverage is very patchy at present (October 2015) and according to one property website,

'those of you familiar with UK land registry on-line plans are likely to be a little disappointed particularly with rural cadastre plans, where the level of topographical information is poor.'¹⁰³

They recommend instead commercial web resources such as Google Earth or Streetview.

A few (non-exhaustive) examples of countries where issues with access to cadastral information might concern the mobile EU citizen are:

- France – the web-based portal is not yet rolled out across all départements;
- The Netherlands – the web-based cadastre is effectively only an index to public records which have to be accessed non-digitally; and
- Poland – coverage of the cadastre appears to be extremely patchy.

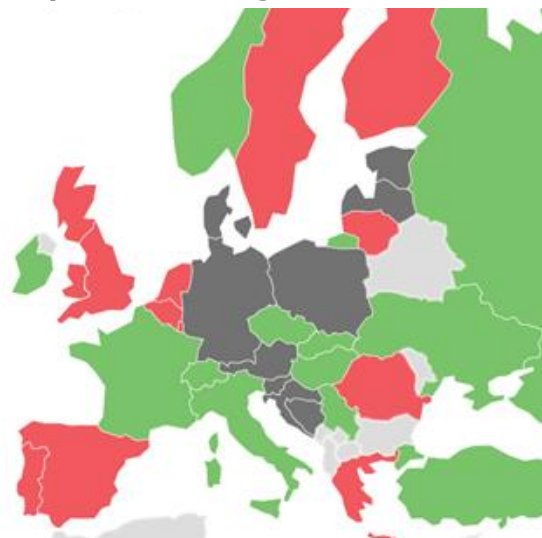
All states should be encouraged to meet the Spanish criteria for access to cadastral data, and on the whole, existing provision is adequate and rapidly improving.

3.4. Accessible registers of title

European states generally entrust the register to a land registry, those which have independence from the government being shown in red below and those under more direct control in green, but a few states (shown in grey) continue to use the courts as registries.

¹⁰² 'Electronic enquiries of non-protected data (freely accessible) in Spain 2003-2014'; www.catastro.minhap.es/ayuda/estadisticas_ovc_new.pdf, 2014.

¹⁰³ www.french-property.com/guides/france/property-rights/registration/, which suggests the use of aerial photographs from www.geoportail.fr/.

Table 15 Who keeps the land register?

Source. Runder Tisch Grundpfandrechte, Berlin, 2015.

A Spanish team has collected together rules on land registration with contributions by jurists from universities across Europe. Their scholarship has led to a proposal for common rules for a European Land Register with the following basic rules:¹⁰⁴

- property rights in land should be entrusted to an electronic register;
- this should be coordinated with the cadastre;
- properties should be the starting point (ie by land parcels rather than names or deeds).

The third criterion is a matter of some contention since, as things stand, Europe is divided between systems of title registration and of deeds registration.¹⁰⁵ In the former, information is arranged by parcel of land; the details recorded in the register vary from system to system but in essence comprise the property (its extent and boundaries), the ownership and benefitting rights and any burdens. These systems generate a snapshot of the current state of the title and will provide much the easiest way for a foreign buyer to understand the state of the title; the title is also much easier to deliver electronically. This is usual in Germanic states (though access in Germany itself is problematic), Britain and Ireland, the Nordic states and much of Central and Eastern Europe.

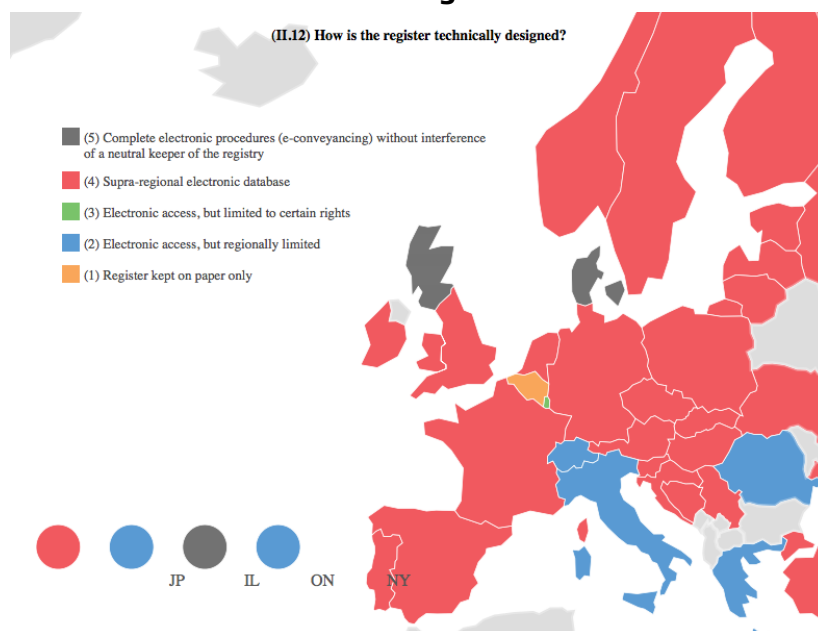
A cross border purchaser will find a register suits his needs best if the registered information is delivered:

- through a web portal;
- which is open (ie publicly accessible);
- in a language he can understand; and
- in a format which is concise and current.

Rapid progress is currently being made in rendering registers electronically, as shown by the spread of dark grey and red across the Runder Tisch map below; progress is understandably slow in the Balkans and less explicably in Belgium.

¹⁰⁴ Contreras, de la Iglesia Monje, & Orduña Moreno, 'Annexo' (n 10), pp 635 ff.

¹⁰⁵ This issue is discussed below at point 5.2.

Table 16 Internet access to land registers

Source. Runder Tisch Grundpfandrechte, Berlin, 2015.

The corresponding map for 2014 showed considerably fewer registers that were electronically accessible. Perhaps it will not be long before conveyancers everywhere on the continent will embrace the digital revolution. Computerisation helps with the delivery of information but merely highlights more quickly the defects in defective systems.

The registers in Nordic states and in Britain and Ireland meet the desiderata of a registration system in full, as does the new procedure of the Spanish registry. The English register will be considered as an example. Since the 1990s registers have been open to all; it is not necessary to be an intending purchaser nor to show any reason for wishing to check a register. Conveyancers are connected to an intranet, allowing them, for a small fee, to print out a copy of any register on their desktop printer. It would be usual to provide a client with a copy of the title at the beginning of a transaction. The land registry also provide an internet portal available to all members of the public through which any title can be inspected and printed out; this service costs GBP 8 for a set of register entries and filed plan (EUR 10).¹⁰⁶ All British registers are designed to provide snappy information – property register proprietorship register, and charges register all supplemented by a filed plan – information which rarely exceeds three A4 sheets.¹⁰⁷ A typical register would be more or less comprehensible to a lay client with some experience of buying property; at the very least a buyer could formulate questions on which to seek advice. Cámara-Lapuente found substantive registration of title applying, as well as in the states already mentioned, throughout the eastern accession states which are starting afresh including Hungary, Poland and the Czech Republic.¹⁰⁸

The Spanish system is a hybrid containing both a property record and personal record,¹⁰⁹ but what are registered is rights against land organised by parcel of land (a real folium system), so each property will have a record included in the corresponding book.¹¹⁰ The

¹⁰⁶ Through www.landregistry.gov.uk; in Ireland at www.landdirect.ie.

¹⁰⁷ Samples are available at www.landregistry.gov.uk/ 'Example Register'.

¹⁰⁸ S Cámara-Lapuente, 'Comparative Remarks on Land Registers within the Frame of European Private Law' (2005) 13 *ERPL* 797–839, 832–833.

¹⁰⁹ O Lino Rodríguez, *Instituciones de Derecho Hipotecario vol I* (Madrid: Dijusa, 2007), pp 69, 76.

¹¹⁰ Ley Hipotecaria art 243; Sonia Martín Santisteban, 'Transfer of immovable property in Spain: from the agreement to the registration', in Andrea Pradi, *Transfer of Immoveable Property in Europe. From Contract to Registration* (Trento: Università Degli Study di Trento, 2012) p 199; Miriam Anderson 'Spain' in Sonia Martin

land register is accessible electronically to any person who shows a legitimate interest in obtaining access.¹¹¹ A buyer of land in Spain can today obtain a simple extract (*nota simple*) from the land registry (*Registro de la Propiedad*). This extracts the data contained in entries held by the registry at the time of issue, showing, among other things:

- a description of the property; with boundaries, floors and surface area etc.;
- type of ownership (eg where the property is part of a community of owners);
- the current owner(s);
- any mortgages, easements, or incumbrances that limit the use of the property;
- outstanding taxes; and
- the *escritura* (notarial deed) value (written-down value) of the property.

The simple extract contains no further detail than is necessary in order to satisfy the legitimate interest of the person requesting this information. The extract can be obtained by personal application at the land registry or online. A Spanish version is produced within a day or two at a cost of EUR 9 plus VAT, whereas a version with an English translation should be ready within one week and costs EUR 30 plus VAT.¹¹² The *nota simple* has no efficacy as legal proof, and if an 'authentic' document is needed the more expensive '*certificación registrar*' must be signed and sealed by the land register.¹¹³ The information in the *nota simple* may not always show accurately, for example, boundaries of rural property and recent extensions¹¹⁴ and omits some information that a buyer would wish to know (for which a reputable local lawyer is essential). In short, the *nota simple* distils from the full register of deeds the information essential to a purchaser in the form of an extract almost like a register of title directed to the needs of a foreign buyer.

3.5. Less accessible land registers

Cross border buyers will find some registers less convenient than the exemplars discussed in the preceding section. This is not to characterise those registers as less appropriate – there may be perfectly legitimate privacy concerns – but merely to categorise them from the point of view of utility to a purchaser struggling with language.

We need to emphasise that making information available to a purchaser is not a substitute for the purchaser taking proper professional advice, but making details of a title available at an early stage may be exceptionally useful to a buyer. A couple with no legal expertise may decide that they like a house enough to buy it, but that they will not in fact make an offer because a neighbour has a right of way to use a driveway immediately outside the windows. A conveyancer would merely report the right of way to the couple to see whether it affects their transactional decision, but on the other hand would be much exercised about an unusual repair liability attached to the property that might deter future buyers from investing in the property and affect lender's willingness to lend on the security of the property.

Santisteban & Peter Sparkes, *Protection of Immovables in European Legal Systems*, (Cambridge: Cambridge University Press, 2015), Case 7.

¹¹¹ <http://www.registradores.org>.

¹¹² www.registradores.org, 'Nota Simple Sample'.

¹¹³ These certificates vary in class and can be positive or negative, refer to a given period or not, and be literal transcripts of entries or relate specifically to issues.

¹¹⁴ R Larraín Nesbitt, 'Nota Simple: What is it and how do you get one?' *Spanish Property Insight*, April 8th 2013.

3.5.1. Title registers lacking conciseness

Poland is an example of a digitised register that requires some improvement in the delivery of registration information. It is possible to check the Polish land register to see who is entered as the rightful owner, whether there are any encumbrances, in particular mortgages. The buyer needs the land register number which should be supplied by the seller, as otherwise this might require by a personal visit to the local authority; however, there are internet sites which retrieve the land register number for a fee of under EUR 10. The exact number of the land register is necessary in order to access the register online. Polish land registers are being converted into electronic registers under legislation passed in 2003.¹¹⁵ By March 2013, 90% of existing land registers had been converted into electronic registers and available through the national data base.¹¹⁶ Excerpts cost between EUR 8 and EUR 20. So far so good, but unfortunately the Polish register falls short in terms of readability. The layout was quite simple when it was paper based. Essentially, the land register comprises four chapters which are further divided into smaller sections. The first chapter identifies the immovable for which it is kept and contains information on rights tied to the right of ownership. Chapter two is used to identify the owner and the perpetual usufruct holder of the immovable. Chapter three is devoted to entries of limited real rights other than mortgages, as well as to certain personal rights and claims which the legislators enumerates. Chapter four is dedicated to entries of mortgages. Computerisation has introduced countless rows and columns, each one containing piecemeal information that is difficult to put together sometimes even by trained professionals. Therefore in cases of more complex legal situations, when many entries are present in the register, understanding the legal status of the immovable will require the professional assistance of a lawyer.

3.5.2. Registers accessible locally

In Poland the land register shows the numbers of plots of land which form one immovable. Maps are not kept within the land register, but in a separate public register, namely the land and buildings register. The base map is available at the local authority and is made in a scale designed to clearly show boundaries and size of land parcels. In densely urbanized areas the scale may be 1: 250 to 1: 1000, otherwise it is usually 1:1000 – 1:2000. Unfortunately Poland does not have a single, nation-wide geoportal accessed from one website. Instead, local authorities for the most part have their own digitalised portal on which a base map is available, as well as other information, concerning the size of a parcel, its zoning in the local development plan, and the like. The amount of information concerning land parcels will depend on how a given local authority runs its database and the geoportal. No official prints may be made from the online service. For official use one always has to receive a paper, stamped copy of the relevant map that may be used for further administrative or private law purposes.

3.5.3. Registers used mainly by notaries

Germany led the way in Europe in the introduction of a comprehensive register of title, the Grundbuch, including all information on the extent, its boundaries, ownership and mortgages and other burdens. The content of the register can be trusted, including that boundaries are registered correctly. The register is not open but can be inspected by those with a legitimate interest, invariably the notary acting for a potential buyer. This

¹¹⁵ *Journal of Statutes* 2003, no 42, item 363. The detailed rules on maintaining electronic land registers are contained in subordinate legislation, the most important one being the regulation of the Minister of Justice of 20 Aug. 2003 on setting up and maintaining land registers within information technology systems: consolidated version: *Journal of Statutes* 2013, item 695.

¹¹⁶ <http://ms.gov.pl/pl/ekw-pytania-i-odpowiedzi/> (accessed on October 22nd 2015).

notary has the duty of explaining the content of the register to the buyer. The German register is organised in this way because of the perception that the information in the register is sensitive and should not be available publicly a point considered below. The register falls short in terms of accessibility, possibly because the registers are organised regionally and not at Federal level.

3.5.4. Registers of deeds

Information is recorded in notarial deeds which pass title from one owner to another in succession; the deeds will contain the same information but it is not collated and the current state of the title can only be discovered by tracing its history. This is inconvenient for a buyer with a tenuous grasp of the language in which the deeds are written. This system operates in Belgium, France and Italy as well as a few states in eastern Europe. In some systems deeds are accessed from a names index and only cross referenced against the cadastral parcel number (for example in France) or purely by name (Italy).

Indeed, the French system enacted in 1955¹¹⁷ is confined to registration of deeds (that is acts, sentences or legal facts by which property rights over immovable property are created or transferred). The mortgage registrar (*conservateur*) carries out a formal analysis of the deeds but does not validate them. Much the same is true of the Italian register, which is old-fashioned in registration against the names of contracting parties rather than against cadastral plots, partly a response to lack of suitable technology but also to the incompleteness of the cadastral data¹¹⁸. The Italian land register records the documents in which rights are created or transferred so any foreigner interested in buying a property must check a whole chain of transactions. The Belgian mortgage register¹¹⁹ follows to greater or lesser extent the Italian approach (personal records and deed registration system) with the added handicap that any search must be requested in paper form.¹²⁰ In these legal systems the registrar does not review whether or not the rights and contracts documented are created, so the purchaser has to check the documents registered in order to ascertain that the content of the land register match the reality. In practice a foreign purchaser would have to leave this to a lawyer. Systems will be much easier for cross border purchasers if deeds are accessed from a plot-based index than if accessed via a names index which is only cross referenced against the cadastral parcel number (for example in France) or purely by name (Italy).

Deeds registers are generally restricted in access; the issue of privacy of registers is considered below.

Just as populations of native red squirrels never recover when pushed out by grey squirrels, so deeds registers are gradually being converted to title registers (as occurred in the past in Yorkshire in the north of England and is currently occurring in Greece¹²¹) with no traffic in the reverse direction. The disadvantages of a pure deeds register will be particularly apparent to a cross border purchaser operating in a non-familiar language,

¹¹⁷ Décret no 55-22 of 4 January 1955 portant réforme de la publicité foncière; and Décret no 55-1350 of 14 October 1955 pour l'application du décret no 55-22 of 4 January 1955.

¹¹⁸ Andrea Pradi, 'Sale and Transcription in Italian Law', in Pradi, *From Contract to Registration* (n 24) p 156.

¹¹⁹ V Sagaert & A Lemmerling, 'The Transfer of Immovable Property in Belgian Law', in A Pradi, *From Contract to Registration* (n 24) p 56 ff. In the Netherlands see: WM Kleijn, JP Jordaans, HD Krans, HD Ploeger & FA Steketee 'Property Law', ch 7 in J Chorus, P-H Gerver, E Hondius, & A Koekkoek, *Introduction to Dutch Law*, (The Hague: Kluwer, third revised edn, 1999) pp 110-111.

¹²⁰ Lino Rodríguez, *Derecho Hipotecario* (n 23) pp 69 and 76.

¹²¹ A Moraitis, 'Transfer of Immovable Property in Greece', in Andrea Pradi, *From Contract to Registration* (n 24), p 121; A Moraitis, 'Greece', in Martín Santisteban & Sparkes (n 24) Case 7; Luz M Martínez Velencoso, 'La Función Registral en los Principales Países Europeos', in Orduña Moreno & De La Puente Alfaro, *Los Sistemas* (n 10), p 36 ff.

because of the degree of repetition from deed to deed, the failure to excise out of date information and a failure to present information concisely, all factors increasing the burden of translation. Deeds registration is regarded as inferior to the register of title by many writers, notably Pedrón,¹²² Diana Wallis – who contrasts deeds registers with ‘administratively advanced Land Registries’¹²³ – and Landeta, who notes the information asymmetry associated with deeds registers and higher transaction costs.¹²⁴ The European Land Registry shares the same view that deeds registers must be superseded by registers of title throughout the EU if transactions with land are to be as safe as possible.¹²⁵

3.5.5. Privacy

Access to many continental registers is restricted to those able to show a legitimate interest in gaining access – including obviously a potential buyer. Examples are the registers in Germany, France and Spain. The register is organised in this way because of the perception that the information in the register is sensitive and should not be available publicly. (These concerns were widely articulated in England and Wales before the register was opened in 1996, but twenty years on the availability of information about land ownership appears not to be an issue). Registers vary in their openness across Europe and it is clearly within the national sphere to determine the balance between accessibility and privacy. That said, it is easy to understand why the ownership of land might be viewed as requiring privacy (eg to protect the privacy of celebrities). It is also possible that the amount outstanding on mortgage loans might be seen as a private matter, though this needs to be balanced against the public interest in knowing the indebtedness of an individual and hence his creditworthiness. We fully accept that Member States have the right to keep some aspects of land registers private, but this should not extend to all aspects of the title. Cadastres are always public and show the physical extent to titles. This same principle can be extended to most aspects of land registers, including the tenure of land, real rights enjoyed with a title and real burdens on the land (always excepting the amount secured by a charge). The nature of real rights is that they bind the world, so all others are required to observe them, and this seems difficult to justify if, in fact, the public at large are not entitled to know what those rights are. In the context of this report: (1) an intending purchaser from another EU Member State should be entitled to the full contents of the register at the earliest stage of a transaction; and (2) Member States should try to make accessible to the public all details of land registers except any that require a restriction on access from the point of view of the privacy of owners. It is surely a simple technical matter to filter information delivered electronically to provide a privacy shield where required.

Before a purchaser is bound by any obligation affecting a property he is interested in buying he must have complete access to information about the title. It is not acceptable for a purchaser to be asked to sign a preliminary contract to buy a property and only told the burdens affecting the property afterwards.¹²⁶

¹²² AP Pedrón, ‘The Register as an Instrument of Security in Property Transactions’ in MES Jordán & A Gambaro, *Land Law in a Comparative Perspective* (The Hague, Kluwer, 2002), pp 94–95; Sparkes *European Land Law* (Oxford: Hart, 2007), para 1.02, fn 18. Cámara-Lapuente (n 22), 832–833.

¹²³ ‘Linking Up National Land Law Systems Across the EU – Some Practical Steps’ in Wallis & Allanson, *Rights & Wrongs* (n 2), pp 65–66.

¹²⁴ Gabriel Alonso Landeta, President of ELRA, in ‘Linking Up National Land Law Systems Across the EU’ in Wallis & Allanson, *Rights & Wrongs* (n 2), pp 66–67.

¹²⁵ ‘Linking Up National Land Law Systems Across the EU’ in Wallis & Allanson, *Rights & Wrongs* (n 2), p 65.

¹²⁶ On Process, see below, ch 11.

3.6. European initiatives on the accessibility of registers and cadastre

3.6.1. Institutional co-operation

Four main organisations are interested in European coordination of the provision of land information:

Cadastre:

Eurogeographics (www.eurogeographics.org) - with membership beyond EU-28;

Permanent Committee on Cadastre in the EU (www.eurocadastre.org) - covering only EU-28;

Land Registries:

European Land Registry Association (www.elra.eu): the main aim is the development and understanding of the role of land registration in real property and capital markets. It covers most of EU-28 but excluding Germany. This organisation heads the CROBECO (Cross Border Electronic Conveyancing) Project, whose main purpose is to set up a framework that allows cross border acquisition of real estate.¹²⁷ To achieve this goal, they have conducted a pilot programme among the Land Registers of Spain and the Netherlands so as to achieve a cross border purchase made entirely through electronic means. In addition, ELRA heads the European Land Registry Network, which aims to establish and maintain an information system for the public via an ELRN website¹²⁸.

Land information:

European Land Information Service (<http://eulis.eu>); described below.

These organisations share a common vision to present to European decision makers and to assist their member organisations in the development of effective and secure services for European citizens.¹²⁹ However, organisational fragmentation cannot help with the coherence of developments, especially given the huge expense of data collection and operation of digital land management systems.

One should also mention that the Troika has recognised the importance of registration initiatives to the regeneration of economies and has often included registration conditionality in its bailout packages.¹³⁰

3.6.2. Knowledge exchange

Another pan-European initiative is the Cadastre and Land Registration Knowledge Exchange Network¹³¹ which has as its main goal of facilitating the exchange of 'best practice' to help members achieve our vision for cadastre and land registration in Europe. It focuses on traditional and potential tasks of cadastres and land registries as well as investigating developments that can affect these tasks. The Network has already published some reports on this topic.

¹²⁷ See below point 11.8.2.

¹²⁸ www.elra.eu/european-land-registry-network/.

¹²⁹ 'Common Vision for Co-operation on Cadastre and Land Registry Issues for Eurogeographics, PCC, ELRA and EULIS' (Marne la Vallée: Eurogeographics, 2012).

¹³⁰ See eg *Memorandum of Understanding of Specific Economic Policy Conditionality* (European Commission, International Monetary Fund and European Central Bank – Republic of Cyprus, May 2014) para 5.3.

¹³¹ www.eurogeographics.org/about/cadastre-and-land-registry.

3.6.3. Substantive standards

European initiatives are directed towards establishing common standards to facilitate European exchange. In terms of **cadastres** within Europe, the INSPIRE directive¹³² provides for coordination of environmental data in relation to a number of themes, one of which is cadastral information. This excludes title information, presumably because of concerns about EU competence in the property field.¹³³ **Eurotitle** is a standard for land registration complementary to existing national systems. According to their promoters¹³⁴, this would be title registration based on (newly developed) European standards. Following the recommendations of the Forum Group on Mortgage Credit¹³⁵ in relation to the necessity of transparency and certainty to have a real European mortgage market¹³⁶, the Eurotitle was conceived as a common method of land registration within Europe, an alternative but not a replacement for existent national land registrations. It does not require the introduction of a European Land Registry but national registries should accept the registration of the Eurotitle, while they should be able to issue Eurotitles within their jurisdiction. A person would be able to choose to register a piece of land as Eurotitle or to keep it as national title. Land registered with Eurotitle would guarantee certainty of rights, but also provide easy access to underpinning information. The Eurotitle would provide the necessary uniform legal certainty for rights to land in all European Member States, and the use of standard procedures all over Europe would provide a reliable basis for e-conveyancing.

3.6.4. Academic analyses

A number of academic comparative projects have touched upon the comparison of registration systems and a comparison of the merits of rival systems. Some of these are outlined in the References at the end of this chapter.

3.6.5. EULIS

The main objective of the EULIS Project (European Land Information Service)¹³⁷ is the creation of a web portal that provides comprehensive information about the content of national land registries, cartography and cadastres in participating European countries. EULIS provides subscribed customers such as banks, lenders, real estate agents, notaries and lawyers, reliable, direct and easy on-line and real time access to land and property information (legal, such as ownership, encumbrances, and physical, such as location, value) of land registries and cadastres of member European countries¹³⁸. EULIS operates by providing links to the computerized databases of the participant organizations while it also provides for a glossary with key terms that help to understand the charges, contracts, etc. in foreign land registries and cadastres. It also offers information to any citizen about the process of registration in member countries or about fees.

The service is patchy even within EU-28, currently delivering:

¹³² Infrastructure for Spatial Information in the European Community, Directive 2007/2/EC, OJ 2007 L108/1-14; cadastral information is one of the environmental themes for which common standards are being developed.

¹³³ See below point 13.1.2.

¹³⁴ B Loenen, S Nasarre-Aznar & H Ploeger, 'EuroTitle: a Standard for European Land Registry. Paving the Road to a Common Real Estate Market', *GIM-International*, (2005) 19(12), pp 34-37.

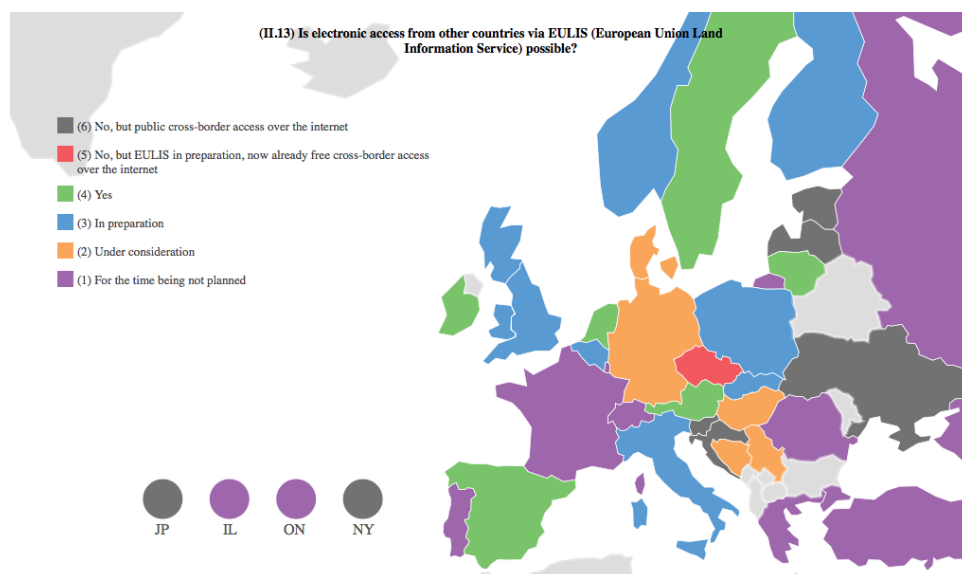
¹³⁵ http://ec.europa.eu/internal_market/finances-retail/docs/home-loans/2004-report-integration_en.pdf.

¹³⁶ The creation, modification and extinction of mortgages should only be effective when implemented on the register. All relevant information should be made available to all parties or their representatives; Member States provide that the responsible Public Register certifying authority should have state indemnity.

¹³⁷ <http://eulis.eu>.

¹³⁸ H Ploeger and B Van Loenen, 'EULIS – At the Beginning of the Road of Harmonization of Land Registry in Europe', *European Review of Private Law*, 2004 (3), pp 379-387.

- full live connections with six states (AT, ES, IE, LT, NL and SE); and
- partial connection with many other EU-28 states;
- wider development is planned; but .
- France and Germany are not currently participating

Table 17 EULIS access as of 2015

Source: *Runder Tisch Grundpfandrechte*, Berlin, 2015.

EULIS is considered a tool to increase transparency in cross border land acquisition as, theoretically, a bank located in member state A could easily check on-line and in real time the legal and physical conditions of a plot of land in member state B that wants he to buy or that has been offered to him as a security for a loan by a national of country B. EULIS is of limited utility for the private citizen. It provides access to detailed property information for professionals, which might be very useful to a future European conveyancing profession; but it is a premium service when what is actually needed is to open up national cadastres/land registers so they can be checked cheaply by citizens directly. Good models are the registers in Ireland, Sweden and the United Kingdom, and the Spanish *nota simple*.

3.7. Recommendations

3.7.1. Summary

According to Diana Wallis MEP:

All [problems] could be solved by enquiry with a properly constituted and administered state land registry. Unfortunately not all state land registries are at an advanced stage of development may not be easy to access, or the state may not yet centralize information or keep it up to date centrally.¹³⁹

This chapter has identified distinct phases in a purchase of residential property by a non-national each with a distinct set of requirements for the citizen to receive adequate information to make informed transactional decisions:

- property search and shortlisting: commercial providers will make full information

¹³⁹ 'Linking Up National Land Law Systems Across the EU' in Wallis & Allanson *Rights & Wrongs* (n 2), p 65.

available readily and for free; research about a property which the citizen intends to buy; official information via a cadastre and land register will be readily accessible at affordable prices in some EU-28 Member States but in many others information will not be readily available to the citizen; and

- conveyancing: once a decision is made to buy and a conveyancer is instructed, normal conveyancing searches and inquiries will be conducted and any available information should be considered; the late availability of information carries a risk of transactional breakdown. Member States are free to organise land registers as they think best, but from the point of view of cross border purchasers, the rules suggested by a team of Spanish experts provide a sound basis for evaluating European systems.¹⁴⁰ They looked for a register organised by land parcels and coordinated with the cadastre, which is openly accessible through a web portal, a search producing results that are concise and current.

3.7.2. Specific problems

A buyer seeking a property will find that the information readily available at the search stage of a transaction, but when the search is narrowed down to one or a small number of properties that are under serious consideration, the information available may fall short of the best practice in states such as Sweden in a number of ways:

- Germany lacks a nationwide portal;
- Privacy is a driving consideration in Germany (resulting in non-participation in European open access projects) and in other notarial states, but this does not explain why partial details cannot be made freely available;
- Paper applications are required for register information (DE) and for cadastral information (BE, CY, CZ, SI¹⁴¹), though most all are moving towards greater digitalisation at varying speeds;¹⁴²
- some registered titles are not yet digitised, leading to paper-based applications and delivery and a few properties remain unregistered (eg in England) though in both cases attempts are being made to fill in gaps;
- deeds registrations systems are not directed to the needs of buyers; the register is likely to be accessed by a notary (too late to influence the transactional decision) and the buyer will be dependent upon the notary's interpretation of what issues need to be drawn to the buyer's attention, probably at a late stage of the transaction;
- where registers are not open, a purchaser needs authorisation to access the register; again Germany is an example; this discourages buyers from obtaining information themselves and is likely to delay their obtaining knowledge of the contents of the land register until immediately before the decision to complete;
- Belgium lags furthest behind with a paper-based deeds register; and
- EULIS is providing a useful premium service but directed at professionals involved in commercial transactions at a later stage of transactions and too expensive to meet the need of citizens; a portal open to the use of citizens at reasonable cost would be much more useful.

¹⁴⁰ Contreras, de la Iglesia Monje, & Orduña Moreno, 'Annexo' (n 10), pp 635 ff.

¹⁴¹ Slovenia has an extraordinary 2.6 parcels of land per head of population: Cadastral Template, www.cadastraltemplate.org/, Slovenia, Part 2, point 2.3.

¹⁴² Cadastre Template (n 55); 'Source of Information, Round 2' (n 11). The latter shows a roughly equal division in 2010 between cadastres and registers accessible via downloadable forms that have to be submitted in hard copy and forms that can be submitted electronically. However, digital technologies are developing rapidly and none of the above information may be entirely up to date.

3.7.3. Recommendations about access to land information

Recommendation 3-A – The EU should ensure that generic information about the home buying process in each Member State is made available (to the extent that this is not already the case) via a web portal.

Recommendation 3-B – The EU should legislate to require access to title information in a standardised format by a purchaser of land before that purchaser becomes liable under any obligation under a preliminary contract or otherwise except to the extent that:

(a) cadastre and land register information (other than the identity of the land owner and his indebtedness) is freely accessible at reasonable cost via an open web portal suitable for cross border use and this facility is made known to the purchaser; or

(b) legal advice from a conveyancer is provided before any obligation is incurred.

This recommendation falls within the consumer protection head of competence of the EU – there being a T2C relationship between the agent putting forward a preliminary contract and the buyer – and relates to obligation rather than property law. The information would be on the model of the recent Mortgage Credit Directive considered in chapter 9 below.

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- A Pradi, *Transfer of Immoveable Property in Europe – From Contract to Registration* (Trento: Università degli Studi di Trento, 2012)
- CU Schmid and C Hertel, 'Real Property Law and Procedure in the European Union' (Florence, EUI, www.eui.eu/, 2005) (point 2 in the various national reports)
- P Sparkes, *European Land Law* (Oxford: Hart, 2007) pp 301-306
- S Van Erp & B Akkermans, *Cases, Materials and Text on Property Law* (Oxford, Hart Publishing, 2012) pp 844-908

Web portals

England and Wales	Land register	www.landregistry.gov.uk .
England and Wales	Public portal to register	www.eservices.landregistry.gov.uk
Europe	Cadastre	www.cadastraltemplate.org/
Europe	Cadastre	http://www.eurocadastre.org/
Europe	Land Registers	e-Justice.europa.eu 'Land Registers'
Europe	Maps/Street View	google earth
Europe	Land information	http://eulis.eu
France	Aerial photographs	www.geoportail.fr/
France	Cadastre	www.cadastre.gouv.fr
Spain	Land register	www.registradores.org .
Sweden	Land register	www.lantmateriet.se

4. PHYSICAL EXTENT AND CONDITION

KEY FINDINGS

- The buyer will be concerned with the physical extent and boundaries of the property and will require information earlier than it is commonly provided in many conveyancing systems.
- It is not universal practice to commission a survey when buying a property, but failure to do so is extremely risky for a cross border purchaser.
- The seller and buyer should agree expressly and in writing what is included and excluded from a sale in order to avoid reliance on uncertain presumptions about fixtures; adoption of the best practice would reduce disputes substantially.

4.1. Concerns of a buyer

Someone buying a home is likely to be more worried about the physical extent and condition of the property than about the title; the latter is a secondary consideration for a buyer who employs a conveyancer in order to check the legal title and public rights affecting the property (chapters 6 and 8 respectively). The physical state of the property will be of vital concern to a buyer from the earliest stage of a proposed transaction, a concern with four aspects:

- the physical extent of the property;
- boundaries – boundaries in 2-D,¹⁴³ their location and responsibility for them;
- the physical condition of the property; and
- fixtures and fittings – what will be left behind and what will be taken on completion.

4.2. Physical extent

4.2.1. Sources of information

Spatial information about a property will be garnered from the cadastre and the land registry. The cadastre is the public plan on which land is plotted and the land register records the physical extent and boundaries of the particular plot. This may be supplemented from the personal knowledge of the vendor. Means of access to this information were described in the preceding chapter, so the current subject for consideration is the substance of the information available. From the perspective of a purchaser, especially one crossing a border and language barrier, geospatial information about a property should be coherent, comprehensive, reliable, up to date and comprehensible. The previous chapter has stressed the need for the buyer to be provided with the official information about the physical extent of the plot at the earliest possible moment.

¹⁴³ The plot on which a house or bungalow is built can be marked out on the surface of the earth, a two dimensional (2-D) title; this leaves 3-D titles involving horizontal divisions (flats/apartments) to chapter 6.

4.2.2. Problems with the quality of spatial information

The main problems identified with spatial information about the physical extent of the property being acquired are:

- The scale of plans; As an aside, we observe that modern global positioning software should facilitate the creation of plans which are far more accurate than those available to previous generations, and states should be trying to take advantage of sales to secure a gradual improvement in the quality of the cadastral information.
- The accessibility and comprehensibility of information about the physical extent of the property in Latin registers, which were cutting edge when first introduced but which appear out of tune with modern technology;
- Variation between the extent shown on the cadastre and on the register especially in Spain and Portugal, though steps are being taken to improve the position; purchasers could become locked unwittingly in slow and expensive procedures;
- Purchasers unaware of the need to check for encroachment by squatters and especially in those states where loss of title is a possibility.

4.2.3. Coordination of cadastre and land register

Across Europe an attempt is made to coordinate spatial information and title information. Three arrangements can be noted.

Coordination is best achieved by registration of title since land is divided into parcels and one register is allocated to each parcel. Although it is impossible to remove all error this should ensure that the same land cannot be registered twice, or, in other words, that the registered titles is reconciled with neighbouring titles to prevent any overlap. The exemplar of this type of register is the German *Grundbuch*. The land register includes all property information, such as the extent and boundaries of the property. The content of the register and the boundaries can be trusted. The notary has the duty of explaining the content to the buyer. No system can eliminate all problems but the German system provides strong certainty of titles (though hampered by issues of accessibility). A similar system operates in other Germanic states, across Scandinavia (with the registers, plans and access arrangements in Sweden a particular exemplar¹⁴⁴) and much of central and eastern Europe.

A different approach is taken in Britain and Ireland, where the land registries are responsible for the filed plans, so close coordination is achieved. The main problem is that the quality and scale of title plans, which is pitiful in the context of the modern digital mapping technologies available; for ordinary suburban housing the scale is adequate to identify a particular home but not to locate precise boundaries.

Deeds registers operate alongside the cadastre in states such as Belgium, France, Italy and The Netherlands, often operated by the same public institution. The cadastre defines the plots of land on the territory of the state - the surface, shape and boundaries of plots.¹⁴⁵ Any deed must be drawn consistently with the cadastre, as is the case for example in France¹⁴⁶ and Italy.¹⁴⁷ Deeds registration works well provided there are inbuilt controls to prevent double registrations and to handle sales off of parts of the land registered.

¹⁴⁴ Cadastral Template, www.cadastraltemplate.org/, 'Sweden' part I, headings C and D.

¹⁴⁵ Amalia Velasco Martín-Varés, *Europa moviliza sus administraciones inmobiliarias*, (Madrid: CT-Catastro, www.catastro.minhap.gob.es/documentos/publicaciones/ct/ct72/1.pdf, 2011).

¹⁴⁶ S Glock, French report in, CU Schmid & C Hertel, *Real Property Law and Procedure in the European Union* (Florence: EUI, 2005), p 10; F Planckeel, 'Introduction to the French System of Transfer of Immovable Property' in A Pradi, *Transfer of Immoveable Property in Europe – From Contract to Registration* (Trento: Università degli Studi di Trento, 2012), pp 99 ff.

Special mention is required of Spain where the cadastre and the land register are not operated by a single organisation, and have not been properly coordinated in the past. Registration of a property in the land register will be made against the plot of land, reference being made to such matters as the origin, location and boundaries of registered properties.¹⁴⁸ The description will take into consideration its urban or rural nature, the location, the surface or area expressed in metric units, its boundaries or the storey or floor if it is part of a building. This was not necessarily linked to the cadastral records. Hence new legislation has been enacted in 2015 to introduce greater legal certainty to transactions with land.¹⁴⁹ Incorporation of the graphic representation of the real estate (drawn from the cadastral cartography) must now be recorded in the books of the land register in any operation involving a rearrangement of land (segregation, division, etc). Contracting parties should arrange this when creating any sale contract etc that is to be registered by attaching to the public deed the cadastral cartography; if spatial information is provided in some alternative way its validity will have to be assessed by the registrar. The register will show when there has been a full coordination of the cadastre and the land register, after which public faith will be attached (as in the past) to the property right registered and (for the future) also to its location and geographical boundaries,¹⁵⁰ so a purchaser in good faith will be protected. Of course, conflicts between neighbours may arise at any moment and any owner may try to mark the boundaries of the property, in which case the procedure to be followed is specified. Spanish law has taken a very significant step towards the same degree of legal certainty as the German system.

4.2.4. Problems with spatial information

Three main issues arise with the quality of geo-spatial information:

- Variation between the extent shown on the cadastre and on the register;
- Encroachment by squatters; and
- Residual unregistered titles.

All of these problems are ameliorated if the buyer becomes aware of them at an early stage of the transaction and become much more damaging if they are only revealed at a late stage of a transaction. A few words are required about the first two.

Reconciliation of the cadastre and land register is a problem with some deeds registers. It appears to be a problem in Spain (for plots of land for which the procedure prescribed by the 2015 Law¹⁵¹ has not yet been adopted) and potentially in states such as Belgium,¹⁵² Poland and Portugal. A buyer needs to be warned that the cadastre and the land register may not match and that this will cause the notary to refuse to execute the notarial deed. The European bodies responsible for registers and cadastres are concerned by this issue, and the need to protect the legal security of titles; they are committed to a comparative study to identify best practices.¹⁵³ Resolving such an issue could be expensive and it may be better simply to buy elsewhere.

Encroachment by squatters creates at the very least an issue of removing the squatters and at worst the possibility that title may have been lost by adverse possession (*usucapio*).

¹⁴⁷ F Maggio, 'The Italian Cadastral System as a Support to Land Management', (Rome: www.eurocadastre.org/pdf/roma_nov2014/MAGGIO_FINAL.pdf, 2014); Stéphane Glock, Italian report in *Real Property in the EU*, (n 4) p 17.

¹⁴⁸ Ley Hipotecaria (Spanish Mortgage Law), art 7.

¹⁴⁹ Law 13/2015, dated June 24th.

¹⁵⁰ Ley Hipotecaria (n 6) art 38.

¹⁵¹ Spanish Law 13/2015, of June 24th; see above point 4.2.2.

¹⁵² V Sagaert & A Lemmerling, 'The Transfer of Immovable Property in Belgian Law', in A Pradi, *Transfer of Immovable Property* (n 4), p 62.

¹⁵³ See above point 4.2.2.

Loss of title is not a difficulty in Germany and other civilian states, since property cannot be acquired contrary to a registered title through squatting,¹⁵⁴ and a buyer can rely on the registered extent. In some civilian states, though, extraordinary prescription is possible against registered titles, though generally only after a very long period of possession.¹⁵⁵ This possibility exists in Catalonia (20 years), France (30 years), Italy (20 years), Poland (30 years) and in the rest of Spain (30 years).¹⁵⁶ Issues can be resolved by lawyers, but the basic check on the integrity of the land registered needs to be carried out as soon as possible, to enable a buyer to walk away from the problem.

Common law systems generally allowed adverse possession historically, though in England this possibility has not existed if possession of registered land was taken after October 1991.¹⁵⁷ In many cases it may be difficult to determine the date on which possession was first taken, and again a potential buyer may be wise to walk away from the problem. Nevertheless there remains the possibility of loss of title through adverse possession, so it is important for the physical extent of the land in the occupation of the vendor to be checked. It is vitally important that the buyer is asked to check this, and of course a purchaser from a civilian state is most unlikely to be alive to this problem.

The concern of the buyer in relation to remove squatters from the property before they achieve its full ownership through adverse possession, is to call upon the seller to take action to remove any unauthorised occupants, which could take time (from days to months). This can be achieved using administrative and criminal action against squatters¹⁵⁸ or civil repossession.¹⁵⁹ Squatting can also be a risk for the buyer once he obtains the ownership of the property, depending on the time he leaves the property empty.

4.3. Boundaries

Boundaries are created when plots of land are sub-divided. Structures marking boundaries vary a good deal, hedges for example being likely to require annual maintenance. Someone contemplating buying land needs to have information about the location of and responsibility for boundaries. If a buyer becomes responsible for a poorly maintained fence, there may be a significant capital outlay to bring it up to an acceptable standard and a significant ongoing cost. On the other hand, lack of control of a poorly maintained boundary may become a significant issue. Many boundaries are shared, in which case there is plenty of scope for disputes about maintenance. Full information needs to be provided early in the conveyancing procedure and made readily available afterwards, since accurate information is often enough to head off disputes.

4.3.1. Plot separation systems

Some systems allow plots to be divided without any especially formality other than the preparation of a detailed plan of what is sold and what is retained. This is probably true in a minority of states. Many property systems (especially Germanic and Scandinavian systems) require the parts to be separated legally in advance of transactions taking place.

¹⁵⁴ Acquisition of land by adverse possession is possible only if the factual possession has lasted for 30 years and the occupier has been unlawfully registered in the land and mortgage register for 30 years: section 900 BGB.

¹⁵⁵ S Martín Santisteban & P Sparkes, *Protection of Immovables in European Legal Systems* (Cambridge: Cambridge University Press, 2015), Case 8; Cadastre Template (n 2), various Country Reports, Part I, point C3.

¹⁵⁶ Catalonia CC art 531-27; French CC art 2272; Italian CC art 1158; Polish CC art 172; Spanish CC art 1959.

¹⁵⁷ Land Registration Act 2002 sch 6.

¹⁵⁸ Eg. in Germany, Criminal Code (Strafgesetzbuch) section 123 (trespass to the home).

¹⁵⁹ Various country reports in Martín Santisteban & Sparkes, *Protection of Immovables* (n 13) Case 1.

Complexity can arise from the way that neighbouring plots of land in a common ownership are (or are not) amalgamated into a single unit, for example in Poland.¹⁶⁰

The perception that items of property must be individualised in advance of any transaction has important practical implications, which are very much a feature of Germanic and Nordic systems. These require that a particular parcel of land should be delineated precisely before it can be sold or mortgaged. This in turn leads to:

- emphasis on precise description of the plot boundaries and hence the availability of very detailed information in registers and cadastres;
- clear allocation of responsibility for the maintenance of boundary structures;
- detailed procedures when land is sub-divided (especially characteristic of Nordic practice) and consequently a big practical difference between selling the whole of the plot and selling a part;
- heavy reliance on surveyors; most countries support four lawyers per surveyor but Sweden has twenty surveyors for every lawyer and Germany 23,000 surveyors devoted solely to cadastral issues;
- expensive procedures on sales of part; in Sweden the fee for a sale of part is said to be EUR 1,600 and in Denmark completion of the formalities could take as long as ten months;¹⁶¹
- potential expense when building on the ground does not match the registered position; in Germany, for example, an owner who constructs a building which encroaches over the boundary line will (in the absence of gross negligence attributable to him or her or immediate protest by the neighbouring owner) become owner of the whole building, leading to a mismatch with the registered boundary.¹⁶²

Buyers need to be made aware of this potential extra expense.

4.3.2. Common law systems

In Britain and Ireland a sale of all the land in a title is distinct from a sale of part, but all that is really required to effect a sale of part is a plan drawn to meet registry requirements, with far less fuss than in, say, Sweden. As a result the whole process of subdivision will be much less costly. Land can always be divided by a lease of part.

Common law registers will often record of the line of the boundary, and the ownership and responsibility for the boundary structure. Ownership of the majority of urban residential properties will be indicated through T-marks (ie a T marked on the boundary line pointing into the land which has ownership of that boundary). Information may come from registered transfers or pre-registration title deeds. However, an undoubted defect of the English system is that the scale is very small, the plan acting as a guide to location but having no real function in determining boundaries (which is done by possession). When, as will be relatively frequent, the register falls silent it will become necessary to rely on presumptions based on:

- party walls;

¹⁶⁰ Especially as there is a potential conflict between the Geodesy and Cartography Act of May 17th 1989, consolidated version: *Journal of Statutes* 2010, no. 193, item 1287, and the Land Registers and Mortgages Act of July 6th 1982, consolidated version: *Journal of Statutes* 2013, item 707; Supreme Court judgment of February 22nd 2012, IV CSK 278/11, LEX no 1170237.

¹⁶¹ 'Cadastres and Land Registers: Source of Information, Round 2' (Marne La Vallée: Eurogeographics, 2010), p 14, Figure 12.

¹⁶² Section 912 BGB.

- particular types of boundary structure (eg fences or hedge and ditch boundaries);
- particular locations, for example boundaries fronting highways; and
- adverse possession;
- prescriptive enjoyment of the right to a cattle proof fence.

This information is supplemented by information provided by the vendor in replies to enquiries made by the buyer's conveyancer; this will indicate which boundaries the seller has maintained or regarded as his or her responsibility.

4.3.3. Latin registers

In the whole of Spain the land register does not guarantee that the factual information recorded in the register is correct, unless the land register and the cadastre have been coordinated,¹⁶³ so usually the physical reality will prevail over the contents of the land register¹⁶⁴. Some long registered properties will merely record the land lying around it, leaving the precise boundaries not properly defined. Under new (2015) legislation¹⁶⁵ evidence can be provided of the real boundaries if the content of the land register is said not to accord with reality, after the conclusion of a sale or at any other time at the instance of anyone interested - the owner or a neighbour or the holder of a limited right. A notary will be in charge of the whole process, the final resolution of which will be entered in the land register.

The same may be said regarding other countries that follow a deed register, such as France¹⁶⁶ and the Netherlands¹⁶⁷. In the former, any owner may compel his neighbour to a setting of boundaries of their contiguous tenements due to the fact that the cadastre does not provide a definitive division between two properties. As a matter of fact, in practice, the boundary description on the cadastre may often be vague or even non-existent. If no agreement is reached, then a court procedure must be followed.¹⁶⁸ With regard to the latter, the public register provides information about the property boundaries as stated in the transfer deed with a reference to the cadastre.

4.4. Physical condition/value

The structural soundness of the property is going to be the number one concern of both purchaser and lender. Practice diverges wildly. In Britain and Ireland a survey is invariably required by the lender. Obtaining a precise valuation based on a detailed investigation of title enables lenders to advance a higher proportion of the value of the property in safety. In civilian states, reliance is often placed on the vendor's duty of disclosure of defects, a practice that appears incredibly unsafe to those accustomed to the British method. Schmid

¹⁶³ See above point 4.2.3.

¹⁶⁴ M Anderson, 'Spain: Controversy over the Property Boundaries', in Martín Santisteban & Sparkes, *Protection of Immovables* (n 13), pp 401 ff.

¹⁶⁵ Law 13/2015, dated June 24th, has repealed the provisions of the Law on Procedure Law 1881, arts 2061 to 2070, in favour of the general provisions of the Ley Hipotecaria, arts 199 ff.

¹⁶⁶ French CC art 646.

¹⁶⁷ M Milo, 'The Netherlands. Controversy over the Property Boundaries', in Martín Santisteban & Sparkes, *Protection of Immovables* (n 14), pp 394 ff.

¹⁶⁸ Source: www.french-property.com/guides/france/property-rights/. 'Neither land publicity, nor the cadastre can protect the buyer against the defects of the translatative contract': Planckeel, 'Transfer of French Immovables' (n 4) p 100.

estimated that surveys were requisitioned in less than 10% of purchases.¹⁶⁹ However, preliminary contracts put forward by agents often require the buyer to accept the property as seen, thus negating the ordinary duty of disclosure.¹⁷⁰ The practice of buying an expensive property without any survey or appraisal seems incredibly unsafe, and demonstrates the fact that buyers need legal advice before they enter into any obligation; civilian practice often only provides legal advice when a transaction is about to be completed. According to Schmid's information practice can be summarised as follows:

Table 18 Reliance on surveys/disclosure

EU-28 states	Banks	Buyers
UK, Ireland	Valuation	Caveat emptor, so either survey or reliance on bank valuation
Denmark		Survey usual
France	Valuation	Survey usual
Italy	Valuation	Reliance on disclosure
Elsewhere	-	Reliance on disclosure

Source: Schmid, *Conveyancing Services* (2007)

Bank valuations should now become normal for property that is to be mortgaged.¹⁷¹

4.4.1. Survey before contract: England

English law departs from civilian systems in applying the principle of caveat emptor ('let the buyer beware') to purchases of existing¹⁷² homes. A seller is not required to disclose physical defects and so the buyer must satisfy him or herself as to the condition. This should be accomplished through a survey conducted by a professional surveyor. Lenders will insist on a valuation and from this the maximum size of mortgage advance that will be allowed is calculated based on the Loan to Value ratio. It is just possible that they will rely on the warranty against defects in new build property. Buyers often rely on the lender's valuation in order to save costs, but this is less than fully desirable. A full report will cover:

- value;
- structural defects;
- foreseeable problems;
- title problems apparent from inspection;
- minor remedial work required;
- flooding risk and insurability; and
- boundaries.

There are certain circumstances in which a buyer should be advised to require a full survey.¹⁷³ Surveys and mortgage valuations commonly reveal defects which are required to be corrected before a mortgage advance will be released, so they often cause retentions and renegotiation of the price; a survey often pays for itself.

¹⁶⁹ C Schmid et al, *Study of the Conveyancing Services Market* (Bremen: ZERP, COMP/2006/D3/003, 2007), paras 82-86

¹⁷⁰ H Dyson, *French Property and Inheritance Law – Principles and Practice* (Oxford, Oxford University Press, 2nd edn, 2003), p 43.

¹⁷¹ Mortgage Credit Directive, 2014/17/EU, OJ 2014 L60/34, art 19.

¹⁷² For new build see below ch 6.

¹⁷³ If the property is of high value, where there is a low loan to value ratio, if the property is old, where it has been altered or extended, any property of unconventional construction or one displaying any signs of soil disturbance.

4.4.2. Survey before mortgage: Spain

Generally speaking, the buyer has the duty to check the physical condition of the property, but the legal system protects the buyer to some extent. If the sale contract is concluded between individuals,¹⁷⁴ the seller warrants against hidden defects in the things sold which render it unsuitable for its destined use or which reduce its value to the extent that the price would be reduced.¹⁷⁵ If there exists a hidden defect or flaw, the purchaser may choose between withdrawing from the contract, being paid any expenses he has paid or a reduction of the price in a proportional amount, pursuant to expert opinion.¹⁷⁶

In Spanish markets especially, it can be important, where necessary, to get an independent valuation of the property to uncover any problems such as subsidence and boundary disputes. Indeed, whereas in UK the buyer normally get a survey done on a UK property, in Spain many repossessed or unsold homes built in the boom of 2000 to 2007 have lain empty. Unless the property comes with a specific guarantee, it is highly recommended to have a building survey completed according to the AIPP (Association of International Property Professionals), the RICS (Royal Institution of Chartered Surveyors), and the Spanish Land Registrars.¹⁷⁷ When an official valuation firm inspects the condition of an apartment, the buyer gets the right idea of its condition, the level of the construction work, and the price asked. The company compiles all information about the apartment in a book, which is given to the buyer. A value estimated by the company will often be slightly lower than the market price, as the company will play it safe.¹⁷⁸ Most banks in Spain suggest that clients request a period of three months before completion to allow for a survey. The bank will have the property condition assessment made by an independent expert company, the buyer paying the costs. The buyer can be at risk when a contract has a tight deadline for completion because surveyors who can be very slow during the busy summer months.¹⁷⁹ Research has shown that 75% of Britons buying in Spain have no survey.¹⁸⁰

The situation is rather similar in Poland, where it is very unusual to have a full survey, but reliance can be placed to some extent on the valuation commissioned by a lender at the borrower's expense.

4.5. Fixtures and fittings

A buyer of a home needs to know what is included and excluded from the purchase. The sooner this is settled the better, because negotiations may be needed before a legally binding commitment is entered into. It is quite likely that a seller and cross border buyer will make different assumptions. Buyers need to know whether things such as light bulbs, greenhouses and kitchen appliances are included in or excluded from a sale. On completion the condition in which the property is handed over is very likely to become a source of dispute. Unexpected removal of a trivial item may make a first night in a new property in a foreign land very uncomfortable indeed. Disputes are best avoided by clear agreements

¹⁷⁴ For newbuild see below ch 6.

¹⁷⁵ Spanish CC art 1484.

¹⁷⁶ Spanish CC art 1486.

¹⁷⁷ *Guide to Buying a Property in Spain*, (Madrid: AIPP, RICS & RDE, www.registradores.org/, 2015), p 10.

¹⁷⁸ 'Buying an Apartment in Spain', Finnish blog 'Home in the Sun', July 24th 2012, at <http://koti-auringossa.com/asunnon-osto-espanjasta/>.

¹⁷⁹ Nicole Blackmore, 'We're having problems buying property in Spain. What's the process?' *Telegraph*, June 2nd 2015 (interview with Miranda John).

¹⁸⁰ K O'Reilly, 'Intra-European migration and social cohesion: The extent and nature of integration of British migrants in Spain' in T Mazon, R Huete, and A Mantecon *Turismo, Urbanización y Estilos de Vida* (Barcelona: Icaria, 2009).

made in advance and recorded in writing. This is a point at which a transparent process is all important.

All European systems have similar principles of affixture, though there may well be marginal differences, and different customs on sale are extremely likely.¹⁸¹ The application of the legal rules to the normal domestic sale may be very unclear. In civilian practice, what is or is not included in a house sale is often not mentioned in the notarial deed or otherwise.¹⁸² It would be interesting to know how many disputes arise. This is an area where all systems would benefit from a clear and simple form setting out what is included and excluded. This is an area where reliance on general rules cannot be recommended and the English practice should become general.

In England what is included or excluded is invariably settled expressly. The written sale contract must include all terms agreed between the parties, since a land contract would be invalidated if the parties had agreed to include, say, curtains but this was not mentioned in the written contract.¹⁸³ A contractual term is often included to apportion the price between the land and fittings, since stamp duty is only payable on the value of the land with fixtures. This is perfectly legitimate provided the apportionment is genuine; it goes without saying that English professionals will not be party to an improper apportionment and any dubious apportionment is likely to be investigated by the Revenue. In order to avoid the uncertainty of the case law rules about fixtures, the practice is that the seller completes a form detailing what is included and what will be left and this is done before contracts are exchanged.¹⁸⁴ Both parties will have a copy of the form which helps the buyer to ensure that the agreed items are indeed left and helps the buyer check that the property is in the correct state when he or she moves in. This procedure reduces the scope for disputes about one of the most contentious issues in a sale. Rubbish and items not included in the sale must be removed before completion, a not infrequent grievance, but the fixtures form will also make this clear.

4.6. What are you buying in Poland? – A case study

All transitional systems suffer to some extent from the legacy of socialist times and in particular the legacy of the nationalisation of land announced by Lenin on the first night of the Bolshevik Revolution in November 1917. In Russia this divided the ownership of buildings from the underlying land. Reform of land tenure was implemented in very different ways in different socialist states in CEE, which also effected the transition back to market economies very differently, and so there is no general picture. It is extraordinary how much this difficulty continues to cause almost a complete century later as demonstrated by our case study, Poland. This brings together many of the concerns of this chapter – a partial cadastre, ghosts from the social era, and a specific rule about the accession of plant.

In Poland the term 'property' is rarely employed by market participants who wish to buy or sell a piece of real estate. In practice, people talk about buying land, a house, an apartment, or a commercial property such as a warehouse, all forms of immovable.¹⁸⁵ Land

¹⁸¹ Comparative work is being carried out through the Common Core of European Private Law ('the Trento project') by Professors Peter Sparkes, Matti Niemi and Piotr Stec. This is a subject ideally suited to the development of a graphical interface to illustrate the rules.

¹⁸² Dyson, *French Property Law* (n 28), p 63.

¹⁸³ The draft contract needs to match the fixtures and fittings form.

¹⁸⁴ Fittings And Contents Form, TA10 (London: Law Society, www.lawsociety.org.uk/, 3rd edition, 2013).

¹⁸⁵ Polish CC art. 46.

as an immovable comprises not only the bare land but also its component parts, including any buildings, facilities connected with land, trees and plants, and movable things attached to the land.¹⁸⁶ The owner of a land is usually the owner of building erected on it, irrespective of who built it and whose materials were used. These rules are mandatory and not rebuttable presumptions.

An exception to this rule concerns transmission equipment for supplying or discharging liquids, steam, gas, electricity and similar facilities.¹⁸⁷ Such equipment/machinery is usually physically and permanently attached to land but nevertheless such facilities are declared not to be component parts of land (and hence movables) when part of an enterprise.¹⁸⁸ Transmission equipment is owned by the party who builds/assembles it,¹⁸⁹ which may be the landowner, the operator or someone else. The constructor may demand that the operator who connected the equipment to his network acquires that equipment and pays an adequate price for the acquisition and similarly, the enterprise operator may demand the right to buy at a fair price.

Buildings (and also flats) are, as a rule, constituent parts of land, applying the *superficies solo cedit* principle. However, there is a limited number of situations in which buildings qualify as immovable things and form separate objects of ownership, when erected on:

- land which is the object of perpetual usufruct;¹⁹⁰
- State Treasury land over which an agricultural cooperative has a right of usufruct;
- land which a member of the cooperative granted as a contribution in kind;
- land transferred to the State by farmers in return for pensions under legislation now repealed.

The last three situations have lost their practical importance. Perpetual usufruct (established despite its name for a fixed term of between 40 and 99 years) retains a significant presence on the real estate market. The right to the building is always tied to the right of perpetual usufruct, so they are coterminous, and the two rights have to be transferred together and also mortgaged together. Buying and selling a building plus a right of perpetual usufruct is not unusual and most persons understand this unique right and have no trouble differentiating it from the situation in which land with buildings is the object of the transaction. The difference is evident from the land register. There are no separate land registers kept for buildings which are immovables as a result of the operation of provisions concerning perpetual usufruct, but a register is kept for the land immovable and an entry in the second chapter will show that ownership is encumbered and separate ownership of buildings exists.¹⁹¹

¹⁸⁶ Polish CC arts. 47, 48, 191.

¹⁸⁷ Polish CC art. 49.

¹⁸⁸ Court of Appeals in Gdańsk, judgment of January 17th 2013, V ACa 833/12, LEX no. 1286513.

¹⁸⁹ Court of Appeals in Katowice, judgment of April 25th 2013, V ACa 71/13, LEX no. 1314748.

¹⁹⁰ Polish CC art. 235.

¹⁹¹ Land Registers and Mortgages Act, Act of 6 July 1982, consolidated version: Journal of Statutes 2013, item 707, art 25; regulation concerning the Maintenance of Land Registers and Document Files of September 17th 2001, Journal of Statutes 2001, no. 102, item 1122, §§ 7, 27, 32, 33, 49 and the regulation concerning the Establishment and Maintenance of Electronic Land Registers of August 20th 2003, Journal of Statutes 2003, no. 162 item 1575, arts 27, 38.

4.7. Recommendations

In respect of boundaries two completely opposite problems emerge from our analysis:

- Procedures for establishing boundaries are very rigorous in Nordic and German states which raises the possibility of citizens who are inwards migrants infringing boundary rules unintentionally. Rigorous procedures also create problems of divergence between officially recorded information and actual events on the ground eg fencing contractors finding that the official line of the boundary is not feasible for some practical reason.
- Procedures in many other states are very lax, leading to lack of clarity about the location of boundaries and responsibility for boundary structures; often boundaries are reliant on presumptions which may be well known to natives but appear obscure to outsiders.

Recommendation 4-A – The EU should ensure that generic information is readily available about aspects of national property laws that are liable to vary from state to state, that is:

- (a) how is the physical extent of land determined;
- (b) whether property can be lost to adverse possessors/squatters;
- (c) formal boundary procedures;
- (d) presumptions about boundaries (eg ownership of hedges or of roads in front of homes); and
- (e) any risk that the cadastre and land register may conflict.

In relation to surveys it lies beyond EU competence to recommend the general adoption of the practice of securing a survey before buying property, which leads to proper protection of buyers and which opens access to markets by allowing lenders to lend a higher percentage of the value of the property. [Hence:](#)

Recommendation 4-B – The practice is so different in common law and civilian states that the recommendation needs to be split:

- (A) - for a civilian buyer in a common law state – general information needs to be provided to the buyer in his language to explain the options available to him about a survey;
- (B)- for a buyer from a common law state in a civilian state – a warning needs to be provided about the dangers of buying without a survey and information about how to secure access to surveying services where this is not generally available; and
- (C)- for both generic information should be made available about the requirements of lenders.

In relation to fixtures and fittings: **Recommendation 4-C** – Member States should ensure that conveyancing procedures are designed to minimise disputes about the condition of the property handed over on completion (both in terms of being clear of rubbish and in including fixtures and any fittings agreed); disputes will be minimised by ensuring that buyers are given information about the general requirements of the law and any variations in the particular transaction in writing at an early stage of the transaction, leaving the buyer plenty of time to raise queries about the information provided.

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5. LEGAL TITLE

KEY FINDINGS

- Buyers may well be confused by interests on the market falling well short of the paradigm of full ownership and action is needed to ensure that advertisements are accurate and that buyers are appraised of what exactly they are buying at the earliest possible stage.
- Buyers should be adequately informed of burdens affecting the ownership by production of a copy of the register entries but again this needs to be done at an earlier stage than is presently common in some conveyancing systems.
- Burdens which override the register are a concern in many systems.

5.1. Concerns of a purchaser

The process of securing title to the property is likely to rank relatively lowly in the concerns of the buyer. He or she will assume that conveyancing will deliver a cast iron title and the only concern of the buyer is to be notified expressly of any difficulty before becoming committed to the transaction. A purchaser crossing a border will know that he or she must accept the property law of the host state, so the concern is to ensure transparency, always remembering to 'mind the gap' between the likely knowledge of a native and of a foreign buyer. This chapter begins by considering the paradigm of ownership – which is common across to Europe. There follows a description of interests short of that paradigm and the procedures to alert a buyer to the fact that he is receiving an interest short of the ideal. Many problems are identified. The third topic is burdens on ownership (incumbrances, adverse interests, charges) and the procedures to bring these to the attention of purchaser. Again major traps for buyers are discovered. The chapter concludes with a brief survey of comparative literature on European property law.

5.2. The paradigm of ownership

5.2.1. General observations

Modern Europe has a single functional conception of property, a point central to the success of the single market since all players in the European market are enabled to understand each other (because in technical jargon of a shared ontology). Without this any market is inevitably subject to dislocation. Since the post-socialist transition, all European states share the same paradigm of ownership. Ownership requires an interest:

- unlimited in time;
- conferring the full power of exclusion;
- allowing free transferability;
- covering the totality of the property as opposed to a share;
- subject only to burdens that are disclosed;
- free of unduly burdensome rights that would affect marketability; and
- free of positive obligations.

The essential universality of these criteria is described in a classic essay on 'Ownership' by Tony Honoré in which he asserts the equivalence of saying that 'This is my umbrella' and

'*Cette parapluie est à moi.*'¹⁹² It is possible to imagine other ways of organising property but throughout Europe land is parcelled out in two dimensions on the surface of the continent in such a way that the owner may exclude everyone else. This commonality is the legacy of Gaius and thus dates back at least to the time of the Emperor Hadrian.¹⁹³ A conveyancer does not need to explain to a European client what it is to become an owner. Reporters all indicate that (native) buyers would understand intuitively when they were negotiating to buy a full ownership right. However, this single paradigm is expressed very differently in different languages – *propriété* in France, *Eigentum* in Germany and freehold in England, – a divergence which might create confusion, especially with interests short of full ownership. The paradigm is considered in rough chronological order of the registration systems.

5.2.2. French influenced states

Civilian ownership is based on the Roman law concept of *dominium*, involving a full ownership right that is unlimited in time, confers full control over land, and since the nineteenth century entirely free of any feudal overlay. Its essential features are that it is absolute, perpetual, exclusive, and unlimited. Ownership is never an aggregate right but passes whole to each consecutive owner by substitution. The original version of this was the *propriété* of the French Napoleonic Code,¹⁹⁴ still recognised as the right to enjoy and dispose of things in the most absolute manner, subject only to prohibitions in statutes or regulations.¹⁹⁵ This conception has been passed to many other Civil Codes of the Latin family such as Catalonia, Italy, the Netherlands (which is Latin as far as property law is concerned), Portugal and Spain.¹⁹⁶

However, in many jurisdictions today full ownership is limited by social function of ownership; the use made of the property by its owner must take account of the rights of others, including obviously neighbours, but also so that leaving many properties empty might affect the rights of others to access to housing.

Latin systems vary considerably in the extent to which registration offers security of title. In most systems titles are derivative, registration protecting for the future but not retrospectively improving the strength of the title conveyed by a title deed. These systems apply the *nemo dat* principle that a person can only pass what he holds (subject to a few exceptions¹⁹⁷). In France, if one buys from a seller whose title is for whatever reason a nullity property does not pass to the buyer, even if registered. As a consequence, the buyer has to check the seller's title carefully. It is the same in Belgium and Italy and several other states.¹⁹⁸ In the light of the foregoing, it may be concluded that generally speaking deeds registration provides less legal certainty for buyers than the title registration. Problems are:

¹⁹² AM Honoré, 'Ownership', in AG Guest *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961), ch 5.

¹⁹³ WM Gordon & OF Robinson *Institutes of Gaius* (London: Duckworth, 1988), Book II.

¹⁹⁴ French CC art 544; (with the same definition in Luxembourg and Belgium); this was influenced by the *Déclaration des Droits de l'Homme et du Citoyen* of 1789, art 17, according to which ownership is '*un droit inviolable et sacré*'.

¹⁹⁵ R-J Pothier, *Traité du Domaine de Propriété*, in M Bugnet *Oeuvres de Pothier* (Paris: Letellier, 1846), p 103.

¹⁹⁶ Catalanian CC art. 541-1; Italian CC art 832; *Burgerlijk Wetboek* (Dutch CC) book 5 art. 1; Portuguese CC art 1305; Spanish CC art 348. See the various national reports in: A Hurndall, *Property in Europe: Law and Practice* (London: Butterworths, 1998); and in CU Schmid & C Hertel, *Real Property Law and Procedure in the EU* (Florence: EUI, www.eui.eu, 2005).

¹⁹⁷ Frédéric Planckeel, 'Introduction to the French System of Transfer of Immovable Property', in A Pradi, *Transfer of Immoveable Property in Europe – From Contract to Registration* (Trento: Università degli Studi di Trento, 2012), p 101. These are (1) a common mistake giving the impression that the title is valid; and (2) acquisitive prescription based on long undisputed possession.

¹⁹⁸ J Zevenbergen, 'Registration of Property Rights', *Notarius International* (1-2) (2003) 132-133.

- the lack of a guarantee to the buyer that the register shows the true state of the title correctly;
- the failure of the registrar to check the validity and effectiveness of documents; and
- the absence of a state guarantee of registered titles.

If the seller is not actually the owner or lacks dispositive powers, the purchaser will not be protected in his acquisition. This is why title insurances that cover compensation in case of loss of the acquired goods have a great success in the countries that follow this system.¹⁹⁹ One is tempted to ask what is the point of the register.

Spain takes a different approach as far the protection of the third party is concerned. Spanish land registrars assess, under their responsibility, not only the legality of the extrinsic characteristics of all kinds of documents (formal publicity) but also the capacity of grantors and the validity of any act (substantial publicity). As a result, a presumption of ownership is created, and the third party in good faith for a consideration is protected because the buyer can rely on what the land register says, even if it does not reflect the reality.²⁰⁰ There is still the possibility of double sales, but this can be avoided by timely registrations.

5.2.3. German influenced states

Exactly the same ownership right is implemented in the German Civil Code (BGB), though it is called *Eigentum*²⁰¹ and in other codes influenced by it, such as the Polish.²⁰² Nordic states recognise the same concept of dominium though it is uncodified. The practical operation of the conveyancing system is quite different. A registered title is constituted by registration after which it is indefeasible. A buyer, therefore, has no need to worry that his title may be stripped from him in favour of a previous owner. Indefeasible systems create the converse concern that existing owners may become vulnerable to loss of title to a fraudulent party, so the worries arise after the registration. This may become a serious worry if electronic conveyancing is introduced because no computer system can be made absolutely safe from being hacked. Nevertheless, German property law (although rather inflexible) provides a very secure title and is an exemplar of how to organise a secure title (though the conveyancing system is behind the times). Again the absoluteness of ownership is limited in the public interest.

5.2.4. England/common law states

The best English title (which is usual for houses) is the freehold. (English land is held for an estate which is a duration of time, the freehold being perpetual and therefore the optimum title.) In more than 99% of cases the freehold will be registered with title absolute, which is a particularly safe title because it is associated with an official guarantee of title backed by the Land Registry indemnity fund.²⁰³ Theoretically a freehold title involves a feudal tenure from the Crown, but this has no practical consequence and it is very unlikely that a purchaser (native or foreign) would be aware of it. It is common for the title to be held for

¹⁹⁹ S Cámara Lapuente, 'Los sistemas registrales en el marco del Derecho privado europeo: reflexiones comparatistas sobre la inscripción registral como formalidad de los contratos', *Anuario de Derecho Civil* (3) (2004) pp 993-994.

²⁰⁰ Ley Hipotecaria (Mortgage Law) arts 34 and 38.

²⁰¹ Ownership is covered in sections 903-928, 985-1007 BGB.

²⁰² Polish CC art 140.

²⁰³ 'Rectification and Indemnity' (London: Land Registry Practice Guide (PG 39), 2015).

two or more proprietors as co-owners which involves a trust, yet the fact that a couple selling a registered property were trustees would scarcely be apparent to a lay client.²⁰⁴ An English registered title is not absolutely indefeasible, but it is almost secure if the buyer has taken possession; in the rare case in which a title was rectified against a purchaser in possession the purchaser would be entitled to an indemnity provided his conveyancing had been thorough. (If his conveyancing is at fault the conveyancer would usually be liable in negligence). If a fraud occurs to cause the loss of a registered title, an indemnity will be available to the innocent victim of the fraud.

5.3. Interests short of the paradigm of ownership

5.3.1. General observations

A buyer of land is entitled to assume that he or she will acquire an outright ownership interest unless the opposite is clearly signalled. All systems have some potentially confusing rights. Problems may emerge during the conveyancing process, but usually an ownership which is limited will be apparent from the outset. However, a buyer might be less sure about the marketability of the interest on offer. When a buyer took legal advice from a conveyancer any issue of marketability would quickly be identified, but there is a potential for costs to be wasted when a buyer lacks an intuitive understanding of what is or is not generally accepted. It is best, therefore, for any limitation to be clearly signposted in advertisement and the warning should be repeated throughout the progress of the transaction from contract to completion. French conveyancing operates in the reverse way because defects in title may emerge at completion and cause a change in the notarial deed at that stage.²⁰⁵ A cross border purchaser needs to be fully appraised throughout of the title and also, as a separate matter, have identified whether the title on offer is or is not a marketable interest.

A decade or so ago, it was alleged that some 40% of sales in inland Spain collapsed because of ownership problems.²⁰⁶ It is believed that these problems lie in the past and vigorous steps have been taken to improve certainty of titles in Spain. The discussion below demonstrates that a potential for misunderstanding between sellers and buyers remains in very many different systems.

5.3.2. Leaseholds

Long leaseholds are recognised in all European systems.²⁰⁷

In **England**, leases are property rights which are commonly bought and sold in the same way as freeholds. They are usual for flats²⁰⁸ but can be used for houses. There are really two distinct markets, one in the provinces where leases are long and the other in central London where short leasehold interests are sold as a means of making London property 'affordable'. There are also building leases giving an interest in the building but not the

²⁰⁴ A transfer to co-owners requires more thought as explained in chap 12 below.

²⁰⁵ H Dyson *French Property and Inheritance Law – Principles and Practice* (Oxford, Oxford University Press, 2nd edn, 2003), pp 59-60. More anecdotally see also Peter Mayle, *A Year in Provence* (London: Hamish Hamilton, 1989), 'April'.

²⁰⁶ Nick West, 'Sweet smell of the stinky finca', *Observer Property* January 16th 2005 (a finca is a farm, whereas 'Sticky Fingers' is the Rolling Stones album featuring a zip on the cover). A Spanish Minister has stated that fewer than 1% of English titles have problems: Beatriz Corredor, www.theguardian.com/money/2011/may/08/property-spain.

²⁰⁷ Rental tenancies are considered below, point 5.7.3.

²⁰⁸ See below point 6.2.4.

underlying ground though many of these have been enfranchised, ie converted to freehold.²⁰⁹ An estate agent's advertisement will show clearly that the property is leasehold, and in the vast majority of cases the title deduced will be marketable. Titles will be acceptable where the outstanding term of the lease is long provided there are no unusual covenants.²¹⁰ Conversely title will not be fully marketable if the outstanding term is very short or the terms of the lease are abnormal. Consideration of a purchase also involves obtaining advice on the possibility of enfranchisement. Because leases are not standardised, problems with the marketability of an estate are only likely to emerge at a relatively late stage in a transaction.

Catalonia has adopted in 2015 (Act 19/2015) a temporal ownership over all sorts of immovable and identifiable chattels, allowing the buyer all ownership rights while the temporal ownership lasts, that is, from 10 years (1 year for chattels) to 99 years, reverting at its end for free to the one entitled with the full ownership.

Elsewhere on the **continent**, most systems have long recognised some form of *superficies*, giving rights in the building but not in the land.²¹¹ Thus in Germany, the main exception from *Eigentum*²¹² is the building lease (also known as a hereditary building right, *Erbbaurecht*) which is an incumbrance consisting of the transferable and hereditary right to have a building on another person's land.²¹³ The right holder acquires the ownership of a building separately from the land. Such buildings remain legally separate for a certain period, which makes it possible that the buildings are sold separately from the land. Although the building lease is established for a limited period, the duration of that period is not prescribed by law. These buildings could appear attractive on the market because of their lower price, and advertisements might not be unambiguous to a foreign buyer. While the nature of the property is stated in the contract and will become clear to the buyer at the latest by listening to the notary, the potential for confusion between the two tenures is a possible problem in the German market. '*Erbbaurecht*' apartments are much less expensive than their equivalents that include land ownership. A sufficient grasp of German is required to read advertisements correctly, and one should be careful regarding the apartments on sale for low prices. In some cases, buyers have proceeded quite far in their preparations before becoming aware of the fact that the sale does not include the ownership of land. Internet discussions caution foreign buyers in Germany against misunderstandings arising from *Erbbaurecht*. The same issue could arise (in different language) elsewhere on the continent.

5.3.3. Shares

One issue which is a real problem on the continent that is where property is inherited by a group of relatives some of whom wish to sell and some of whom do not wish to sell, so what is offered is effectively a share of the property. The issue cannot arise in English law, because a trust is imposed which limits the registered proprietors to a maximum of four and ensures that they will be able to sell the entire property as trustees. Anecdotally it seems clear that the emergence of relatives unwilling to sell at a late stage of a transaction

²⁰⁹ *James v United Kingdom* [1986] ECHR 2.

²¹⁰ There are many Crown leases in Gibraltar.

²¹¹ Spanish Royal Legislative Decree 2/2008, dated June 20th, arts 40-41, and Spanish Mortgage Regulations 1947, dated February 14th, art 16; Catalanian CC arts 564-1 ff; Sergio Nasarre Aznar & Héctor Simón Moreno, 'Fraccionando el Dominio: las Tenencias Intermedias para Facilitar el Acceso a la Vivienda', (2013) (739) *Revista Crítica de Derecho Inmobiliario* 3063 ff; Italian CC arts 952-953; etc.

²¹² Apart from condominium see ch 6 below.

²¹³ Regulation on Building Leases (Verordnung über das Erbbaurecht), section 1.

is a relatively common phenomenon and one which needs to be stamped out.²¹⁴ Proposals to achieve this follow below.

5.3.4. A life interest/reversion on a life interest

There are a number of civilian institutions which effectively create a life interest, the archetype being the *viager* in France, an interest for the life of a widow(er).²¹⁵ This may be marketed by the widow(er) as may the reversionary title on the expiration of the *viager*. Similar rights are the usufruct commonly created on intestacy and the *emphyteusis*.²¹⁶ The trade in these rights is fraught with difficulty, and even more so the trade in reversionary interests. One gamble that went badly wrong was made by André-Francois Raffray, a lawyer in Arles, who learnt to accept with a shrug that he had made a bad deal. He bought the flat of Jeanne Calment, who had spent 50 years alone after the death of husband in 1942, outpacing eventually her daughter and only grandson. She sold out as a 90 year old to Raffray, then aged 47, on a *viager*. She saw him off as well, and when he died in 1995 Jeanne's monthly annuity had cost him three times the value of the flat.²¹⁷ Her life was the longest documented when she finally died on August 4th 1997, at the age of 122 years and 5 months. Jeanne Calment provided an extreme illustration of the effects of increasing life expectancy in France - commonly 80 for a woman but still rising. The trade in life interests in England was effectively killed in 1925 since when trustees always have the power to sell the land rather than a life interest in it.

5.3.5. Intermediate tenures

In England there is an increasing range of intermediate tenures designed to bridge the gap between purchase and rental. House prices have inflated to the point where the average home in London at the end of 2015 cost more than GBP 500,000 (EUR 686,000) so there is an increasing tendency for partial ownership interests to be marketed, though as yet the market share is tiny. Schemes may be good or bad, so a purchaser will always require very careful advice. These schemes rely on a mixture of ownership, beneficial ownership under a trust and renting,²¹⁸ but there are many varieties of tenures. 'Low cost home ownership' includes:²¹⁹

- shared ownership arrangements;
- equity percentage arrangements; and
- shared ownership trusts.

Any arrangement with a proportion of ownership (however small) is categorised as an ownership arrangement, so any rental must be a pure rental. The base interest may be a freehold house or leasehold flat. Schemes work in broadly one of two ways. Either the purchaser acquires the (freehold) ownership of the property on terms that the equity is shared or otherwise the ownership is retained by the seller who grants the purchaser a long lease containing an obligation to transfer the seller's interest in the future. Schemes are funded with a mortgage, so the occupier pays a mix of rent and mortgage interest, and commonly also utilises public subsidy channelled through housing associations. Effectively the buyer is granted a long lease and enabled to buy out their landlords' interests in manageable stages. All of these schemes are notorious for high level of defaults.

²¹⁴ Mayle, *Year in Provence* (n 14), 'April'.

²¹⁵ French CC arts 1968 ff.

²¹⁶ *Code rural et de la pêche maritime* 2010, arts L451-1 ff. Also with variations in Italy, Catalonia, the Netherlands and Spain.

²¹⁷ 'A 120-Year Lease on Life Outlasts Apartment Heir' *New York Times* December 29th 1995.

²¹⁸ P Orji & P Sparkes, 'Tenlaw National Report for England and Wales' (Bremen, ZERP, www.tenlaw.uni-bremen.de, 2014), p 22.

²¹⁹ Housing and Regeneration Act 2008 s 70.

Some civilian legal systems have dipped their toes into the same market, even though intermediate tenures do not fit easily with traditional conceptions of *propriété*. One instance is *Koopgarant* in the Netherlands²²⁰ by which a dwelling is purchased from a housing association at a discount of 25-30%, on the basis that profits or losses will be shared between the homeowner and the housing association on a subsequent sale. Catalonia has introduced in 2015²²¹ *propietat compartida* (shared ownership) and *propietat temporal* (temporary ownership). The former entitles the acquirer of a minimum share of ownership to use the dwelling exclusively and the right to acquire, gradually, the remaining share, while paying a sort of the rent to the seller for the share he has not bought yet. The latter entitles the acquirer to act as an owner with full property for a specific period of time (with a maximum of 99 years), when the property either reverts to the previous owner or passes on to a designated successor. Both intermediate tenures are modelled on English shared ownership and leasehold schemes.

The experience of the sale and rent back market in England and Wales makes clear there is considerable scope for unscrupulous commercial activity in the shared ownership market. Homeowners who entered the market were often facing repossession and turned to the sale and rent back deal as a last resort. Concern about the operation of the sector led the financial authorities to intervene in the market in 2009;²²² all firms that carry out sale and rent back business require authorisation.²²³ There may be scope for EU intervention to protect consumers in the future. A key feature of sale and rent back market transactions was the speed of the transactions, some firms offering to complete a sale and rent back within 48 hours. Consumers were pressured and often received 'woefully inadequate advice' before agreeing to sell their house at a substantial discount (usually at a 30% to 40% discount). Indeed, shortly after shutting down the market the authorities found that most deals which took place in the sector were either unaffordable or unsuitable and never should have been sold. Market players were often small scale but sometimes regional or national.

Most sale and rent back market firms financed their business with buy-to-let mortgages secured on individual properties. The risks to the consumer are illustrated by the test case from the *North East Property Buyers' Litigation* taken to the Supreme Court, *Scott v Southern Pacific Mortgages Limited*.²²⁴ Mrs Scott had difficulty paying her mortgage and was persuaded in 2005 to sell her house at a discounted price to North East Property Buyers (NEPB). In return she was promised the right to remain in the house as a tenant for as long as she liked at a reduced rent. NEPB took out a 'buy to let' mortgage to fund the purchase, but neither Mrs Scott nor the lender was aware of each other. The transfer of the house from Mrs Scott to NEPB and the legal charge to Southern Pacific Mortgages took place on the same day. In 2009, Mrs Scott, who remained in occupation as a shorthold tenant throughout, discovered that a possession order had been made against the property following the default of NEPB. After protracted litigation it was decided Southern Pacific Mortgages had priority over any interest she claimed and she too was evicted.

²²⁰ C Whitehead & KJ Scanlon *Social Housing in Europe* (London: London School of Economics, 2007) p 144 (<http://vbn.aau.dk/>); M Elsinga, J Toussaint & J Doling, 'Reflections on Asset-based Welfare and Future Research', in M Elsinga, P de Decker, N Teller & J Toussaint, *Perceptions of Housing Related Security and Insecurity in Eight European Countries*, (Delft: OTB Research Institute for Housing, Urban and Mobility Studies, 2007), p 318.

²²¹ Catalan Law 19/2015, dated July 29th introducing Catalan CC arts 556.1 and 547.1.

²²² 'Sale and Rent Back – An OFT Market Study', (London: Office of Fair Trading (OFT1018), October 2008,); 'Sale and Rent Back (Full Regime)' (London: Financial Services Authority, 2010); 'Sale and Rent Back Review 2011', (London: Financial Services Authority, 2012).

²²³ Sale and Rent Back (Regulatory Reporting) Instrument 2010, FSA 2010/23.

²²⁴ [2014] UKSC 52.

5.3.6. Property affected by squatting

Any title affected by squatting or registered with a possessory title will need extreme caution and should be advertised as such.²²⁵

5.3.7. Polish perpetual usufruct and cooperative proprietary right

When buying immovables, internet advertisements will simply state in a non-technical legal manner, if a house, apartment or another type of real estate is for sale. However upon closer reading, they do contain more detailed information about the usable area, state of repair, but also the particular right that is being sold. Most often this will simply be ownership, however it may also be perpetual usufruct with the connected ownership of buildings, an ownership right to a unit (i.e. full ownership of an apartment) or a cooperative proprietary right to unit (a limited real right which is created for an unfixed term of time). As has already been stated, members of the society do have at least an intuitive understanding of these rights and all of them are secure rights to immovables.

As has been already mentioned above, apart from ownership, which is the fullest right to a thing, the market also offers other rights to immovables. These rights are also qualified as real rights that are effective against everyone, however technically speaking, they are rights over another person's things. The rights in question are perpetual usufruct and, in relation to units, the cooperative proprietary right to a unit. Most real estate agents as well as members of the society understand the difference between these rights and ownership as well as the content of the rights, even if they are unaware of many more detailed, technical differences. Below is a short presentation of these two rights.

Perpetual usufruct may only be created as an encumbrance of land (and not other types of immovable property) owned by the State or local governments. The quality and kind of entitlements a perpetual usufruct holder enjoys are, however, similar to ones enjoyed by owners.²²⁶ As the right is transferable, passes on to heirs, may be encumbered by a mortgage, may be a contribution in kind to a commercial company. It is usually established in order to allow development of state or municipal land, and, to some extent, resembles the German *Erbaurecht*.

Perpetual usufruct is always created for a term certain of 99 years, with the possibility of creating it for a shorter term, but no shorter than 40 years.²²⁷ It is usually bought for development purposes, however as a legacy from the previous era, numerous residential developments, including single family houses, also stand on land held in perpetual usufruct. These may be enfranchised (i.e. converted into ownership) on the basis of the Conversion of Perpetual Usufruct into Ownership Act 2005.²²⁸ After the expiry of the right the land reverts back to the owner, i.e. the State or local government. The perpetual usufruct holder does not, as a rule, have any claims to purchase the land, however is entitled to demand the prolongation of the right for another period of 40-99 years.²²⁹

The cooperative proprietary right to a unit is a right which exists within housing cooperatives. It is not limited in time, is fully transferrable, may be inherited and encumbered by a mortgage. It is not, legally speaking, an ownership right, however in practice, the most important difference between this right and the full ownership of a flat is the management of the building and common parts. Unlike with owned flats, where a community of owners manages the building and the land on which it stands, having a cooperative right denotes that management is vested with the cooperative. This means that

²²⁵ See above point 4.2.3.

²²⁶ K Pietrzykowski, 'Art 232. Charakter prawny i cel użytkowania wieczystego' in K Pietrzykowski, *Kodeks cywilny. Tom I. Komentarz.*, (Warsaw: CH Beck, 2013), pp 545-546.

²²⁷ Polish CC art 236 para 1.

²²⁸ Act of 29 July 2005, consolidated version: *Journal of Statutes* 2012, item 83, as amended.

²²⁹ Polish CC art 236 para 2.

cooperative flat holders have a less direct impact on the management of common parts, but it also means that they do not have to be very active in preventing damage or dealing with maintenance, since this is done by the cooperative. They also do not need to worry about getting along with other cooperative flat holders, as they do not need to make decisions by personally negotiating them. This is sometimes a problem within communities of owned flats. Needless to say, both owners of flats and cooperative holders of flats must pay a fee for management and maintenance. It seems that these fees are higher in cooperatives, which as rather large entities suffer from less effective management. Nevertheless, market prices are not necessarily higher when one is buying an ownership of a flat as opposed to a cooperative right. Prices will depend mostly on location and the state of repair of the flat and the block.

5.4. The seller's spouse or partner as an incumbrance

Customs vary across the EU and buyers may not be aware of the need to find out the position in the seller's family.

5.4.1. England

Most houses are bought by couples when it would be normal for the house to be registered in joint names. Anyone interested in purchasing the property has to deal with the couple who must act jointly. Difficulties arise where a house is registered in a single name.²³⁰ For instance, a single woman takes out a mortgage to purchase a house which is registered in her sole name, subsequently she begins a relationship with a man who moves into the house and contributes towards the mortgage repayments. By contributing to the purchase price of the house in this way, the man acquires an ownership interest in the house (a beneficial interest)²³¹ which is protected by his occupation.²³² If a purchaser pays the purchase money to the woman only, the purchaser cannot rely on overreaching (which requires payment to be made to two legal owners acting as trustees) and thus the purchaser may be bound by the rights of the partner if his occupation of the house is discoverable at the time of the purchase.²³³ In practice the potential risk to purchasers is handled by requiring the partner to consent to the sale, but this does depend upon the buyer alerting his conveyancer to the existence of the occupier.

5.4.2. Spain

The notary will obtain information about the family and whether the property is jointly owned or where a couple are cohabiting in a house in the name of only one of them and will check that all owners and occupiers have agreed to the sale.²³⁴ This is part of the notary's duty to confirm the identity and other personal details of all parties, regardless of whether they have also a title on the property or have or have not contributed to its purchase.²³⁵ A buyer acting in good faith is protected against errors in the status of the seller²³⁶ or if he does not know that the property is a family home. Similar checks would be general in most notarial systems.

²³⁰ *Williams & Glyn's Bank v Boland* [1981] AC 487, HL.

²³¹ *Stack v Dowden* [2007] UKHL 17; *Jones v Kernott* [2011] UKSC 53.

²³² Land Registration Act 2002, s 29, sch 3 para 2, replacing Land Registration Act 1925 s 70(1)(g).

²³³ *Williams & Glyn's Bank v Boland* (n 39)

²³⁴ AIPP, RICS, RDE, *Guide to Buying a Property in Spain*, (Madrid, AIPP, aipp.org.uk, 2015), p 21.

²³⁵ Notarial Regulation 1944 arts 156 ff.

²³⁶ Resolution of the Directorate General of the Registries and Notaries, March 6th 2004.

5.5. Defective titles in Northern Cyprus

Many titles in northern Cyprus are defeasible because the land was originally owned by Greek Cypriots and was afterwards seized by members of the Turkish community after the invasion of the north of the island. The insecurity of the title is demonstrated by *Orams v Apostolides*. At the time of the invasion in 1973, Mr Apostolides was displaced from his land in Lapithos in the northern sector of Cyprus, the self-declared 'Turkish Republic of Northern Cyprus' - which is not recognised by the international community. A British couple, Linda and David Orams, bought the site in 2002 intending to build a holiday home for GBP 50,000, the seller being a Turkish Cypriot who was registered as owner by the regime in the Turkish Republic of Northern Cyprus. After clearing the land of a partly built house and a number of lemon trees, the Orams spent a further GBP 160,000 in building a villa, adding a swimming pool and making a garden.²³⁷ Mr Apostolides was able to return to Lapithos in 2004 when travel restrictions between the two parts of Cyprus were relaxed. Upon discovering the Orams' villa on the land he had left thirty years earlier, Mr Apostolides sued in the District Court of Nicosia, the capital of the Greek dominated Republic of Cyprus; he claimed that the Orams were trespassing on his property and demanded possession. Under the default judgment of the court, the Orams were ordered to demolish the villa, swimming pool and fence, to deliver immediately possession to Mr Apostolides and to pay damages under several heads. The Orams appealed the decision through to the Supreme Court of Republic of Cyprus but were unsuccessful since the Court ruled that neither good faith nor local custom could provide a defence.²³⁸

Mr Apostolides then sought to have the judgment of the Nicosia District Court enforced in the English High Court arguing that under the Brussels I Regulation²³⁹ an English court was obliged to enforce the judgment from any other Member State.²⁴⁰ Cyprus acceded to the EU on the basis that the EU *acquis* was suspended in the areas outside the effective control of the Government of the Republic of Cyprus.²⁴¹ The Orams therefore argued that judgment of the Greek Cypriot court was not effective and that mutual enforceability of judgments did not apply to land under the control of the Turkish Republic of Northern Cyprus. The High Court found for the Orams, but on appeal²⁴² the question of the application of EU law was referred to the European Court of Justice.²⁴³ EU law did, the Court of Justice ruled, apply to a judgment of a court situated in the area controlled by the government of the Republic of Cyprus, even if the judgment related to a site beyond territorial scope of EU law. Thus, the English Court of Appeal was bound to enforce the judgment against the Orams.

Whatever the merits of this judgment, which is certainly controversial, it highlights and underlines the fact that any system of property can only have effect within the confines of one particular political system, and the lawful owner under one system may simply be a trespasser under another. Unfortunately it is beyond the capability of EU law to regulate the conduct of agents and conveyancers in the north of Cyprus.

²³⁷ *Orams v Apostolides* [2006] EWHC 2226, para 4.

²³⁸ *Orams* (n 46) paras 5-11.

²³⁹ Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

²⁴⁰ *Orams* (n 46) para 12.

²⁴¹ Treaty of Accession of the Republic of Cyprus, Protocol 10, Art 1.

²⁴² *Orams v Apostolides* [2010] EWCA Civ 9.

²⁴³ Case C-420/07, *Meletis Apostolides v David Charles Orams & Linda Elizabeth Orams*, [2009] ECR I-3571, CJ EU (Grand Chamber).

5.6. Burdens

5.6.1. Burdens on the register

Few titles are totally unencumbered. Around three quarters of titles are subject to easements (servitudes) for neighbours or subject to restrictive covenants.²⁴⁴ The latter are distinctive and would need highlighting to an international purchaser. An important function of a conveyancer is to ensure that burdens are discovered, and it is best if they are disclosed at an early stage. The conveyancer should also ensure that mortgages and hypothecs are redeemed by the vendor at the time of sale. The conveyancing process should make known all burdens to the purchaser and signal clearly any burden that is so unusual as to hinder marketability. Particular attention is needed to any positive obligations that impose ongoing costs on the purchaser.

All modern property systems provide for burdens affecting land to be recorded in the land register, so the main issue is to present a copy of the register to the purchaser and explicate it. Title registers are likely to be easier for cross border purchasers to use, though systems vary in their transparency.

In England the buyer will generally be given a copy of the register right at the beginning of the transaction, and if not can obtain a copy if he or she is interested. In Spain land registries are public for those with a legitimate interest in investigating the state of recorded property rights, so an extract from the register (*'nota simple'*) may be requested by the foreign purchaser though the internet²⁴⁵; the same is possible in Italy²⁴⁶, The Netherlands²⁴⁷ and Portugal.²⁴⁸ Not all the information is provided in foreign languages, so for example a buyer in the Netherlands would need to translate the register from Dutch, whereas in Spain a Sample Land Registry Extract, with the most common entries, is provided to the interested party explained in plain English. In most civilian states the notary does the land register search, and it is the duty of the notary to inform the buyer of the legal state of the property, including whether there is a mortgage; this is true for example in Germany and Poland. Currently in Poland the notary actually accesses the land register via internet when the parties have arrived to sign the contract and checks chapter 3 for encumbrances and chapter 4 for mortgages (or pending entries). If the system crashes (which does happen, but not very often) it is not unusual to postpone the signing of the contract. Nor does France have an internet portal allowing a potential buyer to check the register, so it could be time-consuming for the foreign purchaser to move personally to the place where the land registry is located.

5.7. Burdens not on the register (overriding interests)

Buyers will obviously be bound by interests recorded on the land register, but will generally take free of interests not recorded on the register; however, most systems (Germany apart) have some interests which can be binding off the register. The conveyancer's job is to guard against liability, but there is a real risk that a foreign buyer might misunderstand the situation.

5.7.1. England

Overriding interests are rights which bind off the register. The vendor will be required to

²⁴⁴ *Easements Covenants and Profits à Prendre* (London: Law Com CP 186, 2008) para 1.3.

²⁴⁵ <http://www.registradores.org/>.

²⁴⁶ <http://www1.agenziaentrate.gov.it/>.

²⁴⁷ <http://www.kadaster.nl>.

²⁴⁸ <http://www.predialonline.mj.pt/PredialOnline/>.

disclose any that exist and the conveyancing enquiries will be directing to elicit any that are not disclosed. One is very common:

- any interest of a person in actual occupation;

The rights of occupiers are a serious concern in conveyancing: if a person occupying as a licensee also has an option to purchase the land that option becomes an overriding interest. A series of cases has recognised that a cohabitee who has contributed to the acquisition of a house (eg by paying mortgaging instalments) can have an overriding interest in the house and that contribution right will bind a purchaser. A conveyancer acting for a purchaser must ask both the vendor and purchaser what occupiers exist. As already explained²⁴⁹ this is handled by securing consent to the sale from the occupier. Others are more unusual:

- easements if legal and not on the register (usually because they are created on division of the title or by long use);
- customary and public rights;
- local land charges;
- mines and minerals; and
- miscellaneous manorial and public rights (for a transitional 10 year period, now expired).

The consequences can be devastating. When Mr and Mrs Wallbank married, they were given Glebe Farm in the picturesque village of Aston Cantlow by Mrs Wallbank's parents.²⁵⁰ One field had, many years before, formed part of the glebe land of the parish, the land allocated to providing an income for the vicar. As a result the liability to repair the chancel of the parish church attached to the owner of this field.²⁵¹ The chancel repair liability was categorised as an overriding interest²⁵² so it would have been binding even if the Wallbanks had bought the farm in ignorance of it. The Wallbanks had to pay a quarter of a million pounds for the repair, a sum greatly increased by the costs of litigation. All defences failed, including the argument that the chancel liability was an unjustifiable interference with their right to peaceful enjoyment of their possessions.²⁵³ The liability was simply an incident of the ownership of the land, and peaceful enjoyment of land requires the discharge of burdens attached to it.²⁵⁴ This particular overriding interest no longer operates on a sale occurring after October 2013,²⁵⁵ so the chancel repair liability only binds a purchaser if entered on the register, but the liability should have been entirely abolished.²⁵⁶

5.7.2. Poland

There are some rights which might be binding off the register, namely rights which encumber an immovable through the operation of law (*ex lege*),

- the right of lifetime habitation,
- easements created by administrative decisions,
- easements of necessary way,
- an easement created when a building encroaches another's land,
- transmission easements

²⁴⁹ See above point 5.4.1.

²⁵⁰ *Aston Cantlow PCC v Wallbank* [2003] UKHL 37.

²⁵¹ *Wallbank* (n 60) paras 97-105, Lord Scott. The liability was described by Lord Nicholls with considerable understatement as 'anachronistic, even capricious' at para 2.

²⁵² LRA 1925, s 70(1)(c).

²⁵³ European Convention on Human Rights Protocol 1 (Paris: CETS 009, March 20th 1952) art 1.

²⁵⁴ *Wallbank* (n 60) paras 72, 91.

²⁵⁵ LRA 2002, s 117(1). Added to the LRA 2002 by the Land Registration Act 2002 (Transitional Provisions) (No 2) Order 2003.

²⁵⁶ *Property Law: Liability for Chancel Repairs* (London: Law Com 152, Law Commission, 1985).

The seller must disclose these rights, there may be claims under the doctrine of mistake or warranty for legal defects of the sold immovable. The notary also asks the seller about any undisclosed encumbrances and includes a clause in the contract which states that the seller assures the buyer that there are no unregistered burdens.

5.7.3. Tenancy contracts

The position of tenancy agreements can be studied in the reports from the TENLAW project²⁵⁷ (*Tenancy Law and Housing Policy in Multi-level Europe*), which received funding from the Seventh Framework Programme. Protection of the tenant against buyers of the land is obviously necessary for a successful housing tenure.²⁵⁸ Registered titles will generally not record short leases; even though they will bind purchasers; examples are

- England - short leases (up to seven years);
- Italy – unregistered lease valid to nine years;²⁵⁹
- Poland - residential leases within the Tenants Protection Act 2001;²⁶⁰ and
- Portugal, the Netherlands and France.²⁶¹

Conveyancing practice should identify whether the property is tenanted; this may not be a concern if the purchaser is investing in buy to let property, but is a real problem if the buyer wants vacant possession. Even if the parties specify on the preliminary contract whether or not the dwelling is leased, this is unlikely to affect the tenant's legal position. Therefore, the foreign purchaser must be aware of the functioning of each legal system in order to know if a physical inspection of the immovable is needed so as to avoid surprises. Spain is unusual in providing that a tenancy contract is only binding on third parties if properly registered, so foreign purchasers will be protected if someone is living inside the dwelling as a tenant but it does not appear in the land register and by no means they could have been aware of their existence (which indirectly means that judges also will require the purchaser some grade of diligence in expecting the property before buying it).²⁶²

5.5 Recommendations

Recommendation 5-A – Generic information is needed about:

the paradigm of ownership in the national legal system and any commonly accepted variants of it;
other ownership interests and how they fall short of the paradigm;
the real rights recognised as burdens in the legal system;
any real rights which could affect property without appearing on the register; and
any steps a buyer is expected to take to draw possible burdens to the attention of his conveyancer.

Recommendation 5-B – The EU should legislate to require Member States to formulate:

a paradigm of ownership interests that are regarded as fully marketable and mortgageable; and
a description of any ownership interests falling short of that paradigm and appropriate warnings about these.

²⁵⁷ <http://www.tenlaw.uni-bremen.de>.

²⁵⁸ S Nasarre Aznar, 'Leases as an Alternative to Homeownership in Europe: Some Key Legal Aspects', (2014) 22(6) *European Review of Private Law* 815 ff.

²⁵⁹ Italian CC art. 1599.

²⁶⁰ Act of 21 June 2001, consolidated version: *Journal of Statutes* 2014, item 150.

²⁶¹ Portuguese CC art 1057; BW (Netherlands CC) art 7:226; French CC art 1743 (unless otherwise agreed in the lease contract).

²⁶² Act 29/1994, dated November 24th, on Urban Leases, as amended, art 14.1.

Advertisements of property by traders (eg estate agents' particulars or newspaper advertisements) should be required to carry an appropriate warning when the interest for sale falls outside the paradigm of ownership. This would fall within EU competence over consumer transactions given the T2C pattern of the advertising.

5.8. Comparative accounts of European property law

5.8.1. EU funded projects

The Commission has funded a number of studies of aspects of European property and housing law:

- CU Schmid and C Hertel 'Real Property Law and Procedure in the European Union' (Florence, EUI, www.eui.eu/, 2005)
- C Schmid et al, *Study of the Conveyancing Services Market* (ZERP, Bremen: COMP/2006/D3/003, 2007)
- CU Schmid Tenlaw TENLAW project (*Tenancy Law and Housing Policy in Multi-level Europe*), (Bremen: ZERP, <http://www.tenlaw.uni-bremen.de>, 2015).
- Piet Leunis, Dr Pdraic Kenna, Freek Spinnewijn, EU FP7 funded project *Promoting Protection of the Right to Housing – Homelessness Preventing in the Context of Evictions*, (Brussels: FEANTSA, 2015)

5.8.2. The Common Core Project (the 'Trento' project)²⁶³

The Common Core of European Private Law Project seeks to unearth the common core of the bulk of European private law, i.e., of what is already common, if anything, among the different legal systems of European Union member states. The key tool is the questionnaire, which covers the areas of property, torts, and contracts. Each participant is first required to draft a factual questionnaire and to discuss it in one of the topical sessions during general meetings.

- Michele Graziadei, Ugo Mattei & Lionel Smith *Commercial Trusts in European Private Law* (Cambridge: CUP, 2005)
- Cornelius Van Der Merwe & Alain-Laurent Verbeke, *Time Limited Interests in Land in European Law* (Cambridge: CUP, 2012)
- Cornelius Van Der Merwe, *Condominiums in Europe*, (Cambridge: CUP, 2015)
- Sonia Martin Santisteban & Peter Sparkes, *Protection of Immovables in European Legal Systems* (Cambridge: CUP, 2015)

5.8.3. The European Network for Housing Research (ENHR)

The European Network for Housing Research (ENHR) established in 1988 provides an organisational platform for about 1000 individual members and nearly 100 institutional members spread across every country in Europe.²⁶⁴ The ENHR provides a framework for about twenty Working Groups, such as Housing Law, Land Markets and Housing Policy or Southern European Housing.

5.8.4. Commercial texts

There is no book really suitable for lay readers but several aimed at solicitors of which the earliest in English was:

²⁶³ <http://www.common-core.org>.

²⁶⁴ <https://www.enhr.net>.

- A Hurndall, *Property in Europe. Law and Practice* (London: Butterworths, 1998)
- H Simón Moreno, *El proceso de armonización de los derechos reales en Europa* (Valencia: Tirant lo Blanch, 2013) (in Spanish)

5.8.5. Ius Commune Casebooks

The aim of the Ius Commune Casebooks for the Common Law of Europe²⁶⁵ is to enable scholars and students across Europe and beyond to study and discuss the same leading cases and materials. The casebooks combine extracts from national case law and other sources with excerpts from the European level and thus take a 'bottom-up approach' to the study of the law.

- Sjef Van Erp & Bram Akkermans, *Cases, Materials and Text on Property Law* (Oxford, Hart Publishing, 2012);
- Bram Akkermans *The Principle of Numerus Clausus in European Property Law* (Antwerp: Intersentia, 2008)

References

- *Guide to Buying a Property in Spain*, (Madrid, AIPP, , RICS, RDE, aipp.org.uk, 2015)
- AM Honoré 'Ownership' in AG Guest *Oxford Essays in Jurisprudence* (Oxford: OUP, 1961) ch 5
- A Hurndall, *Property in Europe: Law and Practice* (London: Butterworths, 1998)
- Peter Mayle, *A Year in Provence* (London: Hamish Hamilton, 1989), 'April'
- Frédéric Planckeel, 'Introduction to the French System of Transfer of Immovable Property', in A Pradi, *Transfer of Immoveable Property in Europe – From Contract to Registration* (Trento: Università degli Studi di Trento, 2012)
- CU Schmid and C Hertel 'Real Property Law and Procedure in the European Union' (Florence, EUI, www.eui.eu/, 2005)
- C Schmid et al, *Study of the Conveyancing Services Market* (ZERP, Bremen: COMP/2006/D3/003, 2007)

²⁶⁵ <http://www.casebooks.eu/welcome/>.

6. FLATS AND NEW BUILD

KEY FINDINGS

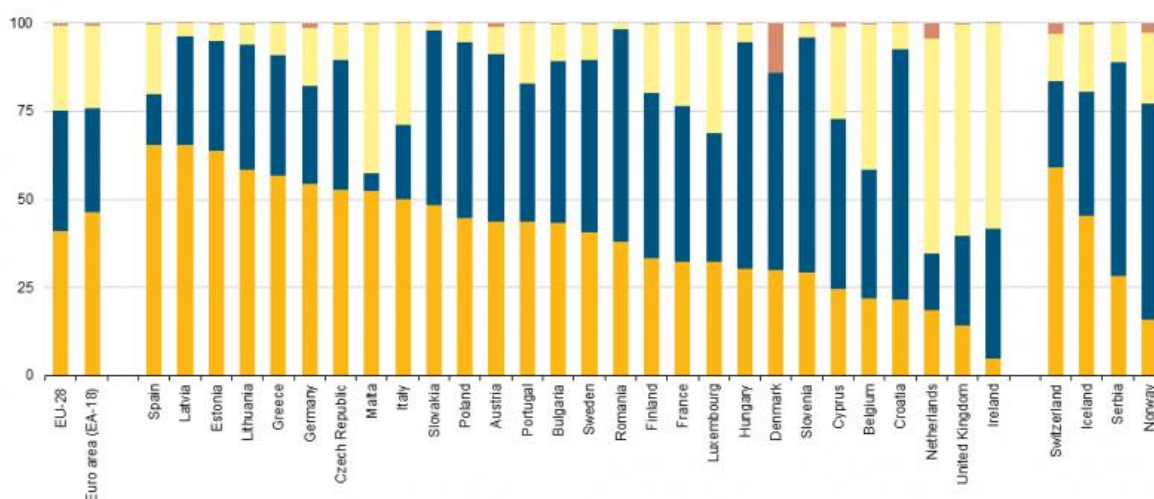
- Purchases of second hand flats present many challenges but are outside the reach of EU consumer law.
- Cross border purchasers of new build houses and flats fit the T2C pattern of EU consumer law.
- Purchasers of land are outside most consumer protections – for reasons that do not withstand scrutiny; in particular purchasers of new build homes need protection against obligations undertaken before they receive legal advice.
- Flat schemes are so complex that information and language rights are appropriate to protect citizens.
- Substantive protections are needed against the insolvency of developers and post completion defects.

6.1. Flats

6.1.1. Prevalence of flats

Flats have become a familiar feature of all European cities, but this is a relatively recent development, a reaction to the advances in construction techniques realised in the 1920s and 1930s as residential blocks began to scrape the skies.²⁶⁶ The proportion of flats in the housing stock varies substantially from country to country, as represented in orange at the bottom of the columns on the diagram below.

Table 19 EU-28 population (%) accommodated in flats 2013



Source: Eurostat (2015)²⁶⁷

At one extreme are Spain and the Baltic states where apartments house around 70% of the population and at the other are the Netherlands (20%) and the United Kingdom (15%). The latter two countries have very similar densities and populations but very different

²⁶⁶ C Van Der Merwe, *European Condominium Law* (Cambridge: CUP, 2015), pp 9-17.

²⁶⁷ Above the orange are blue (detached houses), pale yellow (semi-detached houses) and pink (others).

house prices. Ireland is an outlier on a mere 5%. Across most of EU-28 somewhere between a quarter and a half of the population is accommodated in flats. There seems to be neither rhyme nor reason behind the statistics, with EU-15 states and A-10 countries mixing freely, negating any thought that high concentrations are associated with Stalinist blocks. Not all EU-28 Member States provide separate registers for individual titles, but those that do yield interesting statistics.

Table 20 Registered units per million population in the EU-28

EU-28 state	Strata titles per million population (rounded)	Total no of strata titles (rounded)
DK	40K	0.2M
AT	50K	0.4M
NL	55K	0.9M
CZ	100K	1.0M
BE	100K	1.0M
DE	170K	14.0M
FI	170K	0.9M
HU	260K	2.6M
LV	260K	0.6M
CY	340K	0.3M
SI	580K	1.2M

Source Cadastral Template 2.0 (2015)²⁶⁸

6.1.2. Buying a second hand flat

A buyer on a resale of a second hand flat will not usually fall within EU consumer protections due to the fact that most property transactions of this type follow a consumer to consumer (C2C) pattern, even if the seller happens to be in a professional position. (It is of course different if the seller trades in selling flats.) Nor can the buyer of second hand flat change the basic constitution of the block, so the decision to buy is a take it or leave it decision. Even more obviously the buyer cannot change the national patterns of ownership of flats and blocks, which vary substantially from state to state. So the main issue is to ensure that the buyer is fully appraised of what he or she is buying and whether the title would generally be accepted in the local market.

6.1.3. Flat schemes

The plot on which a house or bungalow is built is demarcated by vertical divisions giving a title in two dimensions (2-D). A flat is a unit in a larger block, divided from its neighbours by both horizontal and vertical divisions, a shift to three dimensions (3-D), that represents a seismic shift in conveyancing from absolute ownership to an ownership mutually dependent upon adjoining owners. There is little commonality in how blocks are organised across EU-28 and buyers are necessarily going to need detailed advice on local customs

²⁶⁸ www.cadastraltemplate.org. The extraordinarily high figure for Slovenia (if it is correct) might be explained if shares in a co-ownership are recorded separately or if garages and other outlying parts have separate titles.

and the particular scheme. The conveyancing process should deliver an interest that is marketable and mortgageable.

6.2. Ownership of a flat

6.2.1. Market terminology

Title to a flat should offer:

- a secure ownership interest in the flat and other exclusive parts;
- a registered title to prove title that is mortgageable and marketable; and
- clear information about restrictions.²⁶⁹

6.2.2. Dualist schemes on continental Europe

In most schemes – which Van der Merwe calls dualist²⁷⁰ – the units are treated differently from the block, thus:

- individual ownership of each individual flat; and
- collective ownership and management of the block.

There are many good and many bad schemes.

Continental law followed the Roman law principle that ownership of the storeys of a building cannot be divided. The many ancients who lived in Rome in large multi-storey slums (*insulae*) were always rental tenants since there was no conceptual way of dividing ownership of the block. Buildings were divided from the late Middle Ages, but the widespread development of flats is much later. Horizontal division of buildings began in the nineteenth century under rudimentary provisions in many civil codes, but Belgium led the way, in 1924, by introducing special condominium legislation, which now appears in all civilian EU states and has often by now matured into second and third generation schemes of increasing sophistication. This legislation is very piecemeal in the sense that it has been adopted nationally with no common model. Cornelius Van Der Merwe was unable even to find any coherent terminology, leading him to adopt the following literal translations of the titles of European legislation:²⁷¹

Denmark	Owned apartments
France	Apartment ownership
Germany	Apartment ownership (often translated as condominium)
Greece	Ownership by storeys
Ireland	Multi-unit developments
Poland	Unit ownership
Spain	Horizontal property

These translations confirm the continental adoption of the Americanism 'apartment'.²⁷²

Germany provides a standard for dual schemes in the Condominium Act (*Wohnungseigentumsgesetz*). Apartment ownership consists of a co-owner's share in all commonly used parts combined with individually owned specific premises. This interest is mortgageable. The separate premises are identified in the partition plan (*Teilungserklärung*), which must be registered in the land register. This is a de facto model

²⁶⁹ Van der Merwe, *European Condominiums* (n 1) ch 2.

²⁷⁰ Van der Merwe, *European Condominiums* (n 1) p 5.

²⁷¹ Van Der Merwe, *European Condominiums* (n 1) p 5.

²⁷² The word 'flat' is usual in England, or 'maisonette' if the accommodation is on split levels.

eg in the Baltics. Poland introduced a Law on Unit Ownership in 1994;²⁷³ ownership of a unit is recorded in a separate land register kept for it exclusively, which is cross referenced to the site of the block held communally. The register contains information as to the usable area of the unit, the rooms it comprises (together with utility rooms), its location within the building, the type of the unit (residential, retail, etc.) and is accompanied by a floor plan. The same pattern applies in most Latin countries (Spain and France and elsewhere) where the buyer would become the owner of an individual unit (ie an apartment) and joint owner of the common areas, such as the walls or the swimming pool.²⁷⁴ This can only be a brief description of a small sample of condominium regimes. Van der Merwe provides coverage for a legal reader of some twenty European states, mostly within EU-28.²⁷⁵

6.2.3. Unitary systems on continental Europe

Some continental blocks are organised under a cruder unitary system based on co-ownership of the block coupled with a licence to use the flat. Examples are

- schemes based on co-ownership of the entire building without a corporate management vehicle nor individual titles to units; the position originally in Belgium and France and still in the Netherlands and elsewhere;
- housing co-operatives - common in Scandinavia²⁷⁶ and other states.

French law provides for the *Société Civile Immobilière à vocation sociale*, by which a block is vested in a company and the flat 'owners' are in truth only owners of shares in the company which allow them to use the dwelling. As a result, they are neither tenants nor owners in the strict sense. This system is quite similar to the one used in housing cooperatives, which are running for example in Catalonia, Portugal, and Spain.²⁷⁷ The ownership of the units may be either individual (the members of the cooperative become homeowners of one specific unit built after the construction) or collective, in which case the cooperative remains the owner of the dwelling. In the latter case, the one in housing need pays an entrance fee to become a member of the cooperative and receives in return a right to use a specific dwelling whose transmission to third parties may be subject to some limitations. This is not a right of ownership strictly speaking.

The Polish market has condominium units and cooperative units side by side.²⁷⁸ Cooperatives confer a proprietary right which allows the entitled person to enjoy the unit in accordance with its (residential) purpose and which is transferable and mortgageable and is entered in a land register. The market values these rights at more or less the same level showing that buyers of units will not usually have a preference as to tenure, but will make a choice based on location and price. Most persons differentiate these rights by asking whether one is buying a unit with a share in the land (ownership of units, the condominium scheme) or without such a share (proprietary cooperative right). Condominiums predominate in post-transition housing estates built by private developers whereas cooperatives predominate in the vast housing estates built in the 1960s and 70s, often in

²⁷³ *Journal of Statutes* 2000, no 80, item 903, as amended.

²⁷⁴ Spanish Law 49/1960, dated July 21st, art 1; Catalanian CC art 553-1; French Act 65-557, dated July 10th, art 1.

²⁷⁵ AT, BE, HR, DK, ES (Spain and Catalonia), EE, FR, DE, EG, IE, IT, NL, PL, PT, SI, SE and UK (England and Scotland).

²⁷⁶ Van der Merwe *European Condominiums* (n 1) p 47.

²⁷⁷ Catalanian Act 12/2015, dated July 9th; Portuguese *Decreto Lei* 502/99, dated November 19th; Spanish Law 27/1999, dated July 16th.

²⁷⁸ Housing Co-operatives Act of 15 December 2000, *Journal of Statutes* 2001, no 4, item 27, as amended, arts 17¹ – 17¹⁹.

prime city locations.

6.2.4. Leasehold flats in Britain and Ireland

English property law was flexible enough when flat development began in the 1920s to make use of existing property law to facilitate flat management schemes management. In both Britain and Ireland horizontal division and the enforcement of positive obligations can both be secured using leasehold schemes. In England and also in Ireland the flat will almost certainly be marketed as leasehold.²⁷⁹ In the provinces of England the paradigm would be the grant of a lease of 999 year leasehold interest, which of course will long outlast any block of flats and is virtually perpetual like a freehold. The technical disadvantages in using leasehold tenure are minor and most flat titles are fully marketable. Schemes tend to be complex, and the market consists of a mixture of good and bad schemes.

6.2.5. Potential difficulties in England

Short leaseholds are encountered in southern England which are potentially problematic. Many modern flat developments (especially in London) are based on 99 year terms, where there is a significant residual value in the developer causing wastage in the value of the leasehold interest. A purchaser needs careful advice about this and any possibility of extension of the term (which will be at market value). In central London there is a market in very short terms – millions of pounds changing hands for the right to occupy an apartment for less than 21 years – which are not an investment but a means for the very rich to squander large amounts of money.

The expense of a proper flat scheme is often avoided when small houses are converted into flats. It is common to sell a leasehold interest in each floor as a separate flat along with a co-ownership of the freehold of the house without setting up a management company, (an arrangement often described as with a 'share of freehold'). The variety of schemes is confusing to buyers.

Commonholds were introduced into England by the Commonhold and Leasehold Reform Act 2002 as a means of reconciling the freehold ownership of units within a development with the need for common arrangements for the management of the whole. The English scheme builds on the strata titles in Australasia, the condominium laws in North America and the continent of Europe. Unfortunately lenders are not happy with the security offered by a mortgage of a commonhold unit and opposition from the lenders' lobby has led to the whole commonhold scheme becoming a dead letter.²⁸⁰ This could be a serious trap for a continental buyer.

6.3. Restrictions on purchase of flats

Whether a flat scheme can restrict the sale of flats within the block depends upon the location of the flat, Europe dividing on family lines.²⁸¹

In most of civilian Europe any restriction on sale would be seen as inconsistent with ownership of the flat and restrictions would be invalid. This applies, for example, in Germany, Poland, and much of eastern Europe and also to the (few) English commonholds. French law does accept restrictions where they are consistent with the intended purpose

²⁷⁹ Scotland has a long tradition of special tenement legislation which is too specialised to receive separate treatment here.

²⁸⁰ *CML Lenders Handbook for England and Wales* (London: Council for Mortgage Lenders, www.cml.org.uk, 2015), question 5.9.1 (Does the lender lend on commonhold?).

²⁸¹ Van der Merwe, *European Condominiums* (n 1) Case 2.

(*destination*) of the scheme.²⁸² Slovenia goes further by allowing the rest of the owners a right of pre-emption. Lesser restrictions might be accepted, in particular on letting and holiday letting. Any restrictions would need to be tested for discrimination.

Restrictions are commonplace in Nordic and Anglo-Celtic blocks. Most usually the flat management company would have to consent to the identity of the purchasers, though this is often counterbalanced by providing that consent is not to be unreasonably withheld. In English and Irish law this balance is achieved because of the leasehold structure of flat schemes; restrictions are accepted on the transfer of leases which would not be valid against freehold ownership. Again discrimination would be outlawed. The major practical difficulty is not in proposing an acceptable assignee but in securing a timely acceptance, though there is legislation in place requiring consent applications to be dealt with promptly. Reconciliation of consent provisions with capital freedom appears to be untested.

6.4. Block ownership and management

6.4.1. Block management

Block documentation tends to be very complex (often to an unnecessary extent) and it may be open to doubt how many native buyers understand the schemes regulating their blocks. A foreign buyer faces a very considerable challenge to understand the scheme and to identify potential pitfalls.

So far as the property aspects of the block are concerned, the desiderata are:

- a share of ownership (either direct or better through membership of a flat management company);
- clear demarcation of the communal parts;
- a mutual scheme of rights covering access etc; and
- clear information about the block ownership and restrictions on it.

It is almost certain that a person who has bought a flat at home will encounter a different system when crossing a border for his or her acquisition, a degree of difference that is unnecessary given the essential similarity of any block as (in Le Corbusier's famous dictum) a 'machine for living in.' That said, legislation must respond to local needs since the essential for communal living might be reliable heating or, alternatively, ventilation and a swimming pool. Again, Germany provides the *de facto* standard for dual schemes. The Condominium Act (*Wohnungseigentumsgesetz*) sets out the statutory rules organising the relations between the several co-owners and defining procedures for settling conflicts, though these are often varied by bylaws which should also be registered.²⁸³ Management is conducted through an owners' assembly with voting rights proportionate to apartment size. The partition plan usually determines the basic rules for the distribution of costs for running expenses and repairs.²⁸⁴

The essence of block management is that certain repairs and services are organised communally and the cost is aggregated and then divided between the units in the block in the form of a service charge. Clearly a buyer must be informed of the current level of

²⁸² H Dyson *French Property and Inheritance Law – Principles and Practice* (Oxford, Oxford University Press, 2nd edn, 2003), p 63.

²⁸³ Section 10 WEG. This also provides the basis for the law governing apartments in the Baltics and elsewhere.

²⁸⁴ Section 16 WEG.

service charge and ensure that payments for his or her unit are up to date but this should be only the beginnings of his or her concerns. One issue is the state of accounts, whether other units are paying and the extent of any reserve. Another issue is the state of repair of the building and the potential liability of the service charge fund for major expenditure. The bottom line is that the value of any individual flat depends upon the condition of all the rest of the block. An English surveyor would both value the flat being purchased and assess the condition of the remainder of the block. Some matters are essential, such as major structural repairs. However, the real concern is how the optional matters are dealt with, such as portering, cosmetic repair and the gardening. A purchaser may face a black hole of unlimited cost, and there is plenty of scope for the deployment of the dark arts and the exploitation of strangers. Collective management of the block needs to work. Flat blocks are legendary as a source of disputes which makes it apparent immediately that there are innumerable traps for purchasers, and cross border purchasers are extremely vulnerable; it is as easy to buy a law suit as it is a restful holiday home (though Poles apparently live together in blocks in perfect harmony). Elsewhere, dispute resolution is an absolutely central concern.

A purchaser will wish to have a say in the management of the block. The scheme will usually involve a management company charged with management of the block, and ideally under the control of the residents themselves. The issue then is how an owner of an individual flat becomes involved in the decision making. There may be a particular problem if management is conducted through meetings at which personal attendance is required. Management needs to be active and not fall into abeyance, as it can do when many flat owners are absentees.

Finally modern blocks have a limited shelf life and the documentation needs to provide clear end of life arrangements.

With a second hand flat, the block management scheme will either have been imposed by law as a result of the division of the building or crafted by lawyers when the development was set up. A buyer cannot change the scheme but must accept it as it stands, or otherwise buy elsewhere. The issues in cross border acquisitions are to ensure adequate information, to overcome the language barrier and recognition of the knowledge gap, and in particular to appreciate the danger of preconceptions. Thus a buyer will require clear information about the block management scheme comprising:

- a flat management company or other management arrangement;
- individual repairing obligations in respect of flats;
- communal repairing obligations in respect of the structure and common parts;
- a scheme for setting a service charge;
- obligations to pay service charge supported by default powers;
- clear information about the obligations;
- a decision making structure; and
- information about the current state of repair and the state of accounts.

6.4.2. Service charges

Germany is an example of a country where the owner is subject to many property laws and regulations, so much so that it has been quipped that the low share of home ownership in the country reflects this. Be that as it may, in the case of apartment buildings, the Federal Court of Justice has affirmed the obligations of an owner to pay his or her share of the common expenses — common water, waste disposal, lightning, and lift — even while no

one is staying in the apartment.²⁸⁵ Nevertheless, it is not mandatory for the owner to pay for any extra care services such as the special services of the housekeeper of the apartment building management (*Hausverwaltung*) or the services of an external management company, when the owner is away (and does not rent out the apartment). Discussions are ongoing regarding obligations to allocate empty apartments to the homeless or the refugees. In Spain, the owner of an apartment pays a building management fee (*comunidad*) as member of the community of owners. The bylaws of the community determine the value of any one apartment as percentage of the value of the apartment building; the owner is responsible for the common costs in accordance with this portion (*cuota de participación*). Also included within the owner's responsibilities is a public waste-collection fee (*basura*). This fee is, in some areas, charged as part of the local property tax. Similar arrangements where owners contribute fees to the common resources of the apartment building exist in other countries under various forms of home ownership, such as the limited-liability housing company in Finland and the housing cooperative in Sweden.

6.4.3. Problems with the communal aspects of flat schemes

These boil down to issues arising from lack of transparency of schemes and disagreements about the conduct of management. In terms of **transparency**, a purchaser requires clear information about the totality of the flat scheme in a language that he can understand. Potential problems are:

- regimes imposed automatically without documentation (eg FR, IT, PL etc.²⁸⁶);
- complex or lengthy documentation that is not explained to the purchaser;
- translation costs;
- belated identification of pitfalls leading to transaction failure.

The real challenge is to differentiate minor defects from serious problems which render the interest unmarketable.

The ideal for **management** is for a management company to hold the common parts of the block, the membership of the management company being be the flat owners themselves. There are manifest potential pitfalls:

- management by the original developer or an outside investor, who may be tempted to exploit his position eg by extracting large commission payments from the insurers of the block;
- defective or defunct management.
- disputes about what facilities to provide and what repair work is required;
- disputes about the quality of work; and
- poor drafting of management structures.

Van der Merwe's ten case studies give a good indication of the range of problems that are common within flat schemes.

²⁸⁵ Bundesgerichtshof, Az VIII ZR 159/05.

²⁸⁶ Van der Merwe *European Condominiums* (n 1) pp 25-42.

Table 21: Condominium problems

Cases studied by Van der Merwe	
Case 1	Purchasing a unit based on building plans
Case 2	Restrictions on sale and letting of apartments
Case 3	Who is responsible for maintenance?
Case 4	My apartment is my castle: leave me alone!
	How does one deal with the assessment defaulter?
Case 5	
Case 6	How does one deal with an obnoxious owner?
Case 7	No more rules please!
Case 8	Are all resolutions binding?
Case 9	'We ... want more rights!'
Case 10	The condominium scheme needs a face lift

Source: Van der Merwe *European Condominiums* (2014)

6.5. New build - information

6.5.1. Competence to protect buyers of new build

Unlike a buyer of a second hand house or flat,²⁸⁷ a person buying new build property may be able to rely on EU consumer protections if:

- the transaction falls into the T2C pattern;
- there is a cross border element; and
- protection of a buyer of an immovable is appropriate.

A sale of new build will usually fit the 'trader to consumer' (T2C) format.²⁸⁸ This is the pattern common to all European legislation in the field, including the marketing of goods,²⁸⁹ consumer credit,²⁹⁰ unfair commercial practices,²⁹¹ and unfair terms.²⁹² On the two sides are:

T - the trader:

- a 'trader', an individual or a company who is a 'seller' or a 'supplier';
- acting within the scope of the legislative regime; and
- acting in a commercial or professional capacity; and .

C - the consumer:

- a natural person,
- acting within the scope of the particular regime, and
- acting outwith any trade or profession.

A sale of new build property will usually involve a trader and a consumer.

Introduction of a cross border element into a purchase raises the potential for EU law to operate.²⁹³ This element will be obvious when the buyer is a citizen or resident of another EU-28 state, but might also be found with a national responding to marketing elsewhere in Europe or drawing the funds for the purchase from another state. In practice EU law will

²⁸⁷ See above point 6.1.2.

²⁸⁸ S Weatherill, *EU Consumer Law & Policy* (Cheltenham: Edward Elgar, 2nd edn, 2013); H-W Micklitz & J Stuyck, *Consumer Law* (Oxford: Hart, 2010); P Sparkes, *European Land Law* (Oxford, Hart, 2007), ch 5.

²⁸⁹ Consumer Rights Directive, 2011/83/EU, OJ 2011 L304/64, arts 2, 3.

²⁹⁰ Consumer Credit Directive, 2008/48/EC, OJ 2008 L133/66, arts 1-3.

²⁹¹ Unfair Commercial Practices Directive, 2005/29/EC, OJ 2005 L149/22, art 2.

²⁹² Unfair Contract Terms Directive, 93/13/EEC, OJ 1993 L95/29.

²⁹³ N Reich 'Cross Border Consumer Protection', in N Reich, H-W Micklitz, P Rott & K Tonner *European Consumer Law* (Mortsel, Belgium: Intersentia, 2014), ch 7.

also dictate the domestic law, because Member States generally avoid (reverse) discrimination against their own nationals.

So, European consumer protection is feasible for cross border buyers of new build.

6.5.2. Protection of buyers of land

EU consumer law has largely excluded itself from sales of land.

Timeshare required a hard sell, including leafleting, telemarketing, fly buy, drive to, owner referrals, in house sales, exchange of guests, affinity list mailing, off-site sales offices, and targeting existing owners.²⁹⁴ Aggressive marketing was targeted at EU visitors resulting in a high potentiality for cross border contracting and hence for European intervention. The Directive introduced in 1994 and toughened in 2008 has been effective in sweeping the continent clear of touts.²⁹⁵ Intervention was posited on a T2C pattern, the targeting of foreign buyers and the complexity of the information required to make an informed decision, the solution being information rights, language rights and time for reflection.

The success of the timeshare reform was not precluded by the fact that aspects of timeshare contracts affected land. Many resorts include a mix of holiday rentals, of timeshares and of owner-occupied holiday homes - which are physically indistinguishable. Information requirements have recently been imposed on residential mortgage lenders,²⁹⁶ and the prohibition of unfair terms has always covered land contracts. All this suggests that there is no a priori reason to exclude purchasers of new build homes from protection.

If a buyer is fed false information this will affect the decision making of the buyer whether or not he receives legal advice. False information and deliberate omission have the same effect, and both are prohibited by the Unfair Commercial Practices Directive.²⁹⁷ Examples of practices applied to a purchaser of a new build home that are unfair are:

- a trader falsely tells a consumer that prices for new houses will be increased in seven days' time, in order to pressurise him into making an immediate decision to buy;
- an estate agent falsely tells a consumer that he has recently sold several houses in the same area, just like the one the consumer is viewing, at a certain price in an effort to persuade the consumer to buy at an inflated price;
- a trader advertises a house as having three bedrooms, where the third room is too small to be occupied at night.

Since these activities are already prohibited there is no need for specific action in relation to new build. One activity which appears to be unfair and to contradict the exercise of market freedoms, so that it ought to be added to the list of unfair commercial practices is:

- differential marketing - some websites increase prices according to the language in which the site is accessed.²⁹⁸

By way of contrast, where the only issue is the provision of information the recent tendency has been to exclude land buyers from EU consumer protection. This can be seen in the legislation covering the consumer rights of consumers, which is limited to buyers of goods contracting at a distance (ie over the internet which is perhaps unlikely for land) or away from business premises (which is very likely for land). The recast Consumer Rights

²⁹⁴ Sparkes, *European Land Law* (n 23) pp 247-252.

²⁹⁵ Timeshare Directive, 2008/122/EC, OJ 2009 L33/10, re-enacting Directive 94/47/EC, OJ 1994 L280/83.

²⁹⁶ See below points 9.1, 9.2.

²⁹⁷ Directive (n 26).

²⁹⁸ The Commission has challenged this practice by car hire companies: public letter to Europcar, Hertz and Avis, July 23rd 2014.

explicitly exclude purchases of immovables, construction of new builds and substantial conversions.²⁹⁹ The stated rationale for these restrictions is that:

[T]hese contracts are already subject to a number of specific requirements in national legislation. [So] the provisions of this Directive are not appropriate to those contracts.³⁰⁰

This reasoning can be tested against a sample of the contents of national legislation.

6.5.3. National legislation

Even a cursory survey of continental legal systems demonstrates that the case for strong protection of buyers of new build and off plan property is widely recognised. This point can be demonstrated by considering France and Spain.

In **France**³⁰¹ the parties often conclude a preliminary contract (*contrat préliminaire*) before construction starts,³⁰² and if so it must be concluded in front of a notary with mandatory contents and a schedule of payments:³⁰³

- 5% maximum deposit;³⁰⁴
- 5% of the price upon completion of foundations;
- 70% with the retirement of water; and
- 95% on completion of the building.

If a loan is required, the buyer has a minimum of 30 days to obtain a loan offer,³⁰⁵ though longer is allowed in practice. In practice it is common to conclude a preliminary contract in writing especially if the property is bought off plan.³⁰⁶ In this case, the seller remains the owner until the construction finishes; ownership transfers automatically and with retrospective effect when a notarised deed is concluded.³⁰⁷ There is a limited protection for any pre-payment against the insolvency of the developer. Non-professional buyers also have the right to withdraw from any sale contract concerning the construction or acquisition of a building for residential use in the next seven days after receiving a copy of the contract by registered post.³⁰⁸

Similarly, in **Spain**,³⁰⁹ the buyer usually signs a private contract, which does not pass ownership, the buyer providing earnest money, the amount of which is not limited by law. Both remain free to withdraw from the sale contract, the purchaser forfeiting the earnest money or the seller returning double the amount.³¹⁰ This form of contract was usual during the housing bubble (2000-2008) and remains common for sales off plan. The developer is required to provide basic pre-contractual information.³¹¹ Specific legislation provides protection for down payments in the event of the developer's insolvency.³¹² Some

²⁹⁹ Consumer Rights Directive (n 24) art 3(3)(e).

³⁰⁰ Consumer Rights Directive (n 24) recital 26.

³⁰¹ Dyson, *French Property* (n 17) ch 6 esp pp 72, 75; PL Murray, *Real Estate Conveyancing in 5 European Union Member States: A Comparative Study*, (Harvard: www.dnotv.de/, 2007), p 174.

³⁰² Van Der Merwe, *European Condominiums* (n 1), p 98

³⁰³ Code de la construction et de l'habitation, arts L261-11, R261-14.

³⁰⁴ Either party may withdraw from the sale contract, the buyer forfeiting the deposit or the the seller returning twice the deposit: French CC art 1590.

³⁰⁵ Code de la consommation, arts L312-15 ff; Loi no 79-596 du 13 juillet 1979 relative a l'information et a la protection des emprunteurs dans le domaine immobilier; 'Buying a Property Guide' (Paris: Notaries de France, www.notaires.fr/sites/, July 2014).

³⁰⁶ Code de la construction et de l'habitation, arts L261-1 ff; French CC arts 1601 ff.

³⁰⁷ Code de la construction et de l'habitation, art L261-3.

³⁰⁸ Code de la construction et de l'habitation, art L271-1.

³⁰⁹ In relation to Portugal see Van Der Merwe, *European Condominiums* (n 1), p 114.

³¹⁰ Spanish CC art 1454.

³¹¹ Royal Decree 515/1989, dated April 21st.

³¹² See below 6.8.3.

households faced difficulties due to credit crunch in obtaining the mortgage loan in order to finance the acquisition of the property once the construction finishes. The Spanish Supreme Court have not accepted the termination of the preliminary contract in these circumstances,³¹³ so the buyer still have the duty to obtain the money in order to perform his obligation of payment or face unlimited personal liability.

Off plan and construction contracts are also regulated in varying ways in **other countries** such as Italy,³¹⁴ Belgium,³¹⁵ Luxembourg,³¹⁶ the Netherlands,³¹⁷ and Poland.³¹⁸ So it is true that national legislation often provides strong protection to purchasers of new build property. This is often incomplete. This can be demonstrated by the fact that several Member States have chosen to extend implementation of the Consumer Rights Directive³¹⁹ to buyers of land. Germany has chosen to extend consumer rights to all consumer products³²⁰ and France allows buyers of land to benefit from a cooling off period.³²¹ Many other states including the United Kingdom have stuck with the land exclusion.³²²

6.5.4. Provision of legal advice to buyers of new build

There is no need to confer information and language rights on buyers of land who are legally advised. In Scandinavian systems the buyer will be advised by the real estate agent.³²³ In Britain and Ireland the buyer will consult a conveyancer at the outset of the transaction and will be protected by the formality requirements against premature contracting (protection which is theoretically inadequate but which works satisfactorily in practice). This is not at all the case in continental Europe where advice is provided by notaries. Although there are states where a notary provides advice at the outset, this is by no means usual. It is common to leave notarisation until the end of the construction process, meaning that a buyer enters into important obligations without having the benefit of advice. This appears to occur in France, Italy, Belgium, Luxembourg, the Netherlands, Portugal and, commonly, in Spain. All Member States consider that an off plan purchase is a situation calling for strong protection of a buyer and the provision of , legal advice, but there is usually no procedure to ensure that legal advice is received as a precondition to the validity of obligations entered into by the buyer.

6.5.5. Recommendation on provision of legal advice to buyers of new build

Legal advice is particularly necessary for a buyer of off plan and new build property. This connection should be made explicit and turned into a conditionality. Legislation is needed to

³¹³ STS 17-1-2014.

³¹⁴ European Law Firm, *Purchasing Real Estate in Europe, 2011/2012* (Eindhoven, www.european-law-firm.com, 2012) p 32

³¹⁵ Breyne Act of 1971; Van Der Merwe, *European Condominiums*, (n 1), pp 88, 89; Vincent Sagaert & Alexis Lemmerling, 'The Transfer of Immovable Property in Belgian Law', in Andrea Pradi, *Transfer of Immovable Property in Europe – From Contract to Registration* (Trento: Università degli Studi di Trento, 2012), pp 52-53; Van Bael & Bellis, *Business Law Guide to Belgium*, (The Hague: Kluwer Law International, 2nd edn, 2003), p 672.

³¹⁶ European Law Firm, *Purchasing Guide* (n 49) p 38.

³¹⁷ Van Der Merwe *European Condominiums* (n 1), p 107; European Law Firm, *Purchasing Guide* (n 47), p 43; Arthur S Hartkamp, Marianne MM Tillema and Annemarie EB Terheide, *Contract Law in the Netherlands* (The Hague: Wolters Kluwer, 2011), pp 192 ff.

³¹⁸ Law on the Protection of the Rights of a Residential Unit or a Single Family Home Purchaser, *Journal of Statutes* 2011, no 232, item 1377, as amended.

³¹⁹ Directive (n 24).

³²⁰ Gesetz zur Umsetzung der Verbraucherrechterichtlinie und zur Änderung des Gesetzes zur Regelung der Wohnungsvermittlung (Act to implement the Consumer Rights Directive and modify the regulations of the procurement of houses).

³²¹ Loi no 2014-344 du 17 mars 2014 relative a la consommation (consumer law).

³²² Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013, reg 6(1)(c).

³²³ See below point 10.4.4.

confer information rights and language rights on buyers where the transaction fits a cross border T2C pattern.

There are two distinct issues about information; the job of the conveyancer/notary is to assess the documentation to see whether it is safe to advise a client to enter into the transaction (which does not require line by line explication of complex documentation) whereas the client also requires access to the documentation in a comprehensible language format in order to be able to make the decision to go ahead with a purchase and then to handle practical issues that arise during the construction work. The closest analogy here seems to be with the Mortgage Credit Directive which provides for consumers to receive comprehensive information about a mortgage offer in a standardised format (the European Standardised Information Sheet - ESIS).³²⁴ We feel that the complexity of the new build construction contract merits a similar approach with the whole bundle of documentation being treated as a single package, and that a solution is required to the problem of cross border purchasers being left in the dark about much of the content of the documentation. Our solutions are:

- the need for information in an appropriate language;
- advice or kite marking to overcome the complexity of new build documentation;
- advice to overcome the risk of preconceptions arising from flat buying experience in a home state.

Further the formulation of a format for a form of information would help to establish a de facto standard for documentation and would then facilitate the development of kite marking as a sign of quality assurance.

Consultation is required about how to define the languages in which information had to be provided since it would not be realistic to translate all estate documentation into all 24 EU languages. However, documentation should be provided in any language used by consumers at whom marketing of the development is targeted. In terms of kite marking it would be appropriate to draw from good practice from the Consumer Code for Home Builders, a voluntary code in the UK supported by the home warranty providers³²⁵ and the many similar schemes in other Member States. The need for information could be obviated if the conveyancer is able to certify that full advice has been provided by the conveyancer in the buyer's home language.

The requirement to provide information in a standardised format could be reduced by proof that the buyer has received appropriate legal advice. This would require a certificate specifying that:

- legal advice has been provided;
- in an appropriate language;
- covering all aspects of the transaction;
- by a notary independent of the developer; and
- before entry into the obligation in question.

However, it would still be beneficial for the buyer to have complete documentation in his own language.

³²⁴ Directive on credit agreements relating to residential immovable property, 2014/17/EU, 2014 L60/34, art 14; see below point 9.2.

³²⁵ *Consumer Code for Home Builders* (London: www.consumercodeforhomebuilders.com, 3rd edn, 2013).

6.6. Value added tax

New build property will generally attract value added tax, though transfer tax may well be reduced as a result. Since the details vary widely, clear information is required in advertisements and throughout.

Table 22 Tax on sale of new build by developer

Member State	VAT rule
Belgium	If building is 'new' for tax purposes and election is made, transfer duty does not apply but VAT applies: 21%
France	Transfer duty: reduced rate of (0.71498%) or fixed duty (EUR 125) may apply (new building) VAT at 20%) on sales within five years of building completion: VAT on whole purchase price or (ii) upon election of the seller VAT on the whole purchase price or on the margin.
Italy	Sale of non-commercial property by VAT-registered individual or entity: VAT-exempt, exception applies for construction companies under certain circumstances. If not VAT-exempt, VAT at a 22% or 10% rate
Luxembourg	Usually VAT exempt but (under certain conditions the parties may opt to submit the sale to VAT: 17% as from 1 January 2015)
The Netherlands	VAT applies on the transfer of a 'new' building (for two years after first occupation)
Portugal	Transfer of real estate is VAT exempt. In certain cases, the seller may waive the VAT exemption.
Spain	On first transfer of new residential buildings for building: 10% VAT

Source: CMS³²⁶

6.7. New build flats

Probably a majority of new build properties will be flats and especially in Spain it appears that foreign buyers are directed towards flats in newly constructed blocks. The three elements introduced earlier in this chapter then coalesce, since the documentation presents the complexity of a flat scheme, the new build element introduces EU consumer competence since the developer is acting as a trader in a T2C contract, and the construction element of the contract merits active intervention to protect consumers.

- liquidation of the developer; and
- service charge provisions;
- complexity of ongoing management and participation rights;
- disputes.

It seems that there is an overwhelming case for marketing controls and information rights in the case of new build flats. Developers should be free to ensure that buyers are in a position to make an informed choice before entering any legally binding commitment. As with new build generally, it would seem appropriate to allow an exemption where an

³²⁶ M Casasole, F Raffaelii & D Zisch, *CMS Guide to Real Estate Transaction Costs and Taxes in Europe*, (Rome and Milan: CMS, www.cmslegal.com/, September 2014).

independent notary gives timely and (from a language point of view) comprehensible advice that predates entry into any legal commitment.

6.8. New build – construction and stage payments

A construction contract is fraught with problems, the main ones being those identified by Diana Wallis:

Purchasing off plan: ... The problem sites are created by developers going bust and failing to finish the development, leaving some residents living in a ghost town with no amenities, or not being built at all due to bankruptcy or to a change in administration in local government sweeping away previous abuses in issuing permits. The purchasers will often have paid in instalments and face a long and complex legal battle to recover their payments or face living in a concrete jungle with no mains electricity or sanitation.³²⁷

Anyone buying new build property is in need of protection and representation in relation to:

- the construction standard;
- control of exclusion clauses;
- rights to vary construction methods, (which should be limited);
- the risk that construction will not be to the agreed standard;
- failure to progress works and the need for a long stop completion date for building work;
- procedures for resolving snagging;
- removal of builder's rubbish (and indeed builders) at the end of construction;
- the provision and public adoption of utilities;
- taxation consequences of resale;
- dispute resolution.

These issues require explication to discover whether there is a case for EU intervention.

6.8.1. Acceptance of the work

A contract to buy new build property off plan involves a construction element in the overall contract. Procedures are needed to govern acceptance of the quality of the work. **Germany** applies a special ordinance to property developers constructing and selling apartments and houses. Ownership remains with the developer until the whole contract is implemented.³²⁸ The development contract (*Bauträgervertrag*) requires a notarial act.³²⁹ The Makler- und Bauträgerverordnung³³⁰ sets out certain pre-conditions to payments become due: the contract must be valid, all necessary permits must have been obtained and the contract must have been protected by a priority notice on the land register.³³¹ Instalments may only

³²⁷ Diana Wallis 'What Can the EU Do?' in Diana Wallis & Sara Allanson, *European Property Rights and Wrongs* (Brussels, www.dianawallis.org, 2011), pp 11-12.

³²⁸ Sections 94 and 946 BGB.

³²⁹ Section 311b BGB. The buyer must receive a draft of the contract two weeks prior to the conclusion of the notarial act (section 17(2a) BeurkG) though failure does not invalidate the contract: Wicke, 'German National Report', in CU Schmid & C Hertel, *Real Property Law and Procedure in the European Union* (Florence: EUI, 2005), 30.

³³⁰ June 20th 1974.

³³¹ A commitment will be required from a creditor with priority over the buyer's priority notice to discharge the registration of the mortgage upon payment of the final instalment of the purchase price. If the building is not completed a prior creditor may reserve the refund of payments made by the buyer up to the value of the partly built apartment.

be paid according to the state of progress of the construction.³³² As soon as the object of sale is ready for occupancy, the acceptance of the building usually takes place after inspection and listing of defects in the minutes of the acceptance. Possession is given concurrently with the payment of the final instalment. In **Spain**, the buyer usually has to check the physical condition of the property he is buying but this - is modified when the seller is a developer;³³³ liability attaches to various parties involved in the construction for property defects, with liability periods ranging from one to ten years. In relation to new build property a surveyor should assess the condition, the quality of the construction work, and the price asked and compile a booklet to be given to the buyer.³³⁴ If the buyer requires a mortgage, the bank will have the property condition assessment made by an independent expert company, at the cost of the buyer.³³⁵ A licence of first occupation is crucial because only when that is issued is it lawful to occupy the building and only then can utilities be connected. A purchase should not be completed until this licence is available. In **Poland**, too, a lender will require a valuation of a certified real estate valuer, whose report will take into account obvious defects, but not any that are latent. If defects in the building become evident after the sale, claims may arise for damages or to rescind the contract under the normal Civil Code provisions governing the performance of contracts. Legislation has recently³³⁶ extended the statutory warranty against defects from three to five years. It is almost inevitable that there will be a long snagging list, and any completion will need to be on the basis of a retention against the cost of remedying defects.

6.8.2. Post completion guarantees

New build homes should be sold with a new home warranty. The following table shows the prevalence of guarantees found by the study of European Liability Insurance Organisation Schemes (ELIOS).

Table 23 Construction guarantees

EU-28 state	Post completion defects cover
France	Yes - mandatory since 1978: Spinetta law 1978
Germany	No (voluntary financial guarantees/ insurance substitutes)
Italy	Yes - compulsory under Law no 210 2/8/04
The Netherlands	Yes - housing warranties mandatory in most areas: cover defects for 6 years and 10 years for serious structural defects causing unfitness
Portugal	No (mandatory requirement under debate)
Spain	Yes - LOE ³³⁷ for 10-years liability cover (insurance or guarantee) mandatory
United Kingdom	Yes - housing warranties for dwellings cover defects for 2 years and structural defects for 10 years

Source: ELIOS study (modified to apply only to new homes)³³⁸

³³² Payments are usually made directly by the buyer to the builder, deposit on escrow being limited to unusual cases requiring special protection: Wicke 'German National Report' (n 64) 30.

³³³ Construction Regulations Act 38/1999, dated 5 November 1999.

³³⁴ Buying an Apartment in Spain, Finnish blog 'Home in the Sun', July 24th 2012, at <http://koti-auringossa.com/asunnon-osto-espanjasta/>.

³³⁵ Ibid. (Miranda John, interview).

³³⁶ Polish CC art 568 para 1. Amendments enacted on 30 May 2014 (*Journal of Statutes* 2014, item 827) came into force on 25 December 2014.

³³⁷ Ley de Ordenació de la Edificació. ³³⁸ It should be clarified, that this 10-year guarantee period is only for structural damages; a 3-year guarantee period is legally provided for functional damages; a 1-year guarantee is granted for damages in details.

If European information requirements are to be introduced for new build property and these are to be kitemarked, a guarantee would be needed to secure kitemarking.

6.8.3. Security of stage payments

Sales contracts always require the purchaser to pay a deposit but in the case of new build it is also common to require part payments in advance of completion. This greatly increases the risk from the point of view of the buyer. It may be difficult to protect the purchase in advance of completion of the building.³³⁹ Unless steps are taken to protect a buyer, he can be exposed to risk in the event that money is released to the developer to fund construction work which is not subsequently completed. One important protection is to link permissible advance payments with particular stages of construction. In Germany, for example, the Makler- und Bauträgerverordnung sets out what instalments can be demanded at what stages of progress of the construction.³⁴⁰ However, the real risk is the insolvency of the builder, a particular problem in Cyprus,³⁴¹ leaving the buyer unsecured in the event of liquidation of the developer.

In relation to insolvency, flat buyer who have paid a deposit or stage payment will be treated as an unsecured creditor almost across Europe.³⁴² As a result almost all states provide some form of protection to flat owners. Of the states covered by Van Der Merwe,³⁴³ this took the form of a requirement that:

- payments in advance to be limited in amount – BE, DE;
- deposits to be held in trust – IE, UK (England);
- deposits to be held in an account until released as building work progresses – AT, PL;
- deposits to be lodged with a notary – FR;
- a bank guarantee be provided against insolvency – AT, BE, DE, FR, IT, MN and PL;³⁴⁴
- an insurance policy be provided against insolvency – Catalonia, ES, SI; and
- development bonds with the local authority – IE.

³³⁸ *Liability and Insurance Regimes in the Construction Sector: National Schemes and Guidelines to Stimulate Innovation and Sustainability* (European Liability Insurance Organisation Schemes, 2015); the final report is due in December 2015.

³³⁹ Protection exists in Dutch and Spanish Law and priority may be protected by pre-notation on the register in states such as Austria, Estonia, Germany and Poland: Van der Merwe, *European Condominiums* (n 1), Case 1, pp 81-82

³⁴⁰ Payments are usually made directly by the buyer to the builder, deposit on escrow being limited to unusual cases requiring special protection: Wicke 'German National Report' (n 64) p 30.

³⁴¹ Because of the delays in issue of proof of registration, see above point 5.5 and below point 6.9.2.

³⁴² AT, BE, EL, ES, HR, IE, NL, PT, UK.

³⁴³ Van der Merwe, *European Condominiums* (n 1), pp 81-82.

³⁴⁴ M Haddas, *Property and Trust Law in Poland* (The Hague: Kluwer, 2015), p 77.

Table 24 Cover against the developer's insolvency

EU-28 state	Cover v pre-completion insolvency
France	Yes - mandatory (law 1990 - 'CMI')
Germany	No (voluntary financial guarantees)
Italy	Yes - compulsory under Law no 210 2/8/04
The Netherlands	Yes - included in housing warranties
Portugal	No
Spain	No
United Kingdom	Yes - included in housing warranties

Source: ELIOS study (modified to apply only to new homes)³⁴⁵

The position in Spain has been improved. Under general law the buyer is an unsecured creditor.³⁴⁶ Protection was originally provided by a Law passed in 1968,³⁴⁷ which established measures to ensure the return of the amounts paid, either by a deposit of money or by insurance. This was not properly observed.³⁴⁸ Indeed, insurance companies estimated that only 30% of private home developments met the provisions of the Act 57/1968; this proportion rose to 70% in state subsidised housing.³⁴⁹ Apparently, some banks have refused to honour the scheme; either because developers have not completed paperwork correctly, or simply by refusing to make a pay out until ordered to do so by a court. Litigation involves risking up-front costs and requires considerable determination.³⁵⁰ This 1968 legislation has recently been repealed³⁵¹ and be replaced by requirements either that the seller must provide either a surety contract backed by insurance companies authorized to operate in Spain, or a solidarity guarantee issued by credit institutions. Consumer protection has been inadvisedly reduced because these duties only arise when the seller has obtained the building license, whereas the vast majority of claims on the part of consumers takes place before the grant of this license.

A different approach has been taken in Poland, where legislation has added special provisions to insolvency law which deal with the insolvency of a developer erecting residential buildings.³⁵² In essence these provisions are aimed at transferring ownership of flats to persons who have concluded a contract with the developer and have already paid some monetary instalments or, if this is not possible, to give those persons priority in regaining their money over most of the other creditors. The legislator has also included provisions allowing for a settlement aimed at completing the project, which may involve additional payments from future unit owners, the sale of the unfinished project to a new developer, etc. Insolvency law does therefore provide some protection to the prospective unit buyer and various options to mitigate losses, however ultimately it will be the insolvent developer's financial situation that will be decisive in how successful prospective unit buyers will be in reclaiming their money or actually receiving their units. Additionally, insolvency proceedings are time consuming, so prospective unit buyers cannot expect to recover their money quickly. Conversely, they will have to invest more money for legal representation to

³⁴⁵ ELIOS (n 71).

³⁴⁶ Spanish Law 22/2003, dated July 9th, on insolvency proceedings, arts 61, 62.

³⁴⁷ Law 57/1968, dated July 27th, on down payments on off plan property.

³⁴⁸ *Memoria del Servicio de Reclamaciones* (Madrid: Bank of Spain, 2008) 66 ff; J Romero Domínguez *La Recuperación de Cantidades Anticipadas por el Adquirente de Vivienda en Construcción 2nd* (Valencia: Tirant lo Blanch, 2011).

³⁴⁹ Á Carrasco Perera, E Cordero Lobato & C González Carrasco, *Régimen Jurídico de la Edificación* (Pamplona: Aranzadi, 2007) p 555 (translated by the Spanish authors of this report).

³⁵⁰ Wallis 'What Can the EU Do?' (n 62) 11-12.

³⁵¹ Law 20/2015, dated July 14th, for the management, monitoring and solvency of insurance entities and reinsurers.

³⁵² Law of February 28th 2003, *Journal of Statutes* 2015, item 233 (consolidated version), arts 425a – 425s.

ensure their interests are protected in the proceedings and that they chose the most beneficial option in a given insolvency case.

6.8.4. Residual liability

The ELIOS project shows the basic framework of liability for defects in construction, limitation periods and mandatory professional indemnity insurance.³⁵³

6.8.5. Dispute resolution

A buyer who is a consumer will generally be able to sue in his home state³⁵⁴ and insist upon the use of his home law,³⁵⁵ but even so litigation against a foreign developer is likely to be extremely difficult, even though disputes are quite likely to arise out of construction contracts. In Spain it is said that problems arose in fewer than one per cent of 850,000 sales of flats,³⁵⁶ and every disputed cases involves a nightmare for the buyer. It seems obvious that alternative dispute resolution should be compulsory in such cases.

6.9. New build flats – ongoing management

6.9.1. Problems while an estate is only partly sold

The block can be handed over to the management company either when the last flat is sold or when the first one is sold. The latter approach is more satisfactory if there is any doubt about whether the development will be completed, though early transfer to the management company still leaves an issue of how management is to be conducted during the interim phase when the development is partially complete.

The Irish experience is very illuminating. Ireland has faced a major problem during the Global Financial Crisis with construction work on blocks being abandoned as it became apparent that flats being built had become unsaleable. Often this left early purchasers on a development stranded without management rights in blocks. The normal practice at the time was to provide a contract between the developer and the purchasers of individual units for the transfer of the common areas after the completion of the development to an Owners Management Company. A radical solution was adopted by the Multi-unit Developments Act 2011.³⁵⁷ The basic idea is that the common areas must be transferred to a purposively formed owners' management company before any units can be sold. This does not relieve the developer from existing duties to ensure completion of the development as specified. The beneficial interest in unsold flats is reserved to the developer and on completion the developer is obliged to swear a statutory declaration that beneficial interest has transferred to the management company. The management company works in accordance with majority rule within the basic framework of rights and duties of parties set by statute i.e. requirement to maintain a sinking fund, establishing a scheme regarding service charges etc. These rules do not affect the sale of new or second hand apartments in existing developments. In new developments the developer may not sell any apartments

³⁵³ ELIOS (n 73).

³⁵⁴ Brussels I Regulation recast, (EU) 1215/2012, OJ 2012 L351/1, arts 17-19.

³⁵⁵ Rome I Regulation, (EC) 593/2008, OJ 2008 L177/6, art 6.

³⁵⁶ Beatriz Corredor, the Spanish Housing Minister, was reported in 2011 as saying that, 'There are 850,000 Britons living in Spain and these problems apply to fewer than 1%', referring to the demolition of homes already owned by Britons, illegally built properties in coastal areas and the loss of deposits given to developers that fell into bankruptcy; see: www.theguardian.com/money/2011/may/08/property-spain. The 45M actes authentiques in France in 1997 gave rise to 4,000 negligence claims (of which 60% were upheld): H Dyson *French Property* (n 17), p 8.

³⁵⁷ Irish Act No 2 of 2011; (Irish) *Law Society's Gazette* June 2013, p 51.

before the common areas have been transferred to the OMC, and it will not be possible to secure mortgage finance for a purchase unless the transfer has taken place.

6.9.2. Hidden mortgages in Cyprus

The practice in Cyprus was to hand over the development only when complete. It was not possible to register title to any flat until the whole development has been handed over, and this has led to delays of several years before early purchasers in a block secure a registered title. By 2008 there were around thirty thousand foreign buyers waiting for deeds.³⁵⁸ Where developments had proved uneconomic this could create an indefinite limbo.

Until recently there was an appalling gap in domestic law which meant that buyers who had paid for their property in full were not protected in their priority until the registration was complete. Unscrupulous developers who retained title during the construction process could re-mortgage the block once some flats in the block had been sold, increasing the buyers' exposure to the developer's debt, without the knowledge of the purchaser. These are colloquially described as 'hidden mortgages'. The procedure for securing title deeds was complex and could require a court order for specific performance of the conveyance.³⁵⁹

A solution has been found in new legislation promoted by the Troika as a condition of bailout funds being released.³⁶⁰ The so called 'Hidden Mortgage Law'³⁶¹ came into force in September 2015³⁶² to address the problem of buyers trapped without their title deeds. Transactions will now require the specific performance of transfer and registration of title deeds. The solution applies to contracts lodged before the end of 2014 and those where specific performance has been ordered by a court. Application to the district land registry can be made by the purchaser, the vendor, or a mortgagee where the purchase price has been paid in full (or has been paid in part with the remainder paid into a suspense account).³⁶³ A statutory declaration can be accepted where payment has been made but there is no receipt to provide evidence of the payment. Transfer fees will be reduced.³⁶⁴ It remains to be seen whether the problem has been resolved. There is also a real problem in the blocking of resale of a flat without a registered title.³⁶⁵ A system is unsatisfactory if it leaves a buyer in suspense for several years,³⁶⁶ especially if conveyancing problems then emerge which further delay the registration.³⁶⁷

³⁵⁸ Wallis 'What Can the EU Do?' (n 62), pp 11-12.

³⁵⁹ Roger Benson, 'The Creation and Supply of Cyprus Title Deeds' (Limassol, *Cyprus Property News*, 2014).

³⁶⁰ George Psyllides *Cyprus Property News* July 23rd 2015; Alexandros Michaelides *Cyprus Property News*, October 17th 2015. Honourable mentions should be given to the Eurogroup and to MEP Vicky Ford for applying pressure.

³⁶¹ Nigel Howarth, *Cyprus Property News*, January 5th 2016; this had attracted 5000 applications by early January 2016 with applications likely to rise substantially in light of the fact that the measure was aimed at approximately 78,000 buyers lacking effective property title deeds; George Psyllides, *Cyprus Property News*, October 23rd 2015.

³⁶² Nigel Howarth, *Cyprus Property News*, September 3rd 2015.

³⁶³ Nigel Howarth, *Cyprus Property News*, January 5th 2016.

³⁶⁴ N Howarth Apply for Your Title Deeds Now *Cyprus Property News* October 28th 2015

³⁶⁵ It has been reported that additional non-statutory requirements are being set before buyers applying for title deeds. Reported instances include the land registry advising that for a single unit in a large development, the complete development has to be dealt with before a single deed can be issued. It has also been reported that buyers have been required to supply the land registry with letters from their developer confirming that they have paid. Nigel Howarth, *Cyprus Property News*, January 5th 2016.

³⁶⁶ *Independent on Sunday* November 21st 2010.

³⁶⁷ In a significant number of cases it appears that registration applications are rejected because Cypriot lawyers have not complied with necessary formalities; there is a particular problem reported with powers of attorney not ratified (as required) by a certifying officer.

6.9.3. Block management

Management of blocks poses many problems.

- liability to ongoing service charges;
- the possibility of increases in service charges;
- disputes about the extent of services to be provided;
- repairs – not a major problem but ‘a fertile source of irritation’;³⁶⁸
- insurance and the use of commissions;
- defunct managements;
- complexity of ongoing management and participation rights;
- amendment of schemes;
- further development; and
- problems arising from liquidation of developers.

All of these issues seem legitimately to fall within the remit of European consumer law when one considers that the Unfair Commercial Practices Directive already encompasses unfair practices in after sales service and the regime regulating unfair contract terms would also apply. The two possible approaches seem to be kitemarking of developments or a legislative structure with an exemption for kitemarked developments.

A purchaser needs to be aware of the procedures for payment of service charge and the consequences of default. These vary from country to country, including:

- fines (in Portugal);
- swift procedure;
- a penalty in the form of an increased interest rate;
- liability for costs;
- suspension of voting rights;
- denial of possession (after in Sweden a single week’s notice); and
- forced sale.

In general though the teeth of schemes are not sharp enough given how crucial financial contributions are to the overall success of the block.³⁶⁹

Fines can be imposed on the Iberian Peninsula but civil sanctions would be more common, including in extremis the possibility of sale of the apartment. The conveyancing process should ensure that the defaults of a previous owner have been made good, but should also alert the buyer if there is an arrears problem in the block generally.

6.10. Recommendations

In relation to flats:

It is of vital importance that simple legal mechanisms are available to promote living ‘cheek by jowl’³⁷⁰ in order to accommodate the European population.

Recommendation 6-A

Member States should make generic information available about (good and bad) flat schemes.

Recommendation 6-B

Member States should establish a benchmark or ‘kitemark’ for good flat schemes.

³⁶⁸ EF George and A George *The Sale of Flats* (London: Sweet & Maxwell, 5th edn, 1984), p 98.

³⁶⁹ Van der Merwe (n 1) pp 317-324 .

³⁷⁰ DN Clarke ‘Occupying “Cheek by Jowl”’: Property Issues Arising from Communal Living’ in S Bright & J Dewar, *Land Law – Themes and Perspectives* (Oxford: Oxford University Press, 1998)

Recommendation 6-C

Flat management schemes are vastly complex even for buyers familiar with the language of the scheme and are a nightmare if formulated in an unfamiliar language. Van der Merwe has laid the foundation for comparative knowledge of flat management schemes. This needs now to be taken forward with detailed comparative research to see whether it is not possible to produce a generally accepted standard or benchmark, compliance with which could be kitemarked and applied (as a first step) to new build schemes.

In relation to new build property:

Recommendation 6-D

Member States should make generic information available about arrangements for purchasing new build property, highlighting bad practice.

Recommendation 6-E

The sale of new build property falls within EU competence because it falls into the T2C pattern and hence into consumer protection principles. Existing consumer protections largely exclude land, but this report demonstrates that the inbuilt assumption (that legal advice is available before buyers commit to a purchase) is not in fact true in most of Europe. There is a strong case for consumer protection along the lines of the Mortgage Credit Directive discussed below in chapter 9. We therefore recommend that no obligation should arise under any proposed sale of new build property until the buyer has been provided with detailed information in a standardised format. This should be modelled on the European Standardised Information Sheet introduced by the Mortgage Credit Directive and should cover all the issues spotlighted in this chapter. It would be:

- (a) Limited where an aspect of the development met European kitemark standards; and
- (b) Excluded where legal advice was provided before the onset of any obligation from a qualified conveyancer.

Recommendation 6-F – Hidden mortgages

EU action is required to prevent a repetition of the ridiculous situation that has arisen in Cyprus with hidden mortgages, which appears to breach the provisions of the European Convention on Human Rights guaranteeing the quiet enjoyment of possessions.

References

- C Van Der Merwe, *European Condominium Law* (Cambridge: Cambridge University Press, 2015)
- P Sparkes, *European Land Law* (Oxford, Hart, 2007), ch 5
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7. PUBLIC RULES

KEY FINDINGS

- Public land law varies from Member State to Member State. There are no adequate sources of information, and no central collection of relevant information within Member States and professional advice on public aspects of purchases.
- Detailed research is required as a first step, followed by action to tighten procedures so that they meet the needs of all buyers, and especially cross border buyers who will be unfamiliar with local rules.
- Notorious problems encountered by purchasers in Spain involved issues of abuse of governmental powers and should have fallen within the remit of human rights protection; however the case law of the European Court of Human Rights has been too deferential to national property systems.

7.1. Concerns of a purchaser

Property rules are largely uniform across Europe because it has remained aloof from the public rules governing land use. Property law is largely mechanical whereas public rules adapt to the needs of a particular society. When, for example, the Deutsche Demokratischer Republik was formed in 1949, it was not found necessary to change the bourgeois civil code of the west for more than a quarter of a century, though the practical operation of property law in the two sectors was greatly different. The old civil code worked in both states because it was separate from the public land law of the two systems. This flexibility of public law suggests that a cross border acquirer will come to his purchaser with copious assumptions about how things work back home, leaving wide potential for dislocation in the market. Rules in Valencia and other regions of Spain are notorious for having caught out native and foreign owners alike.

The descriptions are written only so far as the public rules interact with individual dwellings and do not at this stage consider taxation.³⁷¹

European citizens would surely understand that buying abroad involves acceptance of the property rules of the host nation. When in Rome one must accept Roman property law and Roman public rules. They may not follow this through by ensuring a thorough understanding of local planning law and other bureaucracy, nor research in the detail the effects on the property they are intending to buy.³⁷² Buyers often assume that their conveyancer is supposed to do this, which is often not the case.

The real issue is not therefore divergent property systems as such but rather ensuring that:

- buyers are made aware in a timely fashion of rules that may cause problems, especially if so severe that the title offered is not marketable; and
- legal advisors consider it their job to advise and have sufficient understanding of the divergences between the two systems to understand when this may create problems for the buyer.

³⁷¹ See ch 8 below.

³⁷² Two random examples: *Independent* November 5th 2008; *Independent* September 25th 2012.

7.2. Controls on alien purchase

Chapter 3 has demonstrated how the emerging pan-European residential market is based on the interaction between the right of EU citizens to free movement around Europe coupled with their right to move their capital around freely. The capital market is restricted to a limited extent by the imposition of controls on land acquisitions, particularly in environmentally sensitive areas with limited housing stock, such as the Austrian Alps.³⁷³ There are also restrictions based on defence needs, which remain for example in Spain,³⁷⁴ but are no longer in force in Italy.³⁷⁵ The restrictions affect purchases by 'outsiders', both nationals from other regions of the country and Europeans of different nationality. This tender does not consider whether the balance between capital freedom and restriction of the market in immovables established in Maastricht is correct.

7.3. Lawful development

Anyone buying a residential property needs to know that it complies with the local administrative rules.

7.3.1. Urbanisation

Continental systems tend to demarcate certain areas as urban areas where the planning rules are much more favourable to development and the provision of development infrastructure. In Germany, for example, the development of the detailed development plan (*Bebauungsplan*) by the local authority is a public procedure, which includes publishing a draft plan and inviting suggestions from the public. The procedure is finalised when the municipal council adopts the plan as a bylaw.³⁷⁶ Interested parties can check the plan at the building regulatory agency (*Bauordnungsamt*), at the state planning agency, at the local authority, or online.³⁷⁷ In Poland development usually occurs on land earmarked for development. Permitted use and development is regulated in local development plans which are enacted by the lowest tier of self-governments (the commune – *gmina*) on the basis of the Planning Act 2003.³⁷⁸ Enacting local development plans is not mandatory for the entire territory of the local government, so a given immovable may be located outside an area covered by a development plan. If a local development plan is in force, its contents, both in a written/descriptive form, as well as in the form of the map, are available to the public in the offices of the local authority. Many local authorities make the plans available on their websites. Local development plans contain information on the permitted use (e.g. residential, retail, industrial, etc.) as well as the types of buildings that may be erected and the intensity of construction. Some areas may be designated for green and open spaces, where construction is limited or even completely prohibited. Buyers often enquire not only about their immovable, but also investigate surrounding areas to see if there is a development plan, if there is a procedure to enact one or modify an existing one.

³⁷³ P Sparkes, *European Land Law* (Oxford: Hart, 2007), ch 2.

³⁷⁴ Spanish Law 8/1975, dated March 12th, on areas and facilities of interest for National Defence

³⁷⁵ Law 340 of 24 November 2000, art 1.

³⁷⁶ The local development plan determines permitted uses and building specifications, including the size of the building, its design, roof, facade, and building materials.

³⁷⁷ Planning law consists of federal, state, and local law, including at Federal level the *Baugesetzbuch* (setting out how plots of land are prepared by zoning and planning for construction), building ordinances of the states (defining, among other things, permission procedures and technical, safety, and fire-protection requirements), and land use plan by the local authority (defining territory, including industrial, commercial, and residential areas). Based on the land use plan (*Flaechennutzungsplan*), the local authority develops the more detailed local development plan (*Bebauungsplan*).

³⁷⁸ Law of 27 March 2003, consolidated version: *Journal of Statutes* 2015, item 199.

A purchaser crossing the common law/civil law divide may well fail to appreciate the crucial significance of urbanisation.

Zoning law has to be considered not only in the Germanic states (as indicated above) but also in all the Latin jurisdictions where rules about the use of land and limits on building activity have to be respected, these being for example the *Plan local d'urbanisme* in France, the *Piano Regolatore Generale* in Italy or the *Bestemmingsplan* in the Netherlands drawn up by local authorities.

In Spain the developer is also subject to compliance with urban charges³⁷⁹ and in order to cover the cost of the development works, can assign a given area of land, etc. The transmission of the land (from the promoter to the purchaser) does not change the legal status of the promoter in the sense that the duties imposed by urban legislation. Therefore, the local authority may seize the dwelling from the buyer accordingly. As a consequence, the (foreign) purchaser must ask the local authority for a certificate of planning law so as to see whether or not there is a charge that is not registered. A similar provision is regulated in France, so the sales of property in an urban regeneration area must be authorised by the prefect.³⁸⁰

Any purchaser should be made aware of the basic planning regime and its implications for the property he is buying.

7.3.2. Planning permission

Anglo-Saxon countries have a single regime for town and country planning whether the locality is urban or rural, though, that said, the setting of a property will be an important factor in the planning process; one is much more likely to get permission to infill in a city or suburban site than to build afresh on a green field site. New building will require planning permission wherever it is, and from the point of view of a buyer it is essential that the purchaser sees the document granting permission and ensures this has been complied with. Planning permissions may have conditions attached to them and these bind in rem and are discovered by a local search. One important example is an agricultural occupancy condition which is often imposed when new houses are built in rural districts and which limits occupancy to those employed full time in agriculture, significantly reducing the market value of the house.

A similar system can operate in civilian systems outside areas where local development plans are in force. In Poland, for example, construction in such areas takes place on the basis of the principle of neighbourhood, which denotes that construction should be either consistent with surrounding areas or should complement it. Before applying for building permission investors must obtain a decision on the conditions of development, which is issued on the basis of the above mentioned principle, regulated in detail in a Regulation of the Minister of Infrastructure on the manner of ascertaining conditions for new developments in areas with no development plans.³⁸¹ A decision identifies the detailed conditions of new developments, including their type, use, intensity of construction, etc. Subsequent construction projects must be consistent with the decision, if a building permit is to be issued.

³⁷⁹ Catalan Legislative Decree 1/2010, dated August 3rd, arts 44.1.d) and 120 approving the Zoning Act, and the Royal Legislative Decree 2/2008, dated June 20th, art 9, approving the consolidated text of the Land Law

³⁸⁰ Decree 58/1465, dated December 31th, art 4 bis.

³⁸¹ Regulation of 26 August 2003, *Journal of Statutes* 2003, no. 164, item 1588.

7.3.3. Lawful construction

Across Europe buildings must meet construction standards. Common law systems regulate construction through building regulations consent whether or not the work requires planning permission. A dwelling must meet building regulations in relation to the materials to be used for building work, its layout, sanitation and many other aspects of the work.³⁸² The approval should be kept with the title deeds for production to a purchaser. Continental systems achieve the same results with building permits. For example, in Germany, all construction requires a building permit,³⁸³ as do many alterations and changes of use. A building permit has to comply with the local development plan and the requirements of the building ordinance of the state,³⁸⁴ and in areas outside land use plans must fit in with the existing neighbourhood.³⁸⁵ The permit is an assurance that the building complies with the local requirements, a matter which is not normally a problem.

7.3.4. Energy certification

The valuable role of the EU in relation to construction of property can be seen in the provisions for certification of the energy performance of buildings.³⁸⁶

7.3.5. Limitation periods

Limitation periods for public infringements are necessary. In England both planning and building regulations are subject to periods of limitation – four years for planning breaches consisting of building, ten years for changes of use and twelve months for breaches of building regulations³⁸⁷ - so a purchaser need only investigate recent physical changes.

Information is difficult to obtain, but at least in some continental jurisdictions (of which Poland is one example), time does not generally cure infringements of public law leading to the possibility of property being unmarketable because of sins committed by past owners and long forgotten. In this vein, the Spanish Coastal Law 1988 has been amended in 2013.³⁸⁸ As a result, the limitation period for serious offences (e.g. the illegal construction on the maritime-terrestrial public domain) is two years from the moment of its commission, and for minor offences is six months. Furthermore, the limitation period for sanctions is two years for serious offenses and one year for minor offences from the day on which the administrative resolution imposes the penalty. Finally, the limitation period for the duty of restitution of the property to its original condition is 15 years from the time the resolution is issued. It is worth mentioning that according to the previous law in force (until 2013), the last action was not subject to a time limit.

7.3.6. Illegals

All EU-28 states have rules for legal building construction, and, conversely, there is scope everywhere for illegals. It is up to a purchaser to check that permission has been given, but the purchaser needs to be told how to do this and by whom it should be done.

³⁸² Eg in England: Building Act 1974; Building Regulations 2000, SI 2000/2531.

³⁸³ Except for minor works - cabins, attachments, and some temporary buildings.

³⁸⁴ The building authority has some discretion to grant partial relief (Befreiungen) from the restrictions under the plan and the Code.

³⁸⁵ Common practice and a broad range of case law permit a fair evaluation of this criterion.

³⁸⁶ Directive 2002/91/EC on energy performance of buildings, OJ 2003 L1/65.

³⁸⁷ Prosecution remains possible for 2 years: Building Act 1984 ss 35, 35A, 36.

³⁸⁸ Law 2/2013, dated May 29th.

There is clearly a problem in Italy (especially the south³⁸⁹) where much building is done without permission on the assumption that permission can be bought afterwards, a mode of operation not conducive to the admission to the market of citizens from other states with other approaches to legality.

In Poland construction without a valid building permit or outside the scope of a granted building permit usually concerns single family homes and outbuildings on farming estates. It is possible to legalize such buildings if they were erected in conformity with building regulations and the local development plans or decisions on conditions of construction, but this is subject to a considerable fee. The scale of the problem is decreasing as each year less decisions on legalizing new builds are issued. Decisions ordering the demolition of buildings erected without a permit are even less common. Nevertheless, buyers of single family houses should ask for paperwork documenting the construction process, including building permission and the decision on submitting to usage.

There is a particular problem in parts of Spain. According to Diana Wallis MEP:

in Andalucia 300,000 houses were built in rural or protected areas on the edges of communities with 'permits' from the town hall, but were not authenticated by the regional junta government. The regional government then denied permission and they are now classed as 'illegal' houses. Investigations and prosecutions of developers and officials in Spain have uncovered cases of corruption and collusion to cash in on the building boom, where the town administration knew that permits could not be legally enforced, have not fulfilled the due process, or were deriving income from the issuing of the permits.³⁹⁰

Illegals cannot be registered on the *padrón* (municipal register), the first sign of the illegality often being that they cannot then secure connection to mains water and electricity. Just to take one example at Albox in the Almaizora valley in the south east Andalucía dozens of houses have been built on land not zoned for building and where the planning permission has been revoked by court order. All could face demolition.³⁹¹

7.4. Public rights and proposals

7.4.1. Absence of public charges and proposals

A purchaser wishes to ensure that there are no aspects of public land law that will affect the home he is buying. Concerns would be very numerous and might include:

- liability to the cost of road construction or other infrastructure;
- urban renewal;
- soil contamination liability eg in Belgium³⁹² and Spain;³⁹³
- statutory pre-emption rights of the State.

In relation to the latter, pre-emption rights are used for land-use management in some EU-28 states. A right for the public administration to buy land has priority over third parties and so may have an impact on cross-border acquisitions if the buyer is unaware of the existence of such right, which may be exercised even after the conclusion of the sale

³⁸⁹ F Zanfi, 'The Città Abusiva in Contemporary Southern Italy: Illegal Building and Prospects for Change, (2013) 50(16) *Urban Studies* 3428-3445.

³⁹⁰ Diana Wallis 'What Can the EU Do?' in D Wallis & S Allanson, *European Property Rights and Wrongs* (Brussels, www.dianawallis.org, 2011), 15 (footnotes omitted).

³⁹¹ The UK Government provides a list of residents associations in its advice on 'Buying a Property in Spain' ('other sources of advice') www.gov.uk.

³⁹² Freshfields Bruckhaus Deringer, 'Investing in Real Estate in Europe', www.freshfields.com/, March 2010) p 8.

³⁹³ Law 22/2011, dated July 28th, on waste and contaminated soil.

contract. This operates in some special urban areas in France (priority urbanisation zones and differed improvement zones) which are subject to special rules, such as the right of pre-emption of public authorities for a limited period of time that allow them to control the property market. This measure may also be found in other European countries such as Switzerland (limited to agricultural land) and Belgium (property located in the harbour).³⁹⁴ In Catalonia the public authorities can insist on buying dwellings repossessed by banks that are located in areas of high housing demand.³⁹⁵

The notary should check for pre-emption rights and obtain clearance, but this may occur at a late stage and a time when delayed clearance delays the completion of the transaction.

At some stage pre-emption rights may need assessment for their validity as restrictions on the free movement of capital, since one might think that the same objective might be achieved by less intrusive means.

7.4.2. Absence of development potential

A purchaser may fall in love with the sea view and not think through the extent to which that view is protected. A purchaser wishes to know of proposals or possibilities in the vicinity of the property which would affect the purchase decision. Especially in Spain the problem is always the site in front. This is often viewed by the professionals as a matter for the purchaser, an assumption of which the purchaser is often unaware.

7.5. Utilities

7.5.1. Residential infrastructure

If 'a house is a machine for living in' it requires services to make it function such as:

- energy – electricity, gas, centralised heating;
- communications – telephone and broadband;
- access – roads made up and maintained; and
- water – fresh mains water and drainage.

Conveyancing must be designed so as to ensure that the legal structure for the provision of these services is in place and the costs are met. In England this is the responsibility of the conveyancer, but in parts of continental Europe it appears to be outside the remit of the conveyancing profession. Hence the problems, especially but by no means exclusively when British buyers employ notaries in Spain. A lawyer advising a buyer of a house should check both private and public titles.

7.5.2. 'Land grab' laws in Valencia

Various abuses occurred during the Spanish housing bubble (1995-2007) in almost all Spanish Autonomous Communities. These included the lack of effective plans for regional planning, the marginalization of the municipal planning, the abandonment of the control of the urban legality, the private interests behind the urbanisation process and corruption.³⁹⁶ Action has been taken to alleviate these problems so that any remaining problems should be a historical hangover from these days of excess.

³⁹⁴ V Weyts, national report for Belgium, in CU Schmid & C Hertel, *Real Property Law and Procedure in the European Union*, (Florence: EUI, 2005), p 8.

³⁹⁵ Catalan Decree-Law 1/2015, dated March 24th.

³⁹⁶ Eugenio L. Burriel de Orueta, 'La "Década Prodigiosa" Del Urbanismo Español (1997-2006)', *Scripta Nova. Revista Electrónica De Geografía Y Ciencias Sociales* (Vol. XII) (270) p 64, available at: www.ub.edu/geocrit/sn/sn-270/sn-270-64.htm.

The most notorious of the various abuses (in the sense that this is the one most known about outside Spain) arose from the legislation of the Valencian Community (*Comunitat Valenciana*) in south eastern Spain, the owners of dwellings can be made to pay the infrastructure costs for private development of neighbouring land. Legislation allowed what became known colloquially as 'land grabbing'. The *Ley Reguladora de la Actividad Urbanística* (LRAU) introduced by the Community in 1994 applied where the developer got permission to have rural land urbanised, that is it was re-classified as suitable for development. The law allowed the expropriation of land not owned by the developer, the intention being to prevent one local land owner from blocking development of an entire area. Unfortunate drafting allowed developers to propose a development scheme over land they did not own and to take over land, even land that was inhabited, with minimal compensation paid and a bill to the former land owner for the installation of unwanted services such as street lighting. A law similar to LRAU was also in place in Andalucía with the same effects.³⁹⁷

A revision two years later as the *Ley Urbanística Valenciana* (LUV) failed to address the more important concerns of land owners. Recent legislation has strengthened land owners' protection against bad practices of the agents³⁹⁸ both in Spain generally³⁹⁹ and in Valencia⁴⁰⁰. It is not believed that the infrastructure legislation in Spain is currently presenting problems, though it will appear below that there is no guarantee against a recurrence. Therefore the discussion below relates to historical and residual problems.

The *Ley Reguladora de la Actividad Urbanística* (LRAU) allowed a company to act as an urbanizing agent in Valencia, that is to submit to the municipality a programme for the provision of infrastructure for developable land. This included the situation where rural land was to be reclassified as suitable for urbanisation, a step which could be taken without the landowner's consent. Once a concession was granted, landowners were obliged to collaborate with the urbanizing agent, paying the costs of the infrastructure and ceding land for public infrastructure and facilities. The agent could ask for land to be expropriated.⁴⁰¹ The role of the urbanizing agent is not inherently bad since he takes the initiative to promote urban development which would never be agreed between the landowners themselves, thus reducing the cost of development. The problems with the original wording of the LRAU were mainly the selection criteria and the fact that the local authority gave the green light for approval of some schemes promoted by urbanizing agents who did not own the land when the landowners were not given a chance to comment on the scheme. Unscrupulous developers could compulsorily purchase the property (leading to the suggestion that rural land has been 'grabbed' from landowners) particularly where compensation payments were very low and to demand payment towards the cost of the new infrastructure; these provisions enabled developers to reap very substantial profits.

Bad behaviour by these agencies led to around 15,000 petitions from individuals as well as associations representing several thousand European citizens, and residents, settled in the Valencia autonomous region. They complained about the destruction of the environment and the denial of their legitimately acquired property rights as a result of the improper application of the LRAU. Their complaints led to a number of local

³⁹⁷ Diana Wallis 'What Can the EU Do? (n 20) pp 11-12; L Arroya Jiminex 'Public Spain Infrastructure Planning' (2014) 11(3) *Journal of European Environmental and Planning Law* 232.

³⁹⁸ AJ Alonso Timón, 'Urbanismo Valenciano de Tercera Generación: La Constatación del Agente Menguante', *El Derecho*, November 30th 2015 (www.elderecho.com/tribuna/administrativo/Urbanismo-valenciano-agente-menguante_11_889930003.html).

³⁹⁹ Royal Legislative Decree 7/2015, dated October 30th, on land and urban renewal.

⁴⁰⁰ Valencian Law 5/2014, dated July 25th, on planning, urbanism and landscape

⁴⁰¹ http://urbsadvies.nl/attachments/Munoz_and_Korthals_2007_Lessons_from_Valencia_Separating_infrastructure_provision_from_land_ownership.pdf, p 66 ff.

investigations. First, in 2004, the Valencian Ombudsman investigated and reported on the complaints of Valencian citizens regarding the LRAU.⁴⁰² At European level the Fourtoun Report⁴⁰³ issued by the European Parliament in 2005 invited the Spanish authorities to establish binding criteria for the calculation of compensation in cases of expropriation on the basis of the standards and principles recognised by the case-law of the European Court of Justice and of the European Court of Human Rights. A fact finding visit under the auspices of the European Parliament took place in 2007, leading to a final report in 2009 which condemned the abusive planning practices and made further recommendations.⁴⁰⁴

This resulted in a European Parliament resolution on March 26th 2009 on the impact of extensive urbanisation in Spain on individual rights of European citizens, on the environment and on the application of EU law, based upon petitions received⁴⁰⁵ (the Report was drafted by Margrete Auken). This pointed out that

many thousands of European citizens have, in different circumstances, bought property in Spain in good faith acting with local lawyers, town planners and architects, only to find later that they have become victims of urbanisation abuse by unscrupulous local authorities and that, as a result, their property faces demolition because their homes have been found to be illegally built and therefore worthless and unsaleable.

This observation is entirely in line with the basic thrust of this report. The problem here was simply a lack of transparency, coupled with the lack of a conveyancing procedure designed to protect a bona fide purchaser. Defects in the public title need to be treated just as seriously as defects in the title to the ownership right. Purchasers needed to be given advice and the correct advice with rural land in Valencia was to walk away. There was no clearance procedure to ensure that the land purchased would not be affected by unknown charges. In Valencia the existence of urbanization procedures was difficult to know because LRAU allowed local authorities to publish proposals via the official journal of the Valencian Community, instead of by individual communication to the landowners. When landowners gained knowledge of what was happening, the local authority had already approved the planning process. Estate agents could check that, but the procedure did not make things easy. This problem was pointed out by the Valencian Ombudsman⁴⁰⁶ and also by the Judgment of the High Court of Justice of the Autonomous Community of Valencia.⁴⁰⁷

Conveyancing must identify public law issues at the outset. Procedures must establish the public title in a manner that is binding upon the public administration.

7.5.3. Does 'land grab' infringe the human rights of owners in Valencia?

A remarkable feature of the Valencian legislation is that the epithet 'land grab' has stuck to the LRAU but no contravention has ever been established of the right to property guaranteed by the European Convention on Human Rights. Indeed, it is remarkable given the popular perception of Spanish property law in the past that less than 500 of the reported human rights decisions on HUDOC (amounting to almost 50,000 cases) have

⁴⁰² Síndic De Greuges De La Generalitat Valenciana, 'La actividad urbanística en la comunidad valenciana.

Principales preocupaciones y quejas de los ciudadanos. Comunicación extraordinaria a las Cortes Valencianas' (Alicante: www.elsindic.com/documentos/125_actividad_urbanistica_c.pdf, November 2004), pp 11 ff.

⁴⁰³ Report on the Alleged Abuse of the Valencian Land Law known as the LRAU and its Effect on European Citizens (Petitions 609/2003, 73 2/2003, 985/2002, 1112/2002, 107/2004 and others), 2004/2208(INI), Committee on Petitions, Rapporteur Janelly Fourtoun.

⁴⁰⁴ www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/660/660551/660551en.pdf

⁴⁰⁵ 2008/2248(INI).

⁴⁰⁶ 'La actividad urbanística' (n 32), p 42.

⁴⁰⁷ May 8th 2003.

involved the Kingdom of Spain. These figures relate to all fields covered by the European Convention and not just property. That said challenges in the European Court of Human Rights in Strasbourg can only occur after the exhaustion of internal remedies in Spain, and the low figure for complains may result from complex and expensive internal procedures.

Superficially the problems in Valencia involving LRAU might seem to involve human rights issues. This has enabled developers to appropriate isolated rural properties in newly urbanised areas at less than market value and seems therefore to violate article 1 of Protocol 1 to the European Convention on Human Rights which guarantees freedom from public interference with 'possessions'.⁴⁰⁸ As usual there are three stages in human rights analysis of increasing difficulty:

- to establish that there is a public interference with private property;
- to classify the type of interference; and
- to see whether the interference is justified.

The interference caused by LRAU is manifest. The owner of a nice rural cottage finds that his house is knocked down to be replaced by an estate of identikit urban houses, is forced to accept a low level of compensation and to contribute to the installation of roads, water, sewerage and other infrastructure. This is obviously an interference with the private property of the landowner. It is true that this could be done under the version of the law introduced in Valencia in 1994 by private developers at the instigation of urbanizing agents, but human rights legislation is in play when the state interferes with private property, and the state must clearly accept responsibility for LRAU which allows developers to pursue forced urbanization procedures, and anyway the municipality allows the procedure to go ahead. The landowner is a 'victim' of that state interference.

If the interference is clear, what is less clear is what form of interference has taken place, there being several possibilities. The regional authorities are relying on the interference being classified as a control on the use of property, meaning that compensation is not required (at least not usually); it is the same as when a council turns down an application for planning permission a decision which is made without the land owner being compensated. Vázquez Pita⁴⁰⁹ analysed the relationship between the urbanisation process and the rights to private property and free enterprise. In his view, there is no problem in empowering someone who is not the owner, such as the urban agent, to carry out the urbanisation process, as urban planning is not included in the essential content of the right to property.⁴¹⁰

There are several other possibilities which would normally require market value compensation to be paid, notably:

- a deprivation of property (eg compulsory purchase/expropriation);
- interference with the quiet enjoyment of land (a de facto expropriation); and
- interference with the home.

It might be arguable that the LRAU in Valencia falls into the middle category. Although it is effectively a control on the use of land (an aspect of planning) the practical effect of it is to remove the landowner's quiet enjoyment of his home. If so, the absence of full market level compensation could involve a Convention violation. As already stated

⁴⁰⁸ European Convention of Human Rights Protocol 1, (Paris, CETS 009, March 20th 1952), art 1. The same protection applies in EU law under the Fundamental Charter of Rights, OJ 2012 C326/391.

⁴⁰⁹ José María Vázquez Pita, *Urbanización, derecho de propiedad y libertad de empresa* (Madrid: Instituto Nacional de Administración Pública, 2014), pp 11 ff.

⁴¹⁰ Spanish Constitution arts 33 and 38 ; JJ Rastrollo Suárez, *Poder Público y Propiedad Privada en el Urbanismo: La Junta de Compensación* (Madrid: Reus, 2013) pp 145-146.

intervention by the European Parliament led to the Spanish authorities establishing binding criteria for the calculation of compensation in cases of expropriation on the basis of the standards and principles recognised in European case-law.⁴¹¹ This has presumably curtailed what might have been a flood of human rights complaints.

The central issue in the human rights analysis of LRAU is whether compulsory contribution to infrastructure costs is a justified interference with property. Various elements are involved in justification in particular:

- procedural propriety;
- pursuit of a legitimate public policy (in respect of which the state is allowed a margin of appreciation);
- proportionality between the legislative interference and the policy pursued (which means that the interference should be the smallest suited to achieve the aim);
- interference with the quiet enjoyment of land (a de facto expropriation); and
- interference with the home.

It seems as though LRAU might fail several of these tests. The procedure can certainly be questioned. Bautista⁴¹² analysed the expropriations procedure under the Valencian LRAU against the principles of the European Convention, and, in particular the fact that the approval of urban planning instruments is conclusive of the public interest and the need to occupy the property. So the urbanizing agent is allowed to expropriate after the grant of the concession without any further resolution, which could deny the required fair balance between the general interest and the protection of individual rights. The landowner should be allowed a procedure by which he could pursue an individual objection. Proportionality appears to be another major issue. Superficially it seems difficult to see how it can be justified to force a landowner to sell his property rather than choosing to remain outside the development and how he should be compelled to fund infrastructure that he does not want to use. Legislation which forced developers to purchase objectors at market value and then to fund the infrastructure out of the profits of development would seem to achieve the objectives of the legislation just as well. It seems rather surprising that legislation which primarily benefits developers has apparently survived scrutiny against these criteria.

Sparkes concluded that:

each case turns on its facts, and although the Valencian law will probably withstand wholesale challenges, it may give rise to a residue of cases where an intolerable burden has been imposed on individual landowners.⁴¹³

So far the first prediction has been borne out but (surprisingly) not the second.

7.5.4. Does 'land grab' infringe public procurement rules?

The High Court of Justice of the Autonomous Community of Valencia lodged an appeal before the Constitutional Court in 2001 because, in their opinion, the LRAU was against some constitutional rules, in particular those governing public works. The Constitutional Court, however, rejected the claim. This issue was taken up by the European

⁴¹¹ Report on the Alleged Abuse of the Valencian Land Law known as the LRAU and its Effect on European Citizens (Petitions 609/2003, 73 2/2003, 985/2002, 1112/2002, 107/2004 and others), 2004/2208(INI), Committee on Petitions, Rapporteur Janelly Fourtou; www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/660/660551/6_60551en.pdf

⁴¹² Rafael Fernández Bautista, 'Las garantías de las expropiaciones urbanísticas a la luz del sistema del convenio europeo de derechos humanos', (2009) 249 *Revista de Derecho Urbanístico y Medio Ambiente*, pp 11 ff.

⁴¹³ P Sparkes 'Human Right of Property Buyers' in Wallis & Allanson *Rights & Wrongs* (n 20), p 53.

Commission and attempt was made to challenge these laws as infringing EU public procurement rules, but this was always a misdirected attack.⁴¹⁴ EU law is not in play in relation to infrastructure legislation.

7.5.5. De facto expropriation

Human rights cases show other abuses in relation to expropriation occurring in many parts of the continent, including de facto expropriation followed by a refusal to pursue proper procedures; and long delays in paying compensation. Human rights violations have been found against Greece, the judgments concerning two main issues: the long-term binding of property without compensation and the evidence of auto-compensation applicable to city plan expropriations.⁴¹⁵ Spain has not been found to infringe in this respect.⁴¹⁶

7.6. Special areas

7.6.1. Special designations

All systems vary the basic planning regimes in areas with special significance, such as the listing of buildings, conservation areas and green belts round cities, as well as many areas of environmental significance. These may be shown in registers, but they can also be harder to identify. In Poland, for example, historical monuments might be listed in the vievodship register⁴¹⁷ or in a local register that requires direct enquiry of the local authority.⁴¹⁸ In France⁴¹⁹ special regimes apply to mountain areas and buildings of historic interest (*immeuble classé*), on which the owner has the duty to carry out maintenance works. In Spain, the state has a pre-emption right on land of cultural interest.⁴²⁰ The conveyancing process should alert cross border buyers to these designations of which non-resident purchasers are unlikely to be aware.

7.6.2. The coast of Iberia

A clear example in Spain is the illegal construction in protected coastal zones. Spain took action to protect its coasts (possibly after the horse had bolted) in 1988 with the Ley de Costas (Coastal Law). This lay on the statute book for many years without being enforced routinely or predictably. However, in 2008 enforcement began in earnest. Sometimes property was illegal in the sense that it was constructed without authorisation in protected zones. In other cases, apparently, property that was legal when built became illegal. There was no prescriptive period for enforcement action. Many foreign buyers were caught, especially British⁴²¹, despite relying on a notary and the absence of any publicity in the land registry.⁴²²

⁴¹⁴ C-306/08 *Commission of the European Communities v Spain* September 2010.

⁴¹⁵ H Athanassopoulou, 'Expropriation Law in Greece', in J Sluysmans, S Verbist & E Warind, *Expropriation Law in Europe* (The Hague: Wolter Kluwers, 2015), 228 ff.

⁴¹⁶ H Simón-Moreno, 'Expropriation Law in Spain', in Sluysmans, Verbist & Warind (n 34), p 468.

⁴¹⁷ A vievodship is the area administered by governor, of which there are 16 in Poland.

⁴¹⁸ Protection of Monuments Act 2003, Act of 23 July 2003, consolidated version: *Journal of Statues* 2014, item 1446, as amended.

⁴¹⁹ European Law Firm, 'Purchasing a Real Estate in Europe', 2011/2012, ((Eindhoven, www.european-law-firm.com, 2012) p 21.

⁴²⁰ Law 16/1985, dated June 25th art. 38.

⁴²¹ A specific non-profit organisation was created (AUAN) so as to obtain the legalisation of illegal homes located in the Spanish Autonomous Community of Andalusia (<http://www.almanzora-au.org/>).

⁴²² Wallis 'What Can the EU Do?' (n 20) 15. It is possible to make a preliminary check on the Spanish Ministry of the Environment website, <http://sig.marin.es/dpmt>, but this may not be sufficiently accurate to be sure in all cases.

Portugal enacted similar legislation in 2005⁴²³ to protect the natural environment around both coastlines and inland waterways, covering all property lying within 50 metres of the sea, a river or reservoir. This is deemed to be public property, unless the applicant can provide evidence that such grounds were in private or communal ownership before the end of 1864.⁴²⁴ The Government may reclaim public property a process which led to the demolition of houses owned by bona fide purchasers. This has threatened many titles, including foreign purchasers, not least because the procedure to produce evidence of title is long and costly, even taking account of the statutory relaxations where evidence is difficult to come by. A second amendment of the legislation in 2014⁴²⁵ removes the threat where the land satisfies three conditions by being:

- part of a consolidated urban area;
- outside the zone at risk of erosion or encroachment by the sea; and
- occupied by a construction built before 1951.

Similar action has been taken in France. The latter was subject to a human rights challenge which failed despite what appeared to be good prospects of success, in *Depalle v France*.⁴²⁶ This concerned a house built on the northern shore of the Golfe de Morbihan built in the 1880s, partly on the public foreshore. The Depalles bought the house in the 1960s, as purchasers in good faith who had reasonable grounds to believe that their title would be valid. In fact the title was void because French law did not allow the acquisition of a private title in public land, no matter how long ago the appropriation. (Short shrift would have been given to anyone who bought knowing that it was an illegal in a coastal zone and even more so to someone who built in breach of the coastal zoning.) The Depalles had occupied a hundred year old house worth EUR 1.2 million as their family home for 35 years. The Coastal Areas Law 1986 signalled a tougher approach to the protection of coastal zones. The house was demolished without any compensation and this was not an infringement of the Depalle's right to their property.

This decision makes unequivocally clear that the general community interest in securing unrestricted access to the shore is a legitimate objective of legislation. The court drew on the analogy of Spain where

'the owners of buildings legally built and acquired before the entry into force of Coastal Areas Law 1988, and designed for use as a dwelling, could obtain a concession of these buildings, without any obligation to pay a charge on the sole condition that they apply for the concession within one year of the entry into force of the Law. In Spain properties built before the Law came into force without a permit or concession as required by the previous legislation will be demolished if they cannot be legalised on public-interest grounds. Any building that was authorised before the Law came into force but is now illegal will be demolished on the expiry of the concession if it is located on land falling within the category of maritime public property.'⁴²⁷

It is important to protect coastal environments, and the coastal legislation in France was treated as a control on the use of property, which did not require the payment of compensation. It is perhaps surprising that it had not become an interference with the

⁴²³ Law 54/2005, dated November 15th, on the Ownership of Water Resources.

⁴²⁴ *Guia de Apoio Sobre a Titularidade dos Recursos Hídricos*, (Lisbon: www.apambiente.pt/zdata/Divulgacao/Publicacoes/Guias%20e%20Manuais/GUIA%20RH_julho2013_PublicaoB, 2013).

⁴²⁵ Law 34/2014 dated June 19th, art 15.1.5.c.

⁴²⁶ Application 34044/02, European Court of Human Rights (Grand Chamber), March 29th 2010.

⁴²⁷ Ibid, para 53.

quiet enjoyment of possessions. There is some prospect of success in a human rights challenge if:

the authorities led the owners to believe that their title was valid;

national law allowed the conversion of land from public to private after a prescriptive period;

the authorities acted abusively or discriminated between neighbours.

In the circumstances human rights law proved too narrow to provide a necessary protection.⁴²⁸

7.7. How is information obtained?

7.7.1. Sources of information

Few countries, if any, have comprehensive one stop sources of public information, so knowledge of the public situation of land usually has to be stitched together from a range of sources. This, of course, can be a nightmare for a cross border purchaser. Information may be collected from:

- the land register;
- a local register;
- paper records at the *mairie* local to the property;
- enquiries of the public authority;
- public undertakers for electricity, gas and other services;
- reliance on disclosure by the vendor;
- enquiry of the vendor;
- specialised searches eg for mine shafts.

Many systems have public claims that, even though they are unregistered nevertheless secure priority over registered mortgages.⁴²⁹ These are restricted in France, Belgium and the Netherlands to the costs of the proceedings and necessary costs of administration, in Spain and Portugal property related taxes, public burdens and salary claims of employees within limits are included. Therefore, the foreign purchaser should check before the acquisition if there are some debts on the part of the seller that can lead to the creation of a mortgage by operation of law for the benefit of the State, which will be entitled to enforce the mortgage if the previous owner – the seller – has not paid off these debts.

A potential purchaser must know what information is available, where, and how and by whom it is to be accessed. The purchaser also need to be alerted to any gaps in the provision of information.

7.7.2. Who checks? - England

Concerns over whether property complies with relevant public requirements should be addressed by a conveyancer who is responsible for checking necessary authorisations. Restrictions imposed by planning and environmental law are a matter for the purchaser under the *caveat emptor* (buyer beware) principle, so enquiry has to be made of the seller (using the form for Seller's Property Information) and this needs to be supplemented by searches and enquiries of the local authority (commonly called a 'local search'). It is up to the conveyancer to assess whether other checks are needed.⁴³⁰

⁴²⁸ Sparkes, 'European Land Law: Too Narrow?', (n 43), p 30.

⁴²⁹ OM Stöcker & R Stürner, *Flexibilität, Sicherheit und Effizienz der Grundpfandrechte in Europa*, vol III, 3. erweiterte Auflage, (Berlin: Verb Dt Pfandbriefbanken, 2012), pp 91-92.

⁴³⁰ F Silverman, *Conveyancing Handbook* (London: Law Society, 21st edn, 2015), B.10.11.1.

7.7.3. Who checks? - Continental systems

Checks in continental systems appear to be much more lax. Diana Wallis considers that in many Member States the 'legal services industry ... may not offer the comprehensive service expected in other states'.⁴³¹ Notaries in Germanic Latin systems often do not see it as his or her duty to advise on the public aspects of land purchase. In some states legal counselling would be seen as a formal requirement,⁴³² but in others such as Poland it would not.⁴³³ A Spanish notary has the duty inform the parties, be aware of the ownership and encumbrances on the property and consult the Land Registry before the deed is executed,⁴³⁴ but it seems clear from the catalogue of woes recorded by victims of the Valencian land grab laws or buyers of properties condemned as illegal that advice has often been ineffective if not wholly absent.⁴³⁵ French Notaries are public officers appointed by the Minister of Justice empowered to issue authenticated documents and have the task of advising individuals and businesses,⁴³⁶ but not on public aspects of a purchase. A German notary adds:

In my experience, this is a considerable weakness of all the notary systems. All burdens of the land (especially due to public rules on planning) which are not inserted in the register will not, normally, be dealt with by the notary but may still affect the value of the purchase considerably. So there is not even what may be called a random approach. In sum, it lies on the buyer to enquire about such burdens with the competent authorities.⁴³⁷

It is not clear what the justification is but we may speculate that notarial practice is based on a rigid public/private distinction and a rigid real/personal divide, and the job of the conveyancer is seen as restricted to securing undoubted title to the private sector real rights. In other aspects of jurisprudence the rigid public/personal divide has long since collapsed, and in the conveyancing field professional practice needs urgent revision. Public land law controls have become predominant since the Second World war and it is no longer sensible to convey private property as if the planning system did not exist.

7.8. Recommendations

Diana Wallis summarised the possible reforms thus:

Ownership is no longer an absolute power, but a set of powers that can be enjoyed only in accordance with the general interest. The public interest sets limitations on the exercise of an owner's right, in the form of restrictions and public rights. A balance needs to be struck between protecting the general interest and protecting ownership and real estate trade. The following measures are suggested:

- a) Greater publicity for public restrictions. Each State must make an effort to create lists of public restrictions pertaining to land.
- b) Concentration of all the information concerning public restrictions at a single point. ... With the right technology, it is possible to set up

⁴³¹ Diana Wallis 'What Can the EU Do?' (n 20), p 15.

⁴³² Christoph Schmid 'General Report' on *Real Property Law and Procedure In the European Union* (Florence: EUI, 2005), pp 43, 50 ff.

⁴³³ Profession of Notaries Law, Law of February 14th 1991, *Journal of Statutes* 2014, item 164, as amended.

⁴³⁴ Decree June 2nd 1944, art 147.

⁴³⁵ See above points 7.5.3 and 7.6.2.

⁴³⁶ Ordonnance n° 45-2590 du 2 novembre 1945 relative au statut du notariat, art 1.

⁴³⁷ In correspondence with Dr Tommi Ralli.

concentration points in each State to coordinate all information about public restrictions set by the different administrations.

c) A third level of much more technically complex protection would be to integrate and coordinate public limitations within the systems of land registry publicity.⁴³⁸

Valencian 'land grab' laws represented by far the most potent threat to the cross border purchaser, and one which has entered modern folklore as a 'rip off'. As the European market opens up one has to think that there is scope for many scams that would be viewed in the same light by citizens from other Member States. There is a clear responsibility on the EU to act decisively as it did with timeshare to create a fair and level playing field for market actors from different Member States. We believe that in the majority of cases adequate information in advance to a purchaser will enable a proper assessment of marketability to be carried out. The immediate concerns are to identify what information needs to be made available to purchasers, why that information is not being delivered and what steps could be taken to make the public title to land as secure as the private title. We believe that the present state of information is simply inadequate for that task to be undertaken. These thoughts help to formulate our recommendations.

Recommendation 7-A – Generic information must be provided by each Member State about the public law rules that may affect a purchaser of residential property.

Recommendation 7-B – Research is needed to obtain readily comparable information about the impact of public land law rules on residential purchases in different European countries. Aspects of the research would be:

- developing a kitemark for the safe and unsafe public aspects of transactions;
- identification of any public law rules which might threaten the title of an honest purchaser and hence infringe the principle of legal certainty;
- identification of any changes needed to Protocol 1 article 1 of the European Convention of Human Rights (which protects the 'right to property');
- developing a graphical portal that could demonstrate the impact of public rules on private residential property in the way that the planning rules in England are presented to the public (www.planningportal.gov.uk/permission/house); this should reduce the cost of developing alternative language versions;
- consideration of the feasibility of a full integration of public and private titles as Wallis suggested; and
- consideration of changes to rules of professional practice to ensure that the needs of clients are met.

We would suggest research along the lines of the Tenlaw project, which cost around EUR 2.5M, involving all EU-28 Member States and ideally also potential candidate countries.⁴³⁹

References

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⁴³⁸ 'Linking Up National Land Law Systems Across the EU – Some Practical Steps' in Wallis & Allanson, *Rights & Wrongs* (n 20), pp 68-69.

⁴³⁹ Future discussions of membership applications should consider the necessary adaptation of public land law rules.

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- JJ Rastrollo Suárez, *Poder Público y Propiedad Privada en el Urbanismo: La Junta de Compensación* (Madrid: Reus, 2013)
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8. PRICE – DEPOSIT, BALANCE AND COSTS

KEY FINDINGS

- The procedures for payment of a deposit and the price differ widely and purchasers need to be made aware of when they will be required to produce funds and (where appropriate) how to deal with the risk of currency fluctuations during the transaction.
- Transactional costs vary widely from Member State to Member State and buyers require (a) access to generalised information to enable them to budget before searching for properties and (b) a particularised and binding list of costs and taxes and (c) a reliable estimate of running costs associated with the transaction, all as far as possible at the start of the transaction and before entering into any commitment.
- Buyers should be pointed towards detailed and reliable advice about their taxation position and a warning that Member States retain the power to vary taxes.
- It would be beneficial to set up a single point of contact for buyers with the administration (and ideally also utilities) to reduce the burden on buyers unfamiliar with the language of their host state in meeting administrative formalities and thus ensuring that buyers meet residence and taxation requirements.

8.1. Concerns of a purchaser abroad

This chapter considers the financial aspects of a cross border purchase and in particular:

- payment of the price – the deposit and balance, and handling the risk of currency fluctuations in the interim period;
- transactional costs and taxes – including fees for agents and conveyancers, costs of conveyancing and registration, and taxes such as stamp duty and VAT on new build property;
- running costs including land taxation and utility bills; and
- the financial and taxation position of the buyer after completion.

8.2. Purchase price - deposit and balance

Because conveyancing procedures vary so widely across Europe, it is very likely that a citizen buying away from his home state will have assumptions about the financial aspects of a purchase. At the most basic level, the buyer needs clear information about how and when the purchase price must be provided. (In this chapter we consider cash payments, leaving mortgage funding for the next chapter). Clearly a vital factor in facilitating a market in residential property is the availability of accurate and complete information at the outset about the overall cost of a purchase, and how it is divided between a deposit and the balance. Practice rules in England require a conveyancer taking instructions to confirm the instructions in writing to include this information and much else besides.⁴⁴⁰ A completion statement will be sent as soon as it can be finalised before completion.

⁴⁴⁰ Conveyancing Protocol (London: Law Society, , 2015).

When a transaction crosses a currency boundary (for example from the Eurozone to the sterling area) a warning will be needed about currency fluctuations and advice about how to handle them.

8.2.1. Deposit

The amount of a deposit is a matter of negotiation but buyers need to be aware of the conventional amount at least as a starting point in negotiations. Across the continent 10% seems general. In the UK this is commonly linked to the maximum mortgage advance that is likely to be offered to a borrower (90%) so that if, exceptionally, a larger mortgage advance is available, the deposit is likely to be reduced. A buyer would need to know if a smaller loan to value ratio was linked to the expectation of a larger deposit, though a buyer would also need to be warned about the risks of providing a very substantial deposit.

The stage of a transaction at which it is necessary to pay a deposit varies widely:

- in most civilian countries a deposit of 10% is paid to the agent when signing a preliminary contract;
- in Anglo-Celtic systems, a deposit of 10% is paid through the buyer's conveyancer to the seller's conveyancer on exchange of contracts;
- deposits are not part of the German practice because neither party is under any obligation until the notarisation of the transfer document.

The deposit should in general be a sign of earnest on the part of both the buyer and the seller, so the purchaser should be able to recover it freely if the seller withdraws from the transaction; in fact the seller normally has to return the deposit and the same amount again. It follows that it should be retained by the agent or conveyancer in a deposit account and on the basis that the agent or conveyancer holds as a stakeholder (ie only to release it to the party properly entitled to it on completion or transactional breakdown).⁴⁴¹ The one common exception in England is where a buyer's deposit needs to be utilised by the seller to fund the deposit on the house that he is buying, and so on further up the chain. In Poland it appears that escrow accounts are not readily available, so professional and banking practice needs to evolve to provide proper protection to a buyer. In a cross border transaction it should be a requirement that the deposit is held in a separate account unless the buyer consents to the release of the deposit as a deposit on another property. Proper safekeeping of a deposit is a very simple alternative to the enormous difficulty of taking court action in a foreign state for its recovery.

8.2.2. Balance of the purchase price

The buyer needs to be told well in advance how much money is required on completion and how it is to be paid. In English practice a completion notice is sent as soon as possible, and in cross border transactions the time likely to be taken to organise payments needs to be factored into the equation.⁴⁴² The sum is likely to involve money laundering controls, ie to be a sum large enough to require payment through a financial institution rather than in cash. In addition there are practical issues to consider in relation to organising a cross border transfer, and especially so if the transaction is also crosses a currency boundary, including the sizable fee for cross border transfers of funds. A buyer needs to be advised about whether and how to hedge against exchange rate fluctuations in relation to the balance of the purchase price in the period between payment of the deposit and completion.

⁴⁴¹ Eg in France: H Dyson *French Property and Inheritance Law – Principles and Practice* (Oxford, Oxford University Press, 2nd edn, 2003), p 28.

⁴⁴² Dyson states that completion statements are unknown in France: Dyson *French Property* (n 2), p 62.

8.2.3. The risk of a haircut

During the Cyprus banking crisis, the recently widowed Sharon Conner sold a house in Cyprus for EUR 183,000 to a cash buyer in March 2013. The proceeds of sale were paid into two Bank of Cyprus accounts (one opened specifically for the transaction) on Friday March 15th, a couple of hours before close of business, so there was not enough time to transfer the proceeds from the sale to the United Kingdom that day. In the early hours of Saturday March 16th, it was announced that the savers of Cyprus would have to hand over a slice of their deposits as a condition of the EU/IMF bailout. Connor's account was frozen, and her appeal for dispensation was turned down by the Cyprus central bank.⁴⁴³ Intervention by the Troika against a buyer could make it impossible for the buyer to fulfil a contract in a transaction. Some way needs to be found to avoid a recurrence of this situation.

8.3. Transparency of transactional costs

Residential property is always expensive and a prudent buyer will need to budget carefully in advance. The main issue is transparency.⁴⁴⁴ They will require generic guidance about the structure of costs before even beginning to view properties and a detailed and itemised budget at the start of a transaction and before becoming committed to any obligation. When the conveyancer takes instructions from a buyer in England he is required to confirm the instructions in writing and (apart from the deposit and balance of the purchase price, already mentioned) this should include all financial details. The same information is needed by buyers across the continent:⁴⁴⁵

- legal fees;
- legal costs such as search fees, fees for a power of attorney (if the buyer cannot manage personal attendance on completion) and for drawing up a will (if this is required);
- agents' fees (where payable by the buyer or where shared);⁴⁴⁶
- translation costs in (some) cross border transactions;
- search fees etc;
- survey fees;
- costs associated with the mortgage;
- stamp duty land tax and any VAT on new build property; and
- registration fees.

The case for this may be made with one quotation from a German notary:

Nobody will give the owner a complete statement of all costs at the outset. But he may enquire with the notary and his bank.⁴⁴⁷

Yet this is precisely what is required under the English Conveyancing Protocol.⁴⁴⁸

⁴⁴³ Rupert Jones, 'British Widow's House-sale Money Locked up in Cyprus' *Guardian*, April 6th 2013; Helena Smith, 'British Widow: "I Face Ruin from Cyprus Crisis"' *Observer*, April 14th 2013.

⁴⁴⁴ Sylwia Lindqvist, *Transaction Cost and Transparency in the Owner-occupied Housing Market: An International Comparison* (Stockholm: PhD dissertation at KTH Royal Institute of Technology, www.dissertations.se, 2011).

⁴⁴⁵ See the list of 'Additional Costs' provided in the official UK Government 'Guidance on 'Buying Property Abroad, (London: www.gov.uk, 2015).

⁴⁴⁶ In England agents' fees are paid by the seller, but in states where buyers bear these fees or a proportion of these fees, this would also need to be stated. In Germany this could be between 1.5 and 3 per cent of the purchase price plus VAT at 19 per cent.

⁴⁴⁷ In correspondence with Dr Tommi Ralli.

We suggest a form prescribed at European level or nationally giving these details in a standard form. The form could also indicate other matters that the buyer needs to consider such as removal costs and connection charges for utilities.

8.4. Comparative surveys of costs

Costs and taxes related to the transfer of property (transfer duty, land registry registration fees, VAT on price, and notary fees) differ significantly from one country to another, which may have an impact on cross-border transactions. For the purposes of this study the main issue is transparency, that is awareness of the costs at the outset, and not the comparative levels.

8.4.1. Legal fees

A legal and economic study of the 'Conveyancing Services Market'⁴⁴⁹ in 2007 categorised the majority of EU conveyancing systems into four distinct regulatory models:

- Latin notaries, including Spain, Portugal, France, Italy, Luxembourg, Belgium, Germany, Poland, and Slovenia; the involvement of notaries is mandatory, entry to the profession is restricted⁴⁵⁰ and fees are regulated as scale;
- de-regulated notaries in the Netherlands;
- lawyers – solicitors and licensed conveyancers in the UK, solicitors in Ireland, and lawyers in the Czech Republic and Slovakia; hybrid systems where both a notary and a lawyer are involved are found in Austria, Greece and Hungary; and
- Nordic real estate agents, under which the agents cover both estate agency and legal services.⁴⁵¹

Research conducted by Sylwia Lindqvist on *Transaction Cost and Transparency in the Owner-occupied Housing Market*,⁴⁵² suggested that costs are lower if fewer parties are involved in the process, a methodology by which the Swedish model scored well. More general conclusions were reached by the Schmid report. In the notary countries, legal fees are incremental conditional on the value of the transaction, while in Scandinavian countries and the UK and Ireland, and to a certain extent in the Netherlands, fee schedules are nearly flat. Using a benchmark transaction value of EUR 250,000, the study showed that legal fees in Nordic countries and the Dutch deregulated notary system are lowest, followed by the lawyer-based conveyancing countries. Latin notary countries are generally the most expensive, though fees vary widely within the various regulatory systems. A similar picture emerged when fees are adjusted by net earnings across countries, or, alternatively, when fees are measured relative to the average house price in each country: relative fees are generally lower in Nordic countries, followed by many lawyer-system countries and some Latin notary countries (including the Netherlands). The Latin notary countries of France, Belgium and Italy were found to have relatively high legal fees. The following table gives a

⁴⁴⁸ Conveyancing Protocol (London: Law Society, www.lawsociety.org.uk, 2015).

⁴⁴⁹ C Schmid et al, *Study of the Conveyancing Services Market* (Bremen: ZERP, COMP/2006/D3/003, 2007).

⁴⁵⁰ See below point 10.2.4

⁴⁵¹ The pure form of the model exists in Sweden; in Denmark, the buyer is usually represented by a lawyer, and in Finland there exists a specific form of 'notary' (typically civil servants acting as 'part-timers', who have the sole task of authenticating the signatures of a sales contract and who do not give legal advice).

⁴⁵² Lindqvist, *Transaction Cost and Transparency* (n 5).

selective view of the pricing of legal services in states where fees are prescribed (ie other than the Netherlands, Nordic states and Britain and Ireland): Fees relating to notaries are said to vary extensively, but some idea of the variation can be gathered from the table which follows.

Table 25 Notaries fees for residential conveyancing, 2014

Member State	Fee as % of value (ex VAT)
Belgium	0.3%–1%
France	0.825%
Germany	1–2%
Italy	2%–0.15%
Spain	0.5%

Source: CMS⁴⁵³

8.4.2. Transfer tax

Transfer tax also varies very considerably from Member State to Member State as is demonstrated below:

Table 26 Tax rates (% of value) on land transactions, 2014

Tax rate (%)	Member State
10+	BE
5–9	DE, FR, ES, LU, HR, IT, MT
5–	AT, EL, IE, NL, SI, FI, CZ, DK, LV, PL, SE, HU
Progressive	PT, UK ⁴⁵⁴
None	EE, SK, BG, LT

Source EU Commission⁴⁵⁵

This cost can be very significant. A buyer needs to know the figure right at the beginning when deciding what he can afford. As the following table makes clear a British buyer seeking a second home abroad (who has probably paid a low rate of stamp duty land tax on his primary residence – unless he lives in London) needs a particularly strong warning about this liability. Stamp duty land tax is strongly progressive in an attempt to help first time buyers acquire their own homes, and the most surprising thing about these tables (from which some detail has been omitted in order to bring out the basic pattern) is the flat rates in continental states, which must be very regressive in operation. The very high rates of tax must explain the relatively low turnover of property in many civilian states.

⁴⁵³ M Casasole, F Raffaeli & D Zisch, *CMS Guide to Real Estate Transaction Costs and Taxes in Europe*, (Rome and Milan: CMS, www.cmslegal.com/, September 2014).

⁴⁵⁴ For a purchase at the average price of GBP 300,000, Stamp Duty Land Tax would be GBP 5,000, that is 0.33% of value. The highest marginal rate is 14% on very expensive second homes.

⁴⁵⁵ 'Tax Reforms in EU Member States 2014, Tax Policy Challenges for Economic Growth and Fiscal Sustainability' in *European Economy* 6|2014, (Brussels: EU Commission, http://ec.europa.eu/economy_finance/publications/, 2014) p 65 (some detail omitted).

Table 27 Transfer tax on second hand residential property

Location	Tax as % of value
Belgium (Brussels/Wallonia)	12.5%
Belgium (Flanders)	10%
Luxembourg-City	10%-11.8%
Italy	9%
Luxembourg	7%-8.2%
Spain (by region)	6-11%
Portugal	up to 6%
France	5.09%
Germany (average)	5%
Germany (regionally)	3.5-6.5%
The Netherlands	2%
Poland	2%
United Kingdom	0-5% in bands ⁴⁵⁶

Source: CMS⁴⁵⁷

In the past, it was common practice in some Member States for part of the price of a house to be paid in cash, reducing the apparent sale price and thus reducing the liability of the seller for capital gains tax and the buyer for transfer tax. British buyers in France were strongly counselled not to countenance 'payments under the table'.⁴⁵⁸ In other states, including Germany and the United Kingdom, any under declaration of the value was met with stiff penalties. It is reported that the Spanish authorities have recently been more ready to challenge declaration of value which appear to undervalue properties and that numerous purchasers have received requests for further information about transactions.⁴⁵⁹ The real point is that a single market requires a single standard of professional conduct.

8.4.3. Registration fees

By comparison with transfer tax, registration fees are generally low.

Table 28 Registration fees

Member State	% of value	Member State	EUR
France	0.1%	Belgium	EUR 10+ per page
Germany	0.8 - 1.2%.	Italy	EUR 100
Luxembourg	1%	The Netherlands	EUR 145+
Spain	0.25%	Poland	EUR 50
England	0.05%	Portugal	EUR 200 (online)

Source: CMS⁴⁶⁰

⁴⁵⁶ The first GBP 125,000 is exempt, the next GBP 125,000 is charged at 2% and the band from GBP 250,000 to GBP 925,000 at 5%; the highest rate is 14% for the value of second homes over GBP 2 imillion.

⁴⁵⁷ Casasole, Raffaelii & Zisch, *CMS Guide*, (n 14).

⁴⁵⁸ *Dyson French Property* (n 2), p 41.

⁴⁵⁹ Ruth Lythe 'Why That Cut Price Spanish Villa Has a Nasty tax Surprise' (London: www.this.is.money, January 8th 2016).

⁴⁶⁰ Casasole, Raffaelii & Zisch, *CMS Guide* (n 14). The figure for England is for an average value property of just over GBP 300,000.

8.5. After the purchase

8.5.1. Running costs

Before the purchase, a buyer needs access to generic information that is reliable and up to date from which he could assess the likely ongoing costs of managing the property.

Before entering into any commitment, the buyer requires accurate information about likely running costs, such as:

- local taxation
- connection charges to utilities
- utility bills (waste disposal, water, electricity, gas, television);
- insurance premiums;
- positive obligations affecting the property; and
- service charges in communal buildings.

As ever a standardised sheet could be helpful in ensuring that all relevant matters are mentioned in a form the buyer can understand.

8.5.2. Single point of contact for new buyers

Consideration should be given to creating a single point of contact with local bureaucracy for incomers to a region which could greatly reduce the burden of complying with all the formalities in a new language and ensure that migrants are properly registered for taxation and residence purposes.

8.5.3. Generalised information but not detailed information

There are many aspects of living in a country which need to be drawn to a purchaser's attention but where it would not be appropriate to expect a conveyancer to provide detailed advice; these include:

- capital gains tax;
- wealth tax (eg in France and Spain);
- income tax on letting income;
- health care cover;
- banking procedures;
- car purchase;
- inheritance; and
- access to financial advice and its cost.

Generic advice should be available on such issues and the purchaser's attention should be drawn to it specifically.⁴⁶¹

8.5.3. Matters at risk of buyer

A firm warning is required to buyers that they shoulder a number of risks, notably:

- fluctuation in market prices;

⁴⁶¹ 'Ongoing Living in Spain' at www.gov.uk.

- regional variations in market performance;
- currency fluctuations;
- changes in national tax regimes; and
- exit from the EU.

8.6. Recommendations in relation to cost

Recommendation 8-A– Member States should make available generic information about the various taxes, fees and costs involved in a conveyancing transaction,

Recommendation 8-B– Cross border purchasers should be given at the outset of a transaction a complete breakdown of costs on a form designed to overcome language barriers. This should include:

- details of deposit payments, any stage payments and the balance;
- warnings where appropriate about currency fluctuations;
- information about payments;
- conveyancing costs;
- any other professional fees eg for agents or surveyors;
- land transaction taxes and any VAT;
- registration fees; and
- details of running costs such as:
 - utilities;
 - local taxes;
 - service charges; and
 - costs of positive obligations.

Clear and precise information is also needed about the times that particular payments will be required.

References

- M Casasole, F Raffaelii & D Zisch, *CMS Guide to Real Estate Transaction Costs and Taxes in Europe*, (Rome and Milan: CMS, www.cmslegal.com/, September 2014)
- H Dyson *French Property and Inheritance Law – Principles and Practice* (Oxford, Oxford University Press, 2nd edn, 2003)
- Sylwia Lindqvist, *Transaction Cost and Transparency in the Owner-occupied Housing Market: An International Comparison* (Stockholm: PhD dissertation at KTH Royal Institute of Technology, www.dissertations.se, 2011)
- C Schmid et al, *Study of the Conveyancing Services Market* (Bremen: ZERP, COMP/2006/D3/003, 2007)

9. MORTGAGE FINANCE

KEY FINDINGS

- The Mortgage Credit market has been reformed by a Directive being implemented in March 2016 and it would not be appropriate to make additional recommendations until the success of this legislation can be appraised.
- A future review needs to consider lending outside the scope of the directive and to review the new legislation from the perspective of a cross border borrower.

9.1. EU involvement in the residential mortgage market

One quarter of Europeans currently have a mortgage.⁴⁶² Cross border residential mortgage lending built up slowly between 1994 and 2005. As the Single Market Commissioner of the time observed:

'An efficient single market could mean cheaper and better loans for all Europeans, whether or not they obtain their mortgage abroad.'⁴⁶³

The Green Paper on Mortgage Credit, also published in 2005, found that the 'level of direct cross border sales is ... less than 1% of overall residential mortgage credit activity' with activity largely confined to two niche market sectors consisting of the purchase of holiday homes on the Mediterranean, and purchases in border regions.⁴⁶⁴ Demand for mortgages fell sharply as a result of the Global Financial crisis and although it is recovering it is still running at only two thirds of pre-crisis levels.⁴⁶⁵ Recovery is patchy. According to the European Mortgage Federation, outstanding residential lending represented just over half of EU-28 GDP in 2013.⁴⁶⁶

Table 29 Mortgage lending in 2015 as compared to 2007

Level compared to 2007	EU-28 Member States
Below 20%	ES, HU, IE, PT
20-50%	
50-100%	FR, IT, RO, UK
Above 2007	BE, CZ, DE, DK, NL, PL, SE

Source: European Mortgage Federation (2015)⁴⁶⁷

A small market share may nevertheless represent activity on a substantial scale. It is thought, to give just one example, that some 200 thousand Britons now hold a mortgage designated in euros.⁴⁶⁸

⁴⁶² 'Housing Statistics' (Luxembourg: Eurostat, November 2015).

⁴⁶³ Charlie McCreevy cited in the Executive Summary of the report of the Mortgage Credit Forum Group, *The Integration of EU Mortgage Credit Markets* (Brussels: DG Internal Market, 2004).

⁴⁶⁴ Green Paper on *Mortgage Credit in the EU*, COM(2005) 327, p 5.

⁴⁶⁵ 'Quarterly Review of European Mortgage Markets – Q2 2015' (Brussels: European Mortgage Federation, 2015) p 1.

⁴⁶⁶ *Hypostat 2014, A Review of Europe's Mortgage and Housing Markets*, (Brussels: European Mortgage Federation, 2014).

⁴⁶⁷ 'Review– Q2 2015' (n 4) p 4.

A new Directive on Mortgage Credit will be effective by the time that this report reaches its readers, the transposition date being March 21st 2016.⁴⁶⁹ This is the outcome of a wide ranging process, involving expert reports,⁴⁷⁰ groups attempting to bridge the entrenched views of the industry and consumers, a Green Paper⁴⁷¹ and a White Paper.⁴⁷² At that point the Global Financial Crisis intervened and changed the terms of the debate hugely. In the end what has emerged is essentially a consumer orientated response to the European mortgage market, which ties into existing consumer protections, without treating the cross border market coherently or addressing systematically the issue of harmonisation of the mortgage market.

The legislation has much the same scope as this chapter of this report, that is credit agreements with consumers⁴⁷³ secured on residential immovable property. First and second charges are covered⁴⁷⁴ whereas unsecured credit falls within the consumer credit legislation.⁴⁷⁵ English practice is to remortgage property part of the way through the lifespan of a mortgage to take advantage of more competitive mortgage products, and the Directive will apply to remortgaging of this kind.⁴⁷⁶ Equity releases schemes are currently left to national legislation.⁴⁷⁷ The Directive takes a minimum harmonisation approach, allowing Member States to introduce more stringent provisions in order to protect consumers except in respect of pre-contractual information requirements where the harmonisation is maximal. The Directive will need time to bed in, so that it will only be in a few years' time that it will be possible to appraise its effectiveness.⁴⁷⁸

9.2. Standardised information for borrowers

Residential property is expensive and most buyers will require mortgage finance for their purchase. The author Lisa St Aubin de Terrain was, so she says, taught how to buy houses by a former poet laureate, who told her to find the house she wanted and then buy it, worrying later about how to pay for it. 'A couple of trial runs led me near to but not on to the road to bankruptcy'.⁴⁷⁹ Prudent Europeans will operate in the reverse direction, ensuring that mortgage finance is available before entering a commitment to buy. Especially in a cross border purchase they will require clear information at the outset about the terms on which an advance is made. The Mortgage Credit Directive introduces a

⁴⁶⁸ *Independent on Sunday* December 18th 2011. This figure is widely quoted on the internet, but no official source can be traced.

⁴⁶⁹ Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, OJ 2014 L60/34.

⁴⁷⁰ 'Study on the Financial Integration of European Mortgage Markets' (London: Mercer Oliver Wyman, <http://www.hypo.org>, 2003); 'The Costs and Benefits of Integration of EU Mortgage Markets' (London: London School of Economics, ec.europa.eu/internal_market/finances-retail/home-loans/integration_en.htm, August 2005).

⁴⁷¹ *Mortgage Credit in the EU* (n 3).

⁴⁷² *Integration of EU Mortgage Credit Markets*, COM(2007) 807 final.

⁴⁷³ Falling within the T2C pattern: Mortgage Credit Directive (n 8) art 4.

⁴⁷⁴ French loans secured by a personal guarantee also fall within the Directive.

⁴⁷⁵ Consumer Credit Directive, 2008/48/EC, OJ 2008 L133/66. Member States may apply the consumer credit regime to mortgages where the object is not the acquisition of residential property.

⁴⁷⁶ A common criticism of the Directive is that it will kill the remortgaging market by increasing costs.

⁴⁷⁷ The UK Government gives a warning about Equity Release Schemes in its advice on 'How to Buy Property in Spain' (London: www.gov.uk, 2015).

⁴⁷⁸ The review due in March 2019 must consider the cross border business of creditors and credit intermediaries, but should also consider the position of cross border borrowers.

⁴⁷⁹ Lisa St Aubin de Terrain, *A House in Italy* (London: Penguin, 1995), pp 10-11.

European Standardised Information Sheet (ESIS)⁴⁸⁰ whilst continuing to make use of the Annual Percentage Rate of Charge (APRC) as a means of comparing the overall cost of credit.

The need for standardised information is clear when the range of choice available to consumers of credit is observed. Each Member State has a wide range of mortgage products on offer.⁴⁸¹ Currently the persistent low rate environment is causing a shift from variable to fixed rate mortgages.⁴⁸² For example, in Germany the main types of mortgage loans on offer are:⁴⁸³

- fixed rate loans: the instalments are the same amount throughout the repayment period;⁴⁸⁴ the annuity is in general no less than 1 per cent (normally referred to as '*Tilgung*'); the client can decide to make additional down payments on the loan (no more than 10 per cent per annum, referred to as '*Sondertilgung*').
- interest only loans (*Zinszahlungsdarlehen*): only the interest portion of the loan is repaid over a fixed term. The full amount of the capital is due for repayment at the end of the term. Interest only mortgages will not be found for the full value of a property.
- variable rate loans (flexibles/*Darlehen*): the interest rate tracks the appropriate base rate (Euribor - European Interbank Offered Rate⁴⁸⁵), though a partial or full repayment of the loan may be made, in general every three months. In many cases, the loan can be turned into a fixed interest and repayment loan if necessary.
- loans linked to a savings programme (*Bausparvertrag*): the instalments to be made are in part (or in total) paid into the savings programme which, at a later stage, will be used to pay off the mortgage.⁴⁸⁶

A typical German mortgage lasts for a 25 or 30 year period, with interest rates fixed for the first five years or so. In Spain, to take another instance, (but the same is also true of Portugal) the vast majority of mortgage loans are subscribed at variable rates referenced (one or twice a year) to 12-month Euribor rate. Other possibilities are:

- a fixed rate set for the entire duration of the mortgage contract;
- a rate fixed for an initial period followed by periodic revisions; and
- mortgages combining a part at floating rate with a part fully fixed.

In Spain the average loan to value ratio was 80% on average in 2008 and the average maturity term was 25 years of length in 2011.⁴⁸⁷ French fixed rates, on the other hand, may not mature for as long as 35 years, the average loan to value ratio (again in 2008) being 72.6%.⁴⁸⁸ In Poland mortgage loans are in practice offered only at variable rates and the standard maturity term ranges from 25 to 30 years. Interest rates are consistently higher in eastern Europe than in the west. As of the beginning of 2016 banks

⁴⁸⁰ Mortgage Credit Directive (n 8) art 14; Annex II. Model ESIS documents are included as appendix 2 to the report on *Implementation of the Mortgage Credit Directive and the New Regime for second charge mortgages* (London: Financial Conduct Authority, CP14/20, September 2014), pp315 ff.

⁴⁸¹ Factsheets on a sample of EU-28 states are issued by the European Mortgage Federation (www.hypo.org); 'Study on the Cost of Housing in Europe', (Berkeley, California, EMF, www.law.berkeley.edu/, 2010); 'Quarterly Review- Q2 2015' (n 4) Table 5C.

⁴⁸² 'Quarterly Review- Q2 2015' (n 4) p 1.

⁴⁸³ 'Quarterly Review- Q2 2015' (n 4) Table 5D; 'Buying a German Property', www.expatica.com/de/housing.

⁴⁸⁴ As the loan is repaid, the interest portion decreases while the loan repayment portion increases.

⁴⁸⁵ Any index to which a mortgage is linked in future must be clear, accessible, objective, verifiable and properly recorded: Mortgage Credit Directive (n 8) art 24. Borrowers will have to be informed in advance of change in payments by art 27. This does not appear to bite on mortgages providing for variation at the whim of the lender.

⁴⁸⁶ Fees connected with this procedure may be substantial: First Financial Direct Group OHG, 'Mortgages in Germany' on the website www.howtogermy.com.

⁴⁸⁷ European Mortgage Federation, 'Factsheet Spain 2012', 7 ff.

⁴⁸⁸ 'Review- Q2 2015' (n 4) Table 5D.

will not be able to lend more than 90% of the home's value.⁴⁸⁹ Since the financial crisis, Polish banks have offered mainly mortgage loans denoted in Polish currency. Applicants for Euro denominated mortgage loans (or the occasional mortgages denoted in other currencies such as USD, GBP and CHF) must show a very stable and high income, at least six times the minimum monthly salary.

Variety in the English market would be even greater, though less than before the Global Financial Crisis. The position of a cross border purchaser is even more complex because of the choice of jurisdictions in which to borrow.

Lenders will now have to provide information free of charge at various stages, such as in advertisements and information distributed generally.⁴⁹⁰ At the pre-contract stage, information must be in the form of the European Standardised Information Sheet so as designed to enable consumers to make informed choices from among the array of products on offer. The Mortgage Credit Directive requires creditors to provide personalised information to prospective borrowers in order to allow them to compare the credit products available on the market, assess their implications and make an informed decision on whether to conclude a credit agreement. Information must be provided without undue delay, before an offer or agreement is reached, and the information must be tailored to the personal and financial circumstances of the prospective borrower. Details must be provided in the set format of the European Standardised Information Sheet,⁴⁹¹ setting out the fundamental terms of the proposed loan including:

- the amount and currency of the loan;
- the interest rate;
- the Annual Percentage Rate of Charge (APRC) taking account of all costs;⁴⁹²
- the frequency and number of payments;
- the amount of each instalment; and
- rights of the borrower.

Creditors must allow prospective borrower at least seven days to reach a decision.⁴⁹³

In due time the European Standardised Information Sheet will have to be appraised to determine its utility as a mechanism to enable consumers to make sense of this financial jungle given that the efficacy of mandated disclosure has been questioned.⁴⁹⁴ Will it by itself allow a ready comparison of different bank products? Should there be clear-cut warnings about the risk of losing the home on default, as in Catalonia?⁴⁹⁵ Our preferred approach would be benchmarking (or 'Kitemarking') – that is reorganising the European Standardised Information Sheet to differentiate features of a mortgage product that conform to accepted standards for safe mortgage products from any unusual features of which the consumer requires a specific warning and provide it in a way by which consumers can compare the different offers in a comprehensible way (e.g. avoiding legal jargon and concentrating in those aspects that increase the cost of the loan).

⁴⁸⁹ 'Review– Q2 2015' (n 4) Tables 5A, 5D.

⁴⁹⁰ Mortgage Credit Directive (n 8) arts 8, 10, 13, 16.

⁴⁹¹ Mortgage Credit Directive (n 8) art 14, Annex II. Model ESIS documents are included as app 2 to the report on *Implementation of the Mortgage Credit Directive and the New Regime for Second Charge Mortgages* (London: Financial Conduct Authority, CP14/20, September 2014), pp 315 ff.

⁴⁹² Mortgage Credit Directive (n 8) arts 4(15), 17, Annex I.

⁴⁹³ Mortgage Credit Directive (n 8) art 14(6).

⁴⁹⁴ O Ben-Shahar & CE Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure*, (Princeton, New Jersey: Princeton University Press, 2014), p 64.

⁴⁹⁵ Catalan Act 20/2014. This Act is has been partially suspended by the Spanish Constitutional Court (BOE 9 October 2015, p 93350) giving the Spanish government time to challenge its validity.

9.3. Where to borrow?

9.3.1. Cross border borrowing

EU law is concerned with cross border mortgages, in which two of the three objects involved in a loan - the borrower, the lender and the property to be used as security - are spread across national boundaries. It seems to be very rare for three different states to be involved, so usually two states are coincident which still means that one border is crossed. Thus the main patterns for a borrower in state A are a loan from:

- a B lender on a home in B; or
- an A lender on a home in B.⁴⁹⁶

It may be correct when choosing a currency in which to borrow, to match asset to liability or, alternatively, to match the loan to the source of income being used to service it.⁴⁹⁷ Often a choice must be made between remortgaging the primary residence back home or taking out a local mortgage where the holiday home is located. Clearly this is a choice to be made by the consumer but only after he or she is fully informed. So clear guidance about how to make this choice is a first essential.

9.3.2. Currency fluctuations

Borrowing within the Eurozone is more straightforward than borrowing which crosses a currency boundary, since the latter case adds the complexity of exchange rate fluctuations. In many countries outside the Eurozone mortgages have been tied to foreign currencies, creating huge problems. In Cyprus, for example, (but also in Poland, Hungary, Croatia, Serbia and Romania), mortgages have often been linked to the Swiss Franc, an arrangement which could cause a loan taken out in 2006 to double in terms of the local currency over seven years.⁴⁹⁸ In Poland the fashion of banks has moved from Swiss Francs to the Euro to Polish currency over the same period. Polish citizens who took out one of the omnipresent CHF mortgage loans are currently experiencing problems with the monthly payments to the extent that in many cases conversion of CHF into PLN causes the redemption figure for the loan to exceed the value of the home, plunging the borrower into negative equity and hampering sale. Although the Polish government has tentatively suggested that these loans should be restructured at the cost of the banking sector, no measures have been taken to match those in Hungary;⁴⁹⁹ since the Directive prohibits retrospective solutions it is now too late for this to be implemented.⁵⁰⁰

The Mortgage Credit Directive provides a welcome solution, but only for mortgages taken out once the implementing legislation is in force (that is for post March 2016 loans).⁵⁰¹ States may address the matter in one of two ways. They may confer on borrowers the right to convert a credit agreement designated in a foreign currency into an alternative currency; this will be the currency of his primary source of income or of his residence at the time that the mortgage is taken out or his current residence. Conversion will not be

⁴⁹⁶ Options are set out in more detail by Which? 'Buying Overseas Property: Mortgages for Overseas Property' London: www.which.co.uk, 2015).

⁴⁹⁷ M Warburton & M Fitzpatrick *A Place in the Sun? Trends in the Ownership of UK Foreign Property* (London, Grant Thornton with Lombard Street Research, 2006), p 8.

⁴⁹⁸ J Knight *Independent on Sunday* October 20th 2013; around 25K British buyers are linked to the Swiss Franc.

⁴⁹⁹ N Buckley 'Beware Hungary's cure for the Swiss franc mortgages hangover', *Financial Times, Inside Business*, January 28th 2015. In 2012-2104 the split in the marketplace was 45-47% HUF, 7% EUR and 43-44% CHF; in 2015 mortgages denoted in HUF held a 99% market share: 'Quarterly Review- Q2 2015' (n 4) Table 5C.

⁵⁰⁰ Mortgage Credit Directive (n 8) art 23(5).

⁵⁰¹ Mortgage Credit Directive (n 8) art 23.

possible if all events are located within the Eurozone. Conversion must occur at the market rate current at the time of conversion. An alternative that is likely to prove less satisfactory is that arrangements may be put in place to limit the exchange rate risk to which the consumer is exposed under the credit agreement. Either way, regular warnings must be given about the exposure to shifts in the money markets while the borrower is exposed to this risk. This is the most significant change for transactions involving a cross border element. By providing that the creditor must ensure that the consumer is kept up to speed with key developments in the currency market and indeed the (conditional) right to transfer the mortgage into another currency the Directive may well play a key role in facilitating EU citizens taking part in cross border acquisition of property.

The European Standardised Information Sheet will have to contain information about the national procedures to deal with currency fluctuations, as well as a worked example about the effect of a 20% fluctuation in currency rates. This will need evaluation in due course to see whether cross border borrowers are receiving effective advice and protection.

9.4. Arranging a mortgage

9.4.1. Processing time for applications

Procedures may still be paper-based and delays in processing paperwork may be very inconvenient, especially in states where a purchaser has to sign a 'subject to finance' contract. In Spain, banks are not likely to have an offer in place much before six weeks and a period of three months is generally needed for completion.⁵⁰²

9.4.2. Assessment of creditworthiness

Under the Directive, member states are required to ensure that creditors make a thorough assessment of the consumer's creditworthiness.⁵⁰³ Creditors will have access to the necessary records to make an assessment of creditworthiness, though the information received must be handled properly. In the opinion of the Spanish authors of this report, who live in a state where creditworthiness has been applied very flexibly in recent years, this is the most important provision in the Directive. Use will be made of information supplied by the consumer on request and from public and private public databases. If the applicant does not appear to be able to repay the loan or it is not possible to rate the applicant, the lender must refuse to grant credit. This rule should avoid further NINJA mortgages (ie mortgages with covert or mercenary terms) by making available information that is accurate and clear – though preventive measures could hardly avoid a systemic crisis caused by high unemployment. Tighter checks on borrowers may have unexpected consequences in Mediterranean countries where it may not be feasible for a disappointed applicant for finance to enter the rental market.

Lenders in many European countries require proof of income, typically over three years, and may ask for detailed information. German lenders are known to be conservative and inquisitorial and in the same vein Polish lenders require detailed information on employment, self-employment, outgoings, dependent family members, etc. Information

⁵⁰² 'Don't let your holiday-home plans come tumbling down' *Independent on Sunday*, August 13th 2011; Nicole Blackmore, 'We're having problems buying property in Spain. What's the process?' *Telegraph*, June 2nd 2015.

⁵⁰³ Mortgage Credit Directive (n 8) art 18. Lenders must act 'honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers': art 7.

must be confirmed by documents issued by employers, the Internal Revenue Office and other institutions.⁵⁰⁴ Potential problems are

- instability of income;
- inability to cover outgoings;
- self-employment;
- lack of permanent employment;
- advancing age; and lastly,
- any record of personal indebtedness.

Practical application of these lending criteria has the effect of disadvantaging non-native borrowers as is shown by these quotes from the 'Your Europe' site:

A bank in another EU will make a commercial decision on whether or not to accept your mortgage application on the basis of the risk profile of proposed loan. Your country of residence or the location of the property to be mortgaged can often make it difficult to obtain a mortgage (home loan). Banks frequently refuse to grant mortgages for properties located in another country, or to people whose source of income or place of residence is not in the country where the bank is established. Banks are free to set these kinds of limits to their lending. However, in accordance with the general principle of non-discrimination on grounds of nationality, they may not discriminate between EU citizens on the basis of their nationality.⁵⁰⁵

Were a foreigner to seek to buy in Germany, the criteria applied by financial institutions offering mortgages might represent a serious obstacle because the inability to show a long-term financial track record in Germany might result in the borrower being expected to put up a 40 per cent deposit.⁵⁰⁶ By way of contrast, a German could commonly obtain an 80 per cent mortgage, but would have to provide an additional security (for example an insurance policy) to borrow more.⁵⁰⁷ This is partially driven by the requirements of their mortgage funding system through *Pfandbriefe* (mortgage bonds) which means that German citizens must pay the remaining 40% from their own resources – which might not be possible until individuals have achieved a certain stability at home and at work perhaps not until the age of 45. A by-product of this system is the exclusion of low and certain medium income households in Germany from the ownership market.

Securing a level playing field is seen as an important step towards a transparent market in the thesis of Dr Lindqvist.⁵⁰⁸

9.4.3. Valuation

Proper valuation of the security is important in lending practice and it also helps to eliminate some of the commonest forms of mortgage fraud. Reliable valuation standards are required and Member States must ensure that they are applied to valuations in

⁵⁰⁴ First Financial Direct Group OHG, 'Mortgages in Germany', (www.howtogermany.com/pages/mortgage.html, 2011).

⁵⁰⁵ 'Mortgages', on Your Europe, (www.europa.eu, 2015).

⁵⁰⁶ 'Buying a German Property' (n 22).

⁵⁰⁷ Stuppi, *Buying Real Estate in Germany — An Overview* (www.notar-stuppi.de), 3.

⁵⁰⁸ Sylwia Lindqvist, 'Transaction cost and Transparency in the Owner-occupied Housing Market: An International Comparison', Doctoral Thesis, (Stockholm: PhD thesis at Royal Institute of Technology, www.dissertations.se, 2011), Essay 4.

residential lending. Valuers must be competent and able to provide an impartial and objective valuation.⁵⁰⁹ An issue which needs to be explored when the Mortgage Credit Directive comes to be reviewed is whether cross border purchasers who rely on mortgage valuations are adequately protected if valuations fail to identify major defects in properties.

9.4.4. Guarding against fraud

European money laundering checks will help to eliminate the identity forms of mortgage fraud.

9.4.5. Credit intermediaries

Brokers are prominent in arranging mortgages in many European countries, including the Netherlands, Poland, Spain and Britain. In the new legislation a broker is called an 'intermediary', a person who provides a creditor with information to identify a consumer and who assists in the conclusion of a mortgage. This also includes marketing assistants who assist particular lenders, but not lawyers or notaries while they stick to providing legal or financial advice. Regulation is left to the home member state within a European framework.⁵¹⁰ Information must be provided about commission payments etc.⁵¹¹ Credit intermediaries will be required to carry professional indemnity insurance, be of good repute and satisfy knowledge and competence tests. Conduct rules apply to credit intermediaries and any appointed representatives,⁵¹² including a requirement to act honestly, fairly, transparently and professionally when, for example, 'manufacturing' mortgage products, granting advice to consumers and when executing credit agreement. Payments to staff should not be structured so as to impede these aims. National law may or may not prohibit payments by the consumer prior to conclusion of a credit agreement.⁵¹³

9.4.6. Bundling

The Mortgage Credit Directive allows additional financial products to be bundled with mortgages – perhaps including an endowment policy or house insurance – but it prohibits tying borrowers so that they can only get the mortgage if they accept the extras. Bundling of financial products with mortgages is a practice that has, for example, become very common recently in the domestic market in Spain.⁵¹⁴

9.5. Operating a mortgage

9.5.1. Redemption

The mortgage industry is hesitant about the desirability of early redemption. Lenders like to fix interest rates over a substantial period and lock borrowers into loans, in order to simplify the costing of mortgage deals and also to facilitate the use of a loan book as a collateral for raising funds for further lending. From the point of view of borrowers,

⁵⁰⁹ Mortgage Credit Directive (n 8) art 19.

⁵¹⁰ Mortgage Credit Directive (n 8) arts 29-34, Annex III. Accreditation is required by March 2016, or one year later for a person already in post in March 2014: art 43.

⁵¹¹ Mortgage Credit Directive (n 8) art 15.

⁵¹² Mortgage Credit Directive (n 8) arts 7-9.

⁵¹³ Mortgage Credit Directive (n 8) art 7(5).

⁵¹⁴ Mortgage Credit Directive (n 8) arts 4, 12; Sergio Nasarre Aznar, 'Malas Prácticas Bancarias en la Actividad Hipotecaria', *Revista Crítica de Derecho Inmobiliario*, no 727, 2011, pp 2673 ff.

however, it is desirable that they should be able to reduce the amount they owe as early as possible. For the future (that is for mortgages created after the Directive is implemented) consumers will have a general right to repay their loans early, thereby reducing the overall cost of the mortgage.⁵¹⁵ Member States may make the exercise of this right subject to requirements that creditors receive fair compensation for costs directly and exclusively linked to early repayment,⁵¹⁶ but generally lenders will not suffer significant losses when mortgages are redeemed. It is not yet clear how the Directive has been implemented in Member States. The Directive could have had a bigger impact in countries such as Germany where redemption penalties are common if it had given mortgage borrowers a straightforward right to reduce their debt as they wished. However, the crucial thing from the point of a view of a cross border borrower is that the redemption penalties should be notified in advance to the borrower.

9.5.2. Default

In terms of the effectiveness of procedures for the enforcement of a mortgage in the event of default, great disparity exists across Europe, the average duration of procedures ranging from 84 days in Denmark to 10 years in Cyprus; research sponsored by the Commission into mortgage repossession as an aspect of homelessness and conducted by Dr Kenna and Professor Nasarre Aznar is currently awaiting publication.⁵¹⁷ Member States must ensure that appropriate mechanisms are in place.⁵¹⁸ Lenders are at least required to act 'honestly, fairly, transparently and professionally, taking account of the rights and interests of the consumers'.⁵¹⁹ In particular they are required to show reasonable forbearance before initiating enforcement⁵²⁰ procedures.⁵²¹ High interest rates charged on defaults may be a significant factor in repossession, but this topic is not touched upon by the regimes governing unfair contract terms and mortgage credit. Interest rates charged on defaults have recently been limited in Spain to three times the legal interest rate ie 12% for 2014,⁵²² legislation appearing to vindicate what might be thought an unlawful penalty in other contexts. The Directive allows default charges but requires them to be capped without apparently setting a limit for the cap.⁵²³ Default charges are a major source of contention in Spain at present, with the possibility that they could be labelled 'reckless banking practices' and hence a reason for avoidance of the mortgage contract,⁵²⁴ though this remains a matter of controversy.⁵²⁵

⁵¹⁵ Mortgage Credit Directive (n 8) art 25.

⁵¹⁶ Mortgage Credit Directive (n 8) art 25(3).

⁵¹⁷ Piet Leunis, Dr Padraic Kenna & Freek Spinnewijn, *Promoting Protection of the Right to Housing – Homelessness Prevention in the Context of Evictions* (Brussels: Project VT/293/056, DG of Employment, Social Affairs and Inclusion, 2014-15).

⁵¹⁸ Mortgage Credit Directive (n 8) art 26.

⁵¹⁹ Mortgage Credit Directive (n 8) art 7.

⁵²⁰ The Directive uses the word 'foreclosure' in a way that is inconsistent with its technical meaning in Anglo-American law.

⁵²¹ Mortgage Credit Directive (n 8) art 28.

⁵²² Act 1/2013, dated May 14th, on measures to protect mortgagees, debt restructuring and social rent, art 3.2.

⁵²³ Mortgage Credit Directive (n 8) art 28.

⁵²⁴ *Emergencia habitacional en el Estado Español (Housing emergency in Spain)*, (Madrid: Observatorio DESC and Plataforma de Afectados por la Hipoteca de Barcelona, 2013), p 11.

⁵²⁵ Default interest rates are typically between 17% and 25% but were 72.77% in Case C-415/11 *Aziz v Caixa d'Estalvo de Catalunya Tarragona I Mauresa (Catalunyacaixa)*, March 14th 2013. When a default penalty is added, it is by then too late to avoid mortgage enforcement since the borrower has already defaulted. It is not clear whether judges have competence to decide that an interest rate is too high (this depending on proof of damage incurred by the bank). Double control of the legality of the terms of Spanish mortgages (through the notary public and the land registrar) has not always been effective: Nasarre Aznar, 'Malas Prácticas' (n 52) pp 2681 ff and 2702 ff.

Unfair terms legislation may invalidate subsidiary terms relating to enforcement, for example a provision that enforcement proceedings may not be suspended while unfairness arguments are resolved.⁵²⁶

The Directive has not implemented a right for a borrower to walk away without further liability after handing back the property (the so-called *datio in solutum* or 'no recourse' loans) and so in almost all states across Europe a lender is entitled to pursue a shortfall in this situation.⁵²⁷

9.5.3. Dispute resolution

A welcome feature of the Mortgage Credit Directive is the requirement to provide dispute resolution mechanisms.⁵²⁸

9.6. Research into European mortgage law

Two main research projects to mention are the Eurohypotheck group and the Runder Tisch Grundpfandrechte in Europe (2005-2015).

9.6.1. Eurohypotheck

Since the 1960s⁵²⁹ there have been efforts to create a Eurohypotheck, that is a common mortgage for Europe.⁵³⁰ Harmonisation of the European mortgage market might carry significant economic benefits. The Green Paper on the EU mortgage market asked stakeholders in 2005 about the idea, in response to which the Eurohypotheck received very positive support, but in the White Paper of 2007 the institution was paradoxically and unjustifiably abandoned. The Mortgage Credit Directive is a 'de-cafeinated' version of what went before, having little to do with the harmonization or convergence of mortgage markets in Europe and a sole focus on consumer protection. Since 2003 several different researchers (including Otmar Stöcker) have been working on the "Eurohypotheck Project", the objective of which is to continue the research begun in the 1960s, regarding the creation of a common European mortgage, the 'Eurohypotheck'. Their work produced the *Basic Guidelines for a Eurohypotheck* 2005⁵³¹ summarizing their results and proposing a model for a Eurohypotheck, that was ultimately discussed in the aforementioned EU Commission Green Paper 2005.

9.6.2. Round Table Research (Runder Tisch Grundpfandrechte)

*Runder Tisch Grundpfandrechte*⁵³² aims to provide a comparative description of the law of security rights over land in 22 (mainly European) jurisdictions. The Round Table of the group's titles is provided at the the headquarters of the *Verband deutscher Pfandbriefbanken* under the supervision of Dr Otmar Stöcker.

⁵²⁶ Aziz (n 64).

⁵²⁷ Nasarre Aznar, '*Malas Prácticas*' (n 52) pp 2673 ff. The parties are free to agree such an outcome, but presumably few lenders would do so.

⁵²⁸ Mortgage Credit Directive (n 8) art 39.

⁵²⁹ C Segré *The Development of a European Capital Market* (Brussels: EEC Commission, 1966), 177.

⁵³⁰ <http://housing.urv.cat/en/cover/research/project/eurohypotheck/>.

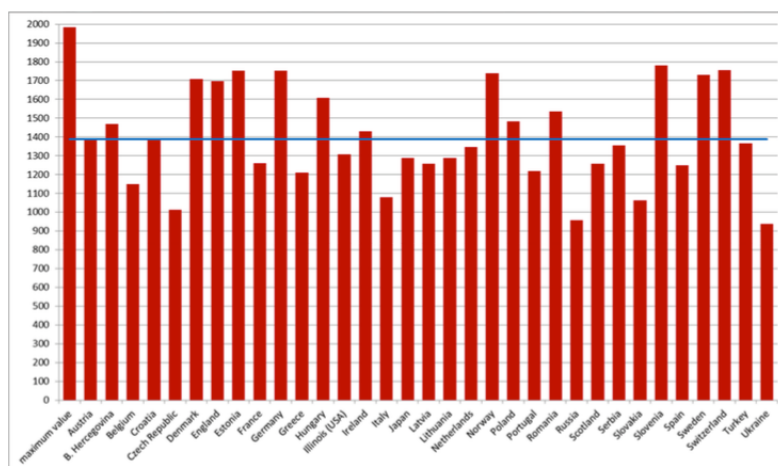
⁵³¹ [www.pfandbrief.de/cms/internet.nsf/0/6B4B095D2EE0FA70C1257B98004F1FEF/\\$FILE/Eurohypotheck%20-%20Basic%20Guidelines.pdf](http://www.pfandbrief.de/cms/internet.nsf/0/6B4B095D2EE0FA70C1257B98004F1FEF/$FILE/Eurohypotheck%20-%20Basic%20Guidelines.pdf).

⁵³² www.pfandbrief.de/cms/internet.nsf/tindex/de_de_rtall.htm;

Table 30 Perceived usability of national mortgages

Round Table „Flexibility, Security and Efficiency of Security Rights over Real Property in Europe”

- complete findings – perspective of usability (as at 21.1.2014) -



Source: Runder Tisch, Berlin, 21 January 2014.

A country based questionnaire has been used to investigate security rights over real property on several topics: types of security rights over real property; public disclosure requirements and protection of trust; effects of accessoriness; protection of the owner; enforcement; insolvency and utilisation in practice. The last results of the Group were published in 2014.⁵³³ One useful outcome of the Round Table discussions has been a ranking (as shown below) of the enforceability and usability of each national mortgage, measuring by an index the extent to which they are convenient for borrowers, lenders and legislator.

9.7. Recommendation

In general our advice is that no further steps should be taken in relation to residential mortgage finance until the Mortgage Credit Directive has bedded in, but we have a specific recommendation in relation to the review due before March 2019, namely:

Recommendation 9-A : The review of the Mortgage Credit Directive should include:

- a review of the operation of the Directive from the point of view of the cross border borrower; and
- a consideration of forms of credit not covered by the Directive, namely
 - guarantees of business debts secured on the entrepreneur's personal residence;⁵³⁴
 - equity release mortgages, ie the use of a home free of mortgage to generate spending money eg to pay for care in old age;⁵³⁵ and
 - Islamic finance products; and

⁵³³ Runder Tisch, *Flexibilität, Sicherheit und Effizienz der Grundpfandrechte in Europa/Rechtmonitoring*, (Berlin, Verband deutscher Pfandbriefbanken, October 2014); OM Stöcker, 'Flexibility, Security and Efficiency of Security Rights over Real Property in Europe', *Housing Finance International*, 2010 (Autumn), pp 14-18.

⁵³⁴ In England some protection is afforded by *Barclays Bank v O'Brien* [1994] 1 AC 180, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44.

⁵³⁵ Detailed warnings about Equity Release Schemes are given by the UK Government in its advice on 'How to Buy Property in Spain' (London: www.gov.uk, 2013). The Equity Release Victims Association may be contacted at www.erva.es.

- Resuscitation of the proposal for a common mortgage instrument for Europe (the Eurohypothec) to facilitate cross-border mortgage lending operations.

References

- Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property ('Mortgage Credit Directive)
- Sergio Nasarre Aznar, 'Malas prácticas bancarias en la actividad hipotecaria', *Revista Crítica de Derecho Inmobiliario*, nº 727, 2011, pp. 2673 ff
- Eurohypothec,
<http://housing.urv.cat/en/cover/research/project/eurohypothec/>
- Runder Tisch zu Flexibilität, Sicherheit und Effizienz der Grundpfandrechte in Europa/Rechtmonitoring, (Berlin: Verband deutscher Pfandbriefbanken, 2014)
- CU Schmid and C Hertel 'Real Property Law and Procedure in the European Union' (Florence, EUI, www.eui.eu/, 2005), point 2 in the various national reports
- P Sparkes *European Land Law* (Oxford: Hart, 2007), ch 9
- S Van Erp & B Akkermans, *Cases, Materials and Text on Property Law* (Oxford, Hart Publishing, 2012), ch 5

10. PROFESSIONAL ASSISTANCE

KEY FINDINGS

- Conveyancing is organised very differently in different EU Member States, though the most prevalent system is the 'Latin' notary.
- The involvement of lawyers or dedicated real estate agents in conveyancing transactions is necessary, though not necessarily the notarial system.
- A cross border purchaser requires advice about the transaction which is not covered by existing notarial practice.
- Buyers need advice independent of that given to sellers in cross border transactions.
- Advice could best be provided by bilingual professionals with expertise specifically dedicated to conveyancing.

10.1. Organisation of conveyancing in Europe

A person employed on behalf of a seller and/or a buyer to conduct the legal aspects of the transfer of residential property from seller to buyer is described in this report as a 'conveyancer'. Most Member States require all conveyancing (and certainly conveyancing for gain) to be carried out by professionals, and it is rare to dispense with professional assistance even where Do-It-Yourself conveyancing is permitted (as in Anglo-Celtic countries). The ZERP Study concluded that the market in *Conveyancing Services* amounted to EUR 16.7 billion annually,⁵³⁶ which might suggest that cross border fees (commercial and domestic) were worth in the region of EUR 150-300 million. Even if the market has taken a significant hit during the Global Financial Crisis, there remains a substantial cross-border segment of the market in residential conveyancing.

Member States almost always create a local monopoly over the preparation of formal documents, the administration of deceaseds' estates and conveyancing. Involvement of a notary in transactions with land is frequently mandatory.⁵³⁷ Across most of continental Europe conveyancing is carried out by ('Latin') notaries, but the organisation of the profession has regional variations.

Table 31 Conveyancers by region of Europe

Western continental Europe	Latin notaries
Central and Eastern Europe	Mainly Latin notaries Lawyers in CZ and HU
Britain and Ireland	Solicitors (95%+) Licensed conveyancers (<5%)
Nordic states	Real estate agents (especially in SE) Lawyers (a small %) elsewhere

Source: Schmid, *Conveyancing Services* (2007)

⁵³⁶ CU Schmid *Study on Conveyancing Services Market* (Bremen: ZERP, COMP/2006/D3/003, 2007), paras 51, 63-71, Table II-1.

⁵³⁷ Schmid, *Conveyancing Services* (n 1) para 8.

As a result conveyancing remains very much a national occupation with compartmentalised markets across Europe in many of which conveyancers are isolated from competition. Notaries conduct conveyancing in the majority of EU-28 Member States, from Iberia to the Baltic sea and in many of the later accession states of central and eastern Europe including the largest economies in the Czech Republic, Hungary and Poland.⁵³⁸ This reflects a system deeply embedded in the history of the Holy Roman Empire and the Papal curia. Medieval Bologna was already home to 2,000 notaries whilst in more rural areas such as the Cathar village of Montailou the same function was often carried out by parish priests.⁵³⁹ This history explains the tag 'Latin' for notaries in this tradition. A system with such deep roots clearly has its merits, but nevertheless its practices need to be appraised for appropriateness within the single market. In a few states lawyers coexist in the conveyancing market with notaries,⁵⁴⁰ but this is rare.

In Nordic countries much of the market is held by real estate agents lacking general legal training.

In Britain and Ireland conveyancing is conducted by lawyers (a mix of solicitors and licensed conveyancers). In England and Wales, the solicitors' monopoly was abolished by the Thatcher government in 1985, but they have held on to perhaps 97 per cent of the market, leaving 3 per cent or so for licensed conveyancers.⁵⁴¹ Although the market penetration by licensed conveyancers is relatively low, the existence of this rival profession has probably had a significant effect on the cost of conveyancing.

The basic task of this chapter is to assess the suitability of the professional assistance on offer to cross border purchasers. In order to do this it is important to establish the EU framework within which cross border practice takes place and in that context to compare and contrast the various professions presently operating within Europe.

10.2. Establishment as a conveyancer

10.2.1. Establishment as a lawyer

Economic globalisation has led to a revolution in the provision of legal services. According to Lee:

The ability of lawyers to provide services outside the jurisdiction in which they were originally located can be said to amount to a necessary precondition of wider economic globalisation.⁵⁴²

Within Europe progress has been made towards creating a single market in legal services but it falls somewhere short of enabling 'seamless' multi-jurisdictional practice, providing a legal service to clients that is indistinguishable in terms of its location.⁵⁴³ The EU has taken a number of important steps towards a single market in this area, including:

⁵³⁸ Schmid *Conveyancing Services* (n 1) p 3, para 88, Table III-3.

⁵³⁹ E Le Roy Ladurie *Montailou – Cathars and Catholics in a French Village 1294-1324* (London: Scholar Press, 1978), p 58.

⁵⁴⁰ In Hungary where there is a choice between a notary and a lawyer, 99% opt for a lawyer: Schmid, *Conveyancing Services*, (n 1) para 95.

⁵⁴¹ P Sparkes & S Sebastian, 'Case Study: England and Wales', in Schmid, *Conveyancing Services*, (n 1) para 379ff.

⁵⁴² RG Lee 'Liberalisation of Legal Services in Europe: Progress and Prospects' (2010) 30(2) *Legal Studies* 186, 186.

⁵⁴³ Lee 'Liberalisation of Legal Services' (n 7) at 187.

- a framework for the cross-border provision of legal services;⁵⁴⁴
- inclusion of lawyers within the general liberalisation of service providers;⁵⁴⁵
- rights of establishment for lawyers;⁵⁴⁶ and
- mutual recognition of legal qualification.⁵⁴⁷

Of these initiatives, the right of establishment is most significant. Qualified lawyers (whether self-employed or salaried) have been able since the spring of 2000 to practise permanently and without restriction under their home professional title in another member state.⁵⁴⁸ Lawyers may practice using their home country professional title and firm name.⁵⁴⁹ Practice can cover the law of either state, as well as Community and international law,⁵⁵⁰ though there are clearly problems of legal culture and language barriers in advising on host state laws. Home state registration must be maintained and, in addition, registration is required in the host state.⁵⁵¹ Practice is subject to meeting host state standards of conduct and insurance and is subject to host state discipline. Home standards must also be maintained for three years, but full integration occurs after three years regular practice in a host state, after which the host state must treat the foreign registered lawyer in the same way as a lawyer qualified in the host state, and home state regulation drops away.⁵⁵²

These steps have gone some way towards creating a single European legal services area and perhaps even a European legal profession though the leading text refers more cautiously to *The Legal Profession in the EU*.⁵⁵³ The market is heavily stratified,⁵⁵⁴ and the single market is more of a reality for commercial clients than it is for private clients.

10.2.2. Conveyancing not an official activity

Conveyancing services remain compartmentalised on national and regional lines. This, it is now clear, is not entrenched in the Treaties. Until a recent case it could be argued that conveyancing monopolies were entrenched by the statement in article 51 of the Treaty on the Functioning of the EU that the right of establishment,

shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority.

This argument has been tested, and rejected, in relation to the functions of the notarial profession in Belgium.⁵⁵⁵ The principal activity of notaries is to establish authentic instruments in proper form, having ascertained that the legal pre-conditions to the validity of the document are satisfied. Authentication of conveyancing documents is mandatory,

⁵⁴⁴ Lawyers' Services Directive, 77/249/EEC, OJ 1977 L78/17; Case 2/74 *Reyners v Belgium* [1974] ECR 631, ECJ; Case 427/85 *Commission EC v Germany (Lawyers' Services)* [1988] ECR 1123, ECJ.

⁵⁴⁵ Services Directive, 2006/123/EC, OJ 2006 L374/36, arts 2, 4.

⁵⁴⁶ Lawyers' Establishment Directive, 98/5/EC, OJ 1998 L77/36.

⁵⁴⁷ Directive on the recognition of professional qualifications, 2005/36/EC, OJ 2005 L255/22; C-313/01 *Morgenbesser v Avvocati di Genova* [2004] ECR I-13467, ECJ.

⁵⁴⁸ Lawyers' Establishment Directive (n 11); P Nebbia 'The New Directive on Lawyers' Establishment' [1998] *European Current Law Yearbook* xlii.

⁵⁴⁹ Lawyers' Establishment Directive (n 11) arts 2, 12; C Toms 'Associations of Lawyers in the EU' (2005) 16 *European Business Law Review* 113.

⁵⁵⁰ Lawyers' Establishment Directive (n 11), recital 10 and art 5.

⁵⁵¹ C-359/09 *Ebert v Budapesti Ügyveek Kamara* [2011] ECR I-269, ECJ.

⁵⁵² Lawyers' Establishment Directive (n 11) arts 3, 6, 7, 10.

⁵⁵³ B Nascimbene & E Bergamini *The Legal Profession in the EU* (The Hague: Kluwer, 2009).

⁵⁵⁴ Lee 'Liberalisation of Legal Services' (n 7) at 187.

⁵⁵⁵ Case C-47/08 *Belgium v Commission EU (Belgian Notaries)*, [2011] ECR I-4156, ECJ, Grand Chamber.

failing which they are void. This process guarantees the lawfulness and legal certainty of documents entered into by individuals.⁵⁵⁶ The European Court of Justice nevertheless concluded that the activities of notaries in Belgium are not connected with the exercise of official authority.⁵⁵⁷ In parallel cases the same result was reached for notaries in other countries. Relevant points from the reasoning are that:⁵⁵⁸

- exceptions to the freedom of establishment have to be interpreted restrictively;
- these activities had to be directly connected with the exercise of official authority (the court appeared to attach little weight to the words 'even occasionally' in art 51);
- notarised documents are based on the consensus of the parties rather than an exercise of official power;
- the exercise of official powers is not demonstrated by mandatory formality requirements, nor by the probative force and direct enforceability of notarised documents;⁵⁵⁹ and
- reservation of the power to verify the lawfulness and effectiveness of documents to nationals was unjustified.

The lawfulness of restrictions on notarial practice other than nationality requirements was not determined either way.⁵⁶⁰

The European Court of Justice rejected two commonly made arguments for official status:

- (1) preserving deeds: notaries claim a quasi-public role in producing and preserving authentic documents. For example in Italy, the main role for the notary is to give public recognition to specific will, to preserve them once filed, to issue copies, certificates and extracts of the same.⁵⁶¹ This function is better carried out by a public registry with an appropriate IT infrastructure.
- (2) tax collection: notaries often claim a public role in the collection of tax,⁵⁶² but although they (and other professionals such as English solicitors) no doubt form a conduit for payments of transfer taxes/stamp duty, the fact is that the land registries provide an effective and official check that taxes have been paid.

10.2.3. Establishment as a conveyancer

Freedom of establishment may not impinge upon the reserved fields of probate and conveyancing without separate qualification.⁵⁶³ Almost all EU-28 states do close their conveyancing markets to some extent. The *Belgian Notaries* case does not outlaw all rules restricting competition with notaries but rather requires any restrictions to be justified in

⁵⁵⁶ *Belgian Notaries* case (n 20) paras 89-104.

⁵⁵⁷ *Belgian Notaries* case (n 20) para 123; the same had been argued by Schmid, *Conveyancing Services* (n 1) paras 111-113.

⁵⁵⁸ *Belgian Notaries* case (n 20) paras 84-85, 90-92, 93, 95-98, and 99-103.

⁵⁵⁹ Rongxin Zeng, 'Real Estate Operations and Notary System at Civil Law Legal System', *US-China Law Review*, 2012, vol 9, p 550.

⁵⁶⁰ See below point 10.2.4.

⁵⁶¹ Law No 89 of February 16th 1913 on rules governing the notarial profession and notarial archives, *Gazzetta Ufficiale* No 55 of March 7th 1913, art 1; Royal Decree no 1326 of September 10th 1914.

⁵⁶² Schmid, *Conveyancing Services*, (n 1) para 127.

⁵⁶³ Lawyers' Establishment Directive (n 11) art 5; C-506/04 *Wilson v Luxembourg Bar* [2006] ECR I-8613, ECJ, para 74.

the same way as any other restriction on the right of establishment.⁵⁶⁴ As the court rules:

[T]he fact that notarial activities pursue objectives in the public interest, in particular to guarantee the lawfulness and legal certainty of documents entered into by individuals, constitutes an overriding reason in the public interest capable of justifying restrictions of Article 43 EC deriving from the particular features of the activities of notaries, such as the restrictions which derive from the procedures by which they are appointed, the limitation of their numbers and their territorial jurisdiction, or the rules governing their remuneration, independence, disqualification from other offices and protection against removal, provided that those restrictions enable those objectives to be attained and are necessary for that purpose.⁵⁶⁵

So restrictions on practice as a conveyancer require justification in the usual way. However, the universality of restrictions suggests that it is justifiable to restrict the conveyancing market to qualified professionals. Much will therefore depend upon the particular restriction and the reason for it. Our task is to consider restrictions for their impact on cross border purchasers.

10.2.4. Anti-competitive practices of notaries

Across most of the continent of Europe the notarial conveyancing profession retains a number of anti-competitive practices, including:

- a *numerus clausus* imposed to limit the number of practising notaries principle;⁵⁶⁶
- a prohibition of advertising;⁵⁶⁷ and
- fixed scales of fees.⁵⁶⁸

Thus the notarial profession is treated differently from almost every other liberal profession.⁵⁶⁹ Some liberalisation has taken place, especially in the Netherlands in 1998,⁵⁷⁰ so that there is now:

- no fixed number of notaries in Hungary or the Netherlands;⁵⁷¹
- no scale fees in Austria,⁵⁷² the Netherlands, nor (since 2006) in Italy;⁵⁷³ and
- no bar on advertising in the Netherlands.

The ZERP study concluded that Latin notary systems were the most expensive way of delivering conveyancing services and that no corresponding advantage in the quality of the service provided could be demonstrated.⁵⁷⁴ Their econometric analysis led to these conclusions:⁵⁷⁵

First, we have found evidence that high levels of regulation leads to high prices

⁵⁶⁴ TFEU art 52; *Belgian Notaries* case (n 20) paras 95-97.

⁵⁶⁵ *Belgian Notaries* case (n 20) para 97.

⁵⁶⁶ Germany has 9,000 notaries: Schmid, *Conveyancing Services*, (n 1) para 51.

⁵⁶⁷ Schmid, *Conveyancing Services*, (n 1) paras 179-181.

⁵⁶⁸ Schmid *Conveyancing Services*, (n 1) paras 11-14.

⁵⁶⁹ R Van den Bergh & Y Manliage 'Competition in Professional Services Markets: Are Latin Notaries Different?' *Journal of Comparative Law and Economics* 2 (2006), 189-214.

⁵⁷⁰ AD Plaggemars 'Case Study: Netherlands' in Schmid, *Conveyancing Services*, (n 1) paras 461 ff.

⁵⁷¹ Schmid, *Conveyancing Services*, (n 1) para 103.

⁵⁷² Scales lay down maxima.

⁵⁷³ Following the decision in C-94/04 etc *Cipolla Fazari* [2007] ECJ I-11421, ECJ.

⁵⁷⁴ Schmid, *Conveyancing Services* (n 1) para 9.

⁵⁷⁵ Schmid, *Conveyancing Services*, (n 1) paras 375-378.

and low levels of regulation lead to lower prices thus showing a potential financial benefit for consumers from deregulation.

Second, the results do not show any proof that high prices have a positive correlation with high service assessment. ...

So, the analysis indicates - within the limits of our approach - that high levels of regulation lead to higher fees whilst not leading to a better outcome in terms of choice for consumers, quality, certainty or speed.

This needs to be treated with some caution because research by the Legal Services Board shows that UK consumers so rarely use lawyers that less than a third had fair grasp of what lawyers do and hence consumers tended to be disempowered when comparing services. The failure to record dissatisfaction may reflect either satisfaction or ignorance.⁵⁷⁶ While the inefficiency of the Latin Notarial System was confirmed by Mattsson⁵⁷⁷, Murray⁵⁷⁸ disagreed stating that deregulation of conveyancing systems does not necessarily imply lower costs or higher efficiency. To the extent that the ZERP study establishes its case that reform of the notarial profession would benefit the consumers of conveyancing services, we assume that it would benefit cross border purchasers even more so, but reform of the notarial profession is not central to satisfying the conveyancing needs of citizens buying in another Member State.

10.2.5. Regional compartmentalisation of the notarial profession

An extreme position is reached in Germany (and also Italy) where conveyancing is restricted by the civil code to the notarial profession,⁵⁷⁹ which is constricted both by a *numerus clausus*⁵⁸⁰ and on territorial grounds.⁵⁸¹ A German notary must practice within the district in which he or she is registered, though the notary is able to convey land elsewhere in Germany. Notarial districts are quite small with more than twenty in some German states. This territorial restriction is valid in German law and prevents, according to a recent decision of the German Federal Court of Justice, German notaries from executing deeds in other EU Member States. In the absence of a reference to the European Court of Justice,⁵⁸² it is difficult to see how this accords with the principles of the single market.⁵⁸³ It seems very odd to have a profession dissected into so many sub-sectors in today's European market, though the issue is peripheral to the subject of this report.

⁵⁷⁶ *Quality in Legal Services – Original Research* (London: Vanilla for Legal Services Consumer Panel, September 2010).

⁵⁷⁷ H Mattsson, 'Process of Sale in the Nordic Countries – Comparisons. TS 5H – Land Administration Case Studies I. Integrating Generations', (Stockholm: FIG Working Week 2008).

⁵⁷⁸ PL Murray, 'The Role of Notaries in Real Estate Transactions – Current Challenges and Perspective on the Future'. (Salzburg, 2008).

⁵⁷⁹ BGB, sections 313 (agreement to buy land), 518 (promise to make a gift) and 1410 (mortgage) but curiously the notarial monopoly does not apply to the final transfer of land, an omission which appears to distort German practice.

⁵⁸⁰ I.e. a numerical cap on the number of notaries.

⁵⁸¹ Schmid, *Conveyancing Services*, (n 1) paras 142-175. French notaries were deregionalised in 1986.

⁵⁸² Bundesgerichtshof of March 4th 2013, NotZ (Brfg) 9/12, *Neue Justische Wochenschrift*, 2013, 1605-1609.

⁵⁸³ Thomas Ritter, 'Entstaatlichung der deutschen Notariatsverfassung', *Europäische Zeitschrift für Wirtschaftsrecht* 2011, 707, 708-710; Tobias Pinkel & Christoph Schmid, 'Ein Markt für transnational ausgebildete europäische Juristen?', *Hanse Law Review*, 2011, 75, 125-127; Pinkel & Schmid, *Neue Justische Wochenschrift*, 2011, 2928, 2930.

10.3. Notarial functions in residential conveyancing

Notarial activities in conveyancing pursue a legitimate public interest of guaranteeing the lawfulness and legal certainty of documents entered into by individuals. It is therefore legitimate to enact restrictions such as the mandatory involvement of notaries in conveyancing and probate, provided that these restrictions 'enable those objectives to be attained and are necessary for that purpose'.⁵⁸⁴ As a first step we need to consider specific restrictions in particular Member States in the context of purely internal conveyancing transactions, before turning to needs of a buyer from another Member State. These can be contrasted with the way that those functions are carried out in Nordic and Anglo-Celtic systems to suggest the extent to which the notarial procedures are necessary to secure lawful and effective conveyancing documents.

10.3.1. Verifying the identity of the parties

Peter Mayle, who had presumably bought houses both in America and in England, was appalled by the complications attached to the purchase of the house in Provence which made him famous. The seller was anxious to sell and he was anxious to buy, but they both got dragged reluctantly into 'the national sport of paper-gathering'. In his opinion he should have been warned about the complexities ahead of him,⁵⁸⁵ but in truth as well as transparency a cross border purchaser just needs the procedure to be simple.

It is obvious that identity of the **seller** of land needs to be established securely. This is essential to prevent fraudulent sales. With closed registers this is relatively less of a problem, since production of the evidence needed to access the title goes some way to establishing that the client is indeed the owner of the property, though it is not conclusive against theft of the title documents. With open registers more secure procedures are needed. There is evidence from the Torrens titles of Australia of thieves completing fraudulent sales while owners are away on holiday.⁵⁸⁶ No system can be completely safe against forgery. It is commonly said that the notarial system is more secure than the common law system, but there appears to be no empirical evidence either way. There is certainly plenty of mortgage fraud, and it is suggested that the issue is sufficiently important to justify the expense of proper empirical enquiry, for which the banks might be persuaded to pay. It is best not to formulate judgements about the relative security of systems until there is proper research from which to draw conclusions. The English register is backed by the state indemnity funded from registration fees and which has a relatively low level of claims (mainly based on mortgage fraud).⁵⁸⁷ We are not aware of comparative research on the prevalence of fraud in the various systems, and there is no doubt much to be learnt from each other. These two systems need to be subjected to cost benefit analysis before a conclusion is reached.

The focus of this report is on the **purchaser**. It is equally important to establish the conveyancing identity of the purchaser properly, though for different reasons. The concerns are to prevent the use of the 'clean' property market for laundering the proceeds

⁵⁸⁴ TFEU art 52; *Belgian Notaries* case (n 20) paras 95-97; Schmid, *Conveyancing Services*, (n 1) paras 114-115.

⁵⁸⁵ Peter Mayle *A Year in Provence* (London: Hamish Hamilton, 1989), 'January', pp 18-19.

⁵⁸⁶ Perth Now, August 15th 2013, www.perthnow.com.au.

⁵⁸⁷ In 2014/15 Land Registry gross fee income was GBP 286M and indemnity payments just over GBP 8.4M (of which GBP 5.2M related to forgery and fraud): HM Land Registry *Annual Report and Accounts 2014/15* (London: Stationery Office, 2015), p 45. Total turnover of property in 2014 was around GBP 391 billion: HM Revenue and Customs *Annual Property Transaction Statistics* (London: Office for National Statistics, 2015), Table 4 (England and Wales) - 2014. Insurance costs are therefore trivial in the context of the overall market.

of crime and terrorist funds. Here, it is very difficult to see that the notarial system can possibly have any advantage over checks carried out by less qualified lawyers. Money laundering rules require any business to 'know their client' when establishing a business relationship with a new client⁵⁸⁸ and the basis of the European fight against organised crime is equivalence, that is that professionals should accept checks by other equivalent professionals from other Member States and from outside the EU. The notarial system thus appears to be an excessive reaction to the need to know clients as purchasers.

The function of the notary has to be set in the context of other administrative procedures. In Spain a first step for a foreign purchaser is to obtain a foreigner's identification number (a *Número de Identificación de Extranjeros* = NIE). This is primarily a taxation formality, but the number is needed before buying land or engaging in any financial transactions such as applying for a mortgage or opening a bank account. The Manchester firm Pannone has this advice for innocents in Spain:

We recommend you apply for your NIE as the initial step as early as possible, before viewing properties, when considering undertaking a purchase in Spain.⁵⁸⁹

On completion the NIE is required by the notary, so the notarial function of ascertaining identity is largely overtaken by administrative and taxation procedures. We advise that a similar procedure should be adopted throughout the EU to ensure that cross border purchasers are linked to national taxation authorities.⁵⁹⁰

10.3.2. Preventing premature contracting

Consumer protection is withheld from purchasers of land on the basis that transactions with land can only be entered into with the advice of a notary. The provision of legal advice negates the imbalance that can otherwise exist in trader to consumer (T2C) contracts. Removal of consumer protection is therefore posited on the provision of legal advice before entry into obligations.

It is the same with ordinary land sales of the C2C (ie consumer to consumer) pattern. Any transaction is of great significance and complexity for the buyer, so it follows that legal advice should be provided before any obligation is undertaken. One would expect therefore national systems to invalidate any obligational contract entered into before the provision of notarial advice. This is not, however, the case generally on the continent (except Germany where contracting takes place very late in the process and Belgium where notaries draft preliminary contracts). The reserved documents requiring notarisation are invariably the final sale contract (confusingly called a contract but in reality a transfer equivalent to the conveyance or land registry transfer in Anglo-Celtic practice). The buyer incurs obligations under a contract prepared by the estate agent and signed by the parties without legal advice. It is true that the buyer can withdraw from this preliminary contract (confusingly named because it is a true obligational contract) but only by forfeiting the deposit. This practice was presumably adopted when house prices were low and the deposit could be seen as a throwaway stake, but is surely dubious when, to take France as an example, average prices in almost every Département of France exceed EUR 100,000 (thus putting at least EUR 10,000 at stake).⁵⁹¹

⁵⁸⁸ Fourth Money Laundering Directive, (EU) 2015/849, OJ 2015 L141/73; see below point 11.5.1.

⁵⁸⁹ *A Beginner's Guide to Purchasing Property in Spain* (Manchester: Pannone, www.pannone.com, 2015), p 6.

⁵⁹⁰ See above point 8.5.2 and below point 11.7.4.

⁵⁹¹ All the various indices of English prices put the average in 2015 above GBP 300,000, so if the continental system were in place the throwaway stake would be GBP 30,000 (almost EUR 40,000 on average).

However, the scope of intervention of notaries is widely different. In Germany and Poland, a detailed sales contract and a separate contract transferring the property need to be drafted by a notary, though both are usually done in one document. If the notarial form is not observed, the transfer will not be legally valid and will be denied registration. In some other countries including the Netherlands and Spain, whilst the parties themselves or an estate agent drafts the detailed contract of sales, the subsequent notarial contract transferring the property will repeat so to speak the essential legal elements. In yet a third group of countries following the French mode (including France itself, Belgium, Italy, Luxembourg, Portugal and Spain), a notarial instrument is required only for the registration procedure. This means that a simple written (or even oral) contract is perfectly valid under private law and may even entail the transfer of property, but that the application for registration must be accompanied by a notarised document, making a notarial contract effectively mandatory. In these countries, the preliminary contract could be drafted by someone else - the parties themselves, an estate agent or a lawyer (though this is done by notaries in Belgium). In yet another group of countries, only a certification of signature for the registration in the land register is required. Whereas in Slovakia and Slovenia, there is no alternative to the notary, in Austria and the Czech Republic the certification can also be done by the district court, in the Czech Republic also by an advocate. In all these countries, the drafting of the contract is mostly done by lawyers (who enjoy the exclusive right to offer this service for money) or by the parties themselves - with the exception of Austria where notaries have retained a considerable market share.

Given the stated intention of ensuring protection of parties to conveyancing transactions, it is strange that the precise notarial monopoly varies from Member State to Member State. The lack of linkage between the precise stage of the transaction at which notarial involvement is mandatory and the onset of obligation does not secure an adequate level of consumer protection for clients, and particularly not for cross-border purchasers.

In Anglo-Celtic practice, buyers are usually also sellers in chains of transactions, and the practice is therefore directed to ensuring that no obligation is entered into before all parties in the chain are ready to proceed. This is achieved by a formality rule for contracts to sell or to buy land⁵⁹² which ensures in practice that contracts never arise without legal advice being provided on them. Legal advice is given at a much earlier stage than on the continent. DIY conveyancing is possible but rare in practice.

10.3.3. Securing title

The core responsibility of any conveyancer acting for a buyer is to secure title for the client. This involves checking the registered title, any necessary checks of matters off the register that affect the land, securing priority for the transaction, and carrying out registration formalities after the purchase. These functions are carried out by notaries in much of Europe, and the role of notaries varying (as outlined in 10.3.4.) between, for example, in on the one hand Spain,⁵⁹³ France,⁵⁹⁴ and Belgium,⁵⁹⁵ and on the other hand

⁵⁹² Law of Property (Miscellaneous Provisions) Act 1989 s 2.

⁵⁹³ Decree June 2nd 1944.

⁵⁹⁴ Phillippe Théry, 'La Transmisión de la Propiedad en el Derecho Francés: Principios y Cláusulas Contractuales', in FJ Orduña Moreno & F de la Puente Alfaro, *Los Sistemas de Transmisión de la Propiedad Inmobiliara en el Derecho Europeo* (Madrid: Civitas, 2009), p 150.

⁵⁹⁵ V Sagaert & A Lemmerling, 'Transfer of Immovable Property in Belgian Law' in Andrea Pradi, *Transfer of Immovable Property in Europe*, (Trento: Università degli Studi di Trento, 2012), p 57

Germany⁵⁹⁶ the main variations being the extent to which electronic procedures are adopted.

Similar work is undertaken by solicitors or licensed conveyancers in the Anglo-Celtic tradition and by real estate agents in Nordic states. We are not aware of any empirical research about the relative technical quality of conveyancing work in these countries, and so there is no scientific evidence to suggest a need for fundamental changes.

In most states, conveyancing procedures are standardised,⁵⁹⁷ and as technology is deployed to an increasing extent the 'form filling' aspect of conveyancing can only increase. In all countries land registries act as gatekeepers for buyers' applications for registration and it should be possible therefore to conduct proper empirical research to determine the relative quality of conveyancing work in the various systems and from state to state by seeing how many applications meet the requirements for registration. Schmid reviewed the publicly available measures of performance and concluded that the evidence did not support the case for reservation of conveyancing functions to notaries.⁵⁹⁸ The case is persuasive but not entirely decisive because of the limitations of the available data which he recognised. The issue is sufficiently important to merit proper empirical research. In the absence of scientific data we would prefer not to express a judgement about variations in the technical quality of conveyancing other than the observation that the efficiency of registration systems is likely to be a more significant factor than professional competence.

10.3.4. Notarisation of documents

Although involvement of a notary in conveyancing is mandatory across most of the continent, it is odd that the particular monopoly stage varies widely⁵⁹⁹ between:

- certification of the signature (the Czech Republic, Slovakia and Slovenia);
- execution of the sale document (Germany⁶⁰⁰ and Greece);
- execution of the property transfer (the Netherlands and Spain); or
- registration (Belgium, France, Italy, Luxembourg and once more Spain).⁶⁰¹

The precise object of involving notaries is to ensure the legality of the land transaction⁶⁰² and thus to reduce legal actions.⁶⁰³ Geimer suggests that notaries save money in the end by precluding legal disputes, with only one notarial deed in a thousand becoming subject to a court dispute.⁶⁰⁴ One aspect of this is drafting the sale document to ensure that it is technically correct, but it remains to be demonstrated that accurate drafting can only be achieved by notaries, or that notaries are better at drafting than less qualified lawyers. A second aspect is to ensure that there is a true consensus between the parties. Legal advice by a solicitor has the same effect of precluding the argument that a common law deed should be avoided for undue influence,⁶⁰⁵ though it is necessary to show that proper

⁵⁹⁶ Friedrich J Reibold, *Praxis des Notariats – Praxisleitfaden* (Cologne: Deubner Verlag, 2007).

⁵⁹⁷ Schmid, *Conveyancing Services*, (n 1) para 132.

⁵⁹⁸ Schmid, *Conveyancing Services*, (n 1) para 141.

⁵⁹⁹ Schmid, *Conveyancing Services*, (n 1) para 94.

⁶⁰⁰ Sections 313, 873, 925 BGB.

⁶⁰¹ Schmid, *Conveyancing Services*, (n 1) para 114.

⁶⁰² Schmid, *Conveyancing Services*, (n 1) para 122-124.

⁶⁰³ Schmid, *Conveyancing Services*, (n 1) para 126.

⁶⁰⁴ R Geimer 'The Circulation of Notarial Acts' (XXIII International Congress of Latin Notaries, www.bnotk.de), p 7. Dyson records 4,000 negligence claims (60% successful) arising from 4.5 million French *actes authentiques* in 1997: H Dyson *French Property and Inheritance Law – Principles and Practice* (Oxford, Oxford University Press, 2nd edn, 2003), p 8.

⁶⁰⁵ *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44.

legal advice was provided and not, for example, untranslated advice by an English speaking solicitor to Urdu speaking parents.⁶⁰⁶ Since both parties have separate advice, it is clear that when the conveyancers advise their parties to exchange contracts that there is a consensus.

All this surely suggests that the requirement for a lawyer to be involved in conveyancing is sound, but the utility of the notary remains to be tested. It is a sensible step to require legal advice to be provided before a purchase of land is executed, but it remains open to question whether legal advice should not be required earlier, before the buyer contracts to buy. This issue is considered as an aspect of 'Process'.⁶⁰⁷

10.3.5. Transactional advice

According to Geimer, speaking of the German profession,

The notary is obliged to provide those legal services the guaranteeing and protection of which operates for legal security and the avoidance of conflicts which lies both in the interests of the private parties concerned and in the general public's interest.⁶⁰⁸

Geimer's statement seems to correspond closely to the common law position, in which a solicitor would be liable in negligence for failure to advise on any aspect of a transaction, including the title, financial aspects, tax or public law.⁶⁰⁹

10.4. Joint or separate representation?

Representation of the parties to a conveyancing transaction is organised in very different ways in different European states. Parties to be considered are the:

- seller (typically a single individual or a couples);
- seller's mortgagee;
- buyer (again usually either an individual or a couple); and
- bank lending to the buyer.

All of these parties may have interests that coincide or interests that conflict. A first step is to consider the most common methods of organisation of conveyancing adopted in EU-28 countries and to appraise them in turn as responses to the needs of the cross border purchaser. These are:

- conveyancing conducted by a single notary;
- division of conveyancing between notaries;
- professional collaborations of notaries;
- conveyancing by a single real estate agent; and
- adversarial conveyancing by English conveyancers.

⁶⁰⁶ *National Westminster Bank v Amin* [2002] UKHL 9.

⁶⁰⁷ See below point 11.3.

⁶⁰⁸ Geimer 'Circulation of Notarial Acts' (n 69) p 28; *Dyson French Property*, (n 69) pp 1, 4-5.

⁶⁰⁹ *Hurlingham Estates v Wilde* [1997] 1 Lloyds Reports 525, Lightman J.

10.4.1. Conveyancing by a single notary

Undoubtedly the thing that seems oddest to English buyers abroad is that a single notary acts for both parties.⁶¹⁰ A notary has the task of certifying the authenticity of the document effecting a transfer of land for official purposes, and assisting the parties to effect a formal legal act such as the transfer of a house, remaining neutral as between the parties,⁶¹¹ a task that one can see does not require separate representation.

The Schmid report concluded that the German profession had a high reputation and client satisfaction.⁶¹² This may be because the buyer may choose his own notary, and is encouraged to do so. High satisfaction also exists with the services of notaries in Poland according to the explanation of the Polish practice by Professor Magdalena Habdas. Ultimately, the notary makes sure the parties were given advice that is legally sound and that they understand. The parties see the notary as an unbiased public official, who makes sure no one's interests are violated. In a typical residential purchase the parties are happy not to consult lawyers and simply go to the notary who has to check all the documentation anyway. Foreign buyers often come to notaries directly (sometimes with a sworn translator) and do not use the separate help of lawyers. Agents give clients only basic legal information, the rest being checked by the notary. In the case of new build, developers appoint a notary who handles the transactions of a given project, speeding up the process of conveyancing and reducing costs. The notary remains unbiased and makes sure the developer is not trying to circumvent the law, at the risk of his own criminal liability. A notary is not acting for anyone, both in theory and in practice. He makes sure the transaction is legal, the parties have proven their rights, the documents are not contradictory, there is no extortion or money laundering. As an unbiased link the notary confirms the legality of the transaction.

As Yaigre and Pillebout observe, speaking of the advantages and disadvantages of each system,

'the spirit of the Latin system ensures that the draftsman of a document entered into between parties when they were in agreement shall not be the same person who attacks or defends it when difficulties arise between the parties.'⁶¹³

There is, therefore, no case for the EU intervening in conveyancing transactions with no cross border element. It is for Member States to ascertain whether their nationals are adequately served by the notarial profession and given adequate advice or whether some other arrangement of the conveyancing profession would provide a better service. The question for this report is whether cross border purchasers are able to reach an agreement on a level playing field in the spirit that Yaigre and Pillebout suggest. The *notaire* only acts in cases of an already concluded agreement 'prepared in the majority of cases by the seller's estate agent.'⁶¹⁴

10.4.2. Conveyancing by separate notaries

In every country in Europe it appears that the buyer is entitled to insist on separate representation with the overall fees being split between the notaries so that separate representation costs no more than common representation. On the one hand the continued use of dual representation in such a system demonstrates that clients of

⁶¹⁰ Schmid, *Conveyancing Services*, (n 1) para 89.

⁶¹¹ Schmid, *Conveyancing Services*, (n 1) para 137.

⁶¹² Schmid, *Conveyancing Services*, (n 1) para 326 and Table VI-5.

⁶¹³ J Yaigre & J-F Pillebout, *Droit Professionnel Notarial* (Paris: Litec, 5me edn, 2000), para 269.

⁶¹⁴ Dyson *French Property*, (n 69), 6; see below point 11.3.1.

notaries clearly have considerable faith in the ability of notaries to act neutrally. On the other hand, a purchaser is bound to conclude that he has something to gain and nothing to lose by insisting on split representation. This is usual for buyers in Portugal⁶¹⁵ and for banks in Spain.⁶¹⁶ Buyers in Spain are informed by the official UK Government guidance that they are entitled to insist on their own notary⁶¹⁷ but what is so interesting about this official document is that it is drafted throughout on the assumption that the buyer has not appointed a lawyer but is carrying out checks himself. This suggests a strong case for mandatory intervention to secure proper consumer protection. The authors attach considerable weight to the view of Harry Dyson, the leading English expert on French conveyancing. His basic principle is the 'maintenance in transactions in which the English are involved of the basic English rule of separate representation'.⁶¹⁸

There can, therefore, be only one rule to follow in all cases in which those used to the Anglo-Saxon (English) system are involved. Each party should be separately represented by his or her *notaire* in all cases where there is or may be a conflict of interest. Parties have an absolute right to their choice of *notaire* and nothing can override this right. Such a choice does not make for delay; on the contrary, it frequently ensures that the transaction moves along at a normal pace. Nor in the case of the purchase of land does it increase the costs for the buyer; the *notaires* involved split the fee. However, care must be taken in certain other circumstances (such as the administration of estates) where professional rules dictate who will act for which party and specific enquiries must be made.⁶¹⁹

The question posed is how the requirement to give transactional advice is consistent with representation of both parties. One can see that there are cases where both parties have an equal interest in a transaction being completed as quickly and cheaply as possible. However, there are also many cases where a title is dubious and some where the only proper advice to a buyer is not to proceed with a transaction. Many foreign buyers in Spain (though officially less than 1%⁶²⁰) have been assisted by notaries to acquire property that is illegal or has serious issues with the public title to the land. [The notarial duties may well not extend to advice on these issues.] However, there are innumerable points in perfectly ordinary conveyancing transactions in which the parties may have competing interests, eg:

- ultimatums about the progress of the transaction;
- requests for access before completion or for the seller to retain limited use after completion;
- minor defects in title;
- the thoroughness of checks on the legality of the property;
- physical defects revealed by survey reports;
- problems about fixtures after completion, etc, etc.

There has to be a question about whether a bank and a borrower have a single interest in a transaction. The public/private divide seems to manifest itself in the perception that a

⁶¹⁵ Schmid, *Conveyancing Services*, (n 1) para 90.

⁶¹⁶ Schmid, *Conveyancing Services*, (n 1) para 92.

⁶¹⁷ 'How to Buy Property in Spain' (London: www.gov.uk, 2013).

⁶¹⁸ Dyson *French Property*, (n 69) p 6; he cites a paper by Hervet & Ryssen.

⁶¹⁹ Dyson *French Property*, (n 69) p 6.

⁶²⁰ See above n 69.

conveyancer's function is limited to securing a good title to the property in private law. Where a conveyancer is allowed to represent both parties to a transaction, this representation needs to cease whenever the interests of the parties begin to conflict.

10.4.3. Notarial collaborations

A project worth highlighting is EUFides,⁶²¹ a shared platform created by the Notaries of Europe whose aim is to facilitate cross border real estate transactions in Europe. It is sponsored by the Council of Notaries of the European Union (CNUE)⁶²². This aims to facilitate cross border real estate transactions by bringing purchasers into contact with their usual notary, who will be in charge of carrying out the legal transaction in collaboration with the notary of the Member State where the property is located. The notaries shall inform and advise both the buyer and seller about the legal consequences under national law and will be in charge of all relevant administrative procedures to be made. It is expected this collaboration to take place almost entirely through electronic means. According to the two notaries that took part in the pilot project⁶²³, the core of the EUFides project is collaboration between notaries from countries that follow a Latin notary system.⁶²⁴ Although the system is useful it does not address the issues faced in many cases that is to bridge the divide between Latin notaries and British conveyancers or Nordic agents, and it does not address the issue of how to overcome a language barrier, since both notaries must be able to communicate in a common language.

EUROJURIS is a network of independent law firms in Europe – lawyers in 610 towns spread over eighteen countries.⁶²⁵ IBERJURIS, the Spanish branch, established a specialised group in the field of property law, with the objective of sharing and exchanging knowledge on property law in a professional and practical manner. They produced a checklist, and according to Mr. Xavier Ibarrondo⁶²⁶ (Vice President of Eurojuris Belgium) they should have this practical tool in every Member State, and perhaps legal professionals across the Member States could draft a standardised series of checklists working with the European Parliament. As a result, a sort of list or brochure with the most common problems in each legal system concerning cross border acquisitions could help to simplify the whole process.

These and other collaboration demonstrate a welcome willingness by notaries to recognise that cross border transactions require a range of expertise which any one professional is unlikely to possess. The basis of EUFides is separate representation of seller and buyer and this signals the way forward for cross border conveyancing.

10.4.4. Conveyancing in Nordic states by a single real estate agent

The greater part of the conveyancing market is held by real estate agents in Nordic countries, to the point where lawyers are almost excluded in Sweden.⁶²⁷ This system

⁶²¹ www.notaries-of-europe.eu/index.php?pageID=8033.

⁶²² www.cnue.be.

⁶²³ 'El Proyecto EUFIDES: Un Proyecto de Hoy Para el Futuro' *El Notario del Siglo, XXI*, 2012 (September-October), no 45.

⁶²⁴ The Iberfides project addresses transactions in Spanish between Latin American and European countries: <http://iberfides.notariado.org/liferay/web/iberfides/inicio>.

⁶²⁵ Xavier Ibarrondo in 'Linking Up National Land Law Systems across the EU – Some Practical Steps' in D Wallis MEP & S Allanson *European Property: Rights & Wrongs* (Brussels: www.dianawallis.org.uk, 2011), pp 57 ff.

⁶²⁶ www.elra.eu/wp-content/uploads/2014/01/EUROPEAN-PROPERTY-RIGHTS-2.pdf.

⁶²⁷ The real estate agent who fixes the deal also provides legal services in SE and FI; in DK the estate agent acts for the seller, whereas the buyer has an independent lawyer; in Finland a notary is in addition necessary, but this task of an official witness is performed by public officials, high-ranking police officers, land surveyors, the staff of foreign services, and others. The 'notary' only checks formal requirements, authenticates signatures, and informs the National Land Survey and the municipality (in this way, the municipality receives information to decide

seems to work well, suggesting that the important factor is expertise in conveyancing rather than notarial qualification. However, the general practice is for a single agent to act for both parties. This appears to work perfectly well for internal purchases,⁶²⁸ with the cheapest transactional fees in Europe, especially in Denmark. We do not support the view of Lundquist that the number of people involved in sales should be reduced to minimise costs, and especially not in cross border transactions. Ulf Jensen's outline of the process of a sale and purchase in Sweden⁶²⁹ attributes the lack of a legal profession to the sparse rural population – scarcely a sound reason to extend it. We would wish to add that Sweden has an exceptionally good registration system⁶³⁰ and the better the register the more the transactional aspects of a sale and purchase become mechanical. A system that works well there might break down completely if applied to a system with creaky registration procedures.

10.4.5. Adversarial conveyancing

The conveyancing process in England and Wales is very different from the practice on the continent of Europe. English buyers encountering the continental system for the first time have encountered a culture shock – all the books in the good life abroad genre commence with an obligatory comic description of the visit to the notary's office, though of course if there was a good life in England genre continental buyers would experience a reciprocal shock on entering a solicitor's office. The biggest surprise to the English is undoubtedly to find a single person acting for both parties when English buyers are used to having representation by their own conveyancer. The reason that practice evolved towards having different conveyancers on either side of a conveyancing transaction is primarily that buyers and sellers are usually locked in chains of around six to ten transactions, since a couple cannot afford to buy at English house prices without first selling their existing house.⁶³¹ (Chains are usual in England and Wales but not in Scotland or Ireland). This system is inevitable in a system which experiences sharp reversals of market sentiment in order to mitigate the risk of being caught without a house in a rising market or with two houses in a falling market. Much of the expertise of an English conveyancing is in managing the chain to achieve a simultaneous exchange of contracts and completion of sale and purchase, and for this, of course, the couple require their own conveyancer to coordinate the sale and purchase. Adversarial conveyancing provides a shield behind which a client can act and this ensures that parties are not intimidated in relation to

- timescales for exchange and completion;
- defects in title;
- problems with the public law title;
- physical defects revealed by the survey;
- requirements of lenders;
- requests for advance access; and
- the condition of the property left on completion and fixtures;

whether it will use its pre-emption right in large land sales). All signatories must be present before the notary at the same time (themselves or represented by agents).

⁶²⁸ Schmid, *Conveyancing Services*, (n 1) para 89.

⁶²⁹ Ulf Jensen 'Case Study: Sweden' in Schmid, *Conveyancing Services*, (n 1), paras 1558-1565.

⁶³⁰ See above point 3.4.

⁶³¹ P Sparkes & S Sebastian, 'Case Study: England and Wales', in Schmid, *Conveyancing Services*, (n 1) para 379ff.

Practice rules have precluded a single conveyancer acting for both parties since the 1960s and appear totally beneficial.⁶³²

10.5. Professional representation of cross border purchasers

Discussion to date has concentrated on the representation of conveyancing parties in internal transactions. There is no evidence of any problem with the seller in cross border transactions, but plenty of evidence that buyers in such transactions have not been adequately advised. Aspects of proper conveyancing representation are:

- separate representation;
- advice in a language the buyer understands;
- comprehensive advice; and
- help in finding a conveyancer.

A buyer also needs to be forewarned about the process, the issue addressed in the subsequent chapter.

10.5.1. Separate representation

Few matters are stressed as consistently through the literature on buying property in Spain as the importance of choosing a lawyer who is independent of other interested parties. 'The choice of solicitor is incredibly important,' a manager at a mortgage broker advises British buyers, 'where possible, referrals should be sought, rather than being recommended a solicitor by the vendor or another interested party.'⁶³³ One should be especially cautious of recommendations by local estate agents⁶³⁴ but the buyer should also eschew the choice of lawyer proposed by any developer or a private seller. Anyone 'recommended by your developer or estate agent ... may not have your best interests at heart.'⁶³⁵ The following warning to 'Seek independent legal advice' appears as the first substantive point in the UK Government *Guidance for Buying Property Abroad*:⁶³⁶

Many property owners encounter problems with their property because they did not seek independent legal advice and instead used lawyers and translators/interpreters who were recommended by the estate agent or developer and in some cases were acting for both parties. Appoint an independent English speaking lawyer who is licensed to practice and is experienced in property sales.

Similarly warnings are issued by those with experience of the market in Cyprus, where a developer may have an interest in delaying the registration process,⁶³⁷ and no doubt the same advice can be extended continent wide. Rightmove.co.uk advise their customers to

⁶³² Solicitors' Regulation Authority *Code of Conduct* (London, 2011) ch 3; (formerly Solicitors' Practice Rules 1990 rule 6(3)); F Silverman, *Conveyancing Handbook 2015* (London: Law Society, 25th edn, 2015), paras 10.1.1-10.1.2.

⁶³³ *Daily Telegraph*, June 2nd 2015 (interview of Miranda John, international manager at mortgage broker SPF Private Clients).

⁶³⁴ No doubt most estate agents are perfectly reliable, but one might encounter a rogue or someone trying to rush through a deal without taking the necessary precautions: Mark King 'Fancy putting your feet up abroad?' *The Guardian*, August 27th 2005.

⁶³⁵ According to Stefano Lucatello, senior partner at multinational law firm Kobalt Law, which specialises in advising Britons buying property overseas, in Harvey Jones, 'Beware buying property abroad' *The Observer*, August 12th 2013.

⁶³⁶ www.gov.uk.

⁶³⁷ 'Don't let your holiday-home plans come tumbling down' *Independent on Sunday*, August 13th 2011.

source their own lawyer.⁶³⁸ Harry Dyson has the same advice for his readers who are contemplating buying in France.⁶³⁹

At the very least it is important to bring to a buyer's notice that he is allowed to appoint his own adviser and that he is wise to do so. However, given the regularity with which the same advice is issued it seems appropriate to legislate to protect consumers of legal services by requiring:

- a bar on advising the vendor and the purchaser in a cross border transaction;
- a right to split representation without cost;
- certification by a conveyancer accepting instructions of independence from the vendor and any developer and is otherwise free to advise the buyer; and
- confirmation of the absence of any financial interest such as a referral commission.

It is suggested that any cross border transaction should be divided thus:

- a notary acting for the seller and carrying out public duties (checking the identity of the parties and ensuring that tax due is declared properly); and
- a conveyancer representing the buyer giving advice on the title and property law in the destination state and also general financial advice.

This solves the problem of cross border transactions neatly, respecting the notarial monopoly over conveyancing, ensuring that the state has a guarantee of consensus of the parties, and leaving the EU free to regulate the activities of the person advising the buyer.⁶⁴⁰ Since split representation is already possible, this recommendation involves no cost to the consumer.

10.5.2. Competent legal representation

Anyone buying in a foreign country requires legal advice from someone who is competent to give it. By crossing a national boundary, the buyer may well encounter a difficulty with the competences and powers of the professionals involved which 'can vary between Member States'.⁶⁴¹ The first thing is to establish what a cross border purchaser really needs. Key competence issues involve:

- understanding the property concepts of the state in which the dwelling is sited;
- understanding the property concepts of the buyer's home state; and
- knowledge of property markets.

All this boils down to dual competence in property laws. It is immediately apparent how unlikely it is that for every pairing of EU Member States there is an adequate pool of people dual qualified in the whole of the law of the host and destination states. Realistically it is often going to be necessary to split the legal representation between two people, which immediately throws up the issue of language competence. In other words the case is made for a profession dedicated to cross border conveyancing where the person is not fully dual qualified as a lawyer.

⁶³⁸ Julian Knight, 'Strong Cyprus housing market attracts Britons' *Independent on Sunday*, November 21st 2010. The British press suggests that there are many cases where Cypriot lawyers have not complied with necessary formalities in relation to powers of attorney.

⁶³⁹ Dyson, *French Property* (n 69), p 29 ff.

⁶⁴⁰ Any division needs to have clear cut areas of responsibility so that liability in negligence for particular parts of a transaction is clear; cf *Gregory v Shepherds* (2001) 81 P & CR 10.

⁶⁴¹ Xavier Ibarrondo in 'Linking up National Land Laws' (n 90), p 58.

10.5.3. Linguistic competence

Anyone buying in a foreign country requires legal advice from someone who is competent to give it. The first thing is to establish what a cross border purchaser really needs. Key competence issues involve:

- fluency in the language of the state in which the dwelling is sited;
- fluency in the language of the buyer's home state; and
- legal translation skills.⁶⁴²

All this boils down to dual competence in legal language.⁶⁴³ The pool will be very small, unless a profession can evolve which is dedicated to cross border conveyancing. There are a number of partial solutions to the language problem:

- registration of title shortens titles and therefore reduces translation costs;
- cracks in the register need to be minimised;
- foreign buyers are consumers of new build and therefore have EU language rights;
- a kitemark might be developed for the basics of a conveyancing transaction (for example the requirement to deliver vacant possession on completion) and sellers could be required to advise clearly of any departures from the kitemark norm, if, for example, family members will retain an undivided share of the property.

The best long term solution, however, is to recognise that the legalistic language used in most countries is an obstacle to lay understanding of property systems by the citizens of the country, and to encourage nations to recast their property legislation and registration schemes in simple and comprehensible language; what would help nationals would transform the experience of other EU citizens. Further, market pressures must eventually lead to the evolution of a cross border conveyancing profession, where the conveyancing firm would lose the cost of translation in the general business overhead.

10.5.4. Comprehensive advice

Notarial duties are limited and proper advice is not given to purchasers because the buyer is essentially unadvised when he signs a preliminary contract. As Dyson expresses this, 'a [French] *notaire* is primarily a recorder of documents and not a holder of hands.'⁶⁴⁴ Or as Manchester firm Pannone says, 'in general, a Spanish *Notario* will not advise or explain the contents of the deeds in advance to a buyer', or at least not its full ramifications.⁶⁴⁵ The fundamental premise of this report is that a cross border purchaser requires someone to hold his or her hand and the system should be set up so that a buyer acquires an adviser right at the outset. The advice to which a buyer is entitled needs to be codified and kitemarked so that a purchaser anywhere on the continent knows what to expect and any areas excluded from the advice (eg future tax liability). (We would observe, incidentally, that price comparison is meaningless unless the service being provided is comparable). The

⁶⁴² Pannone's advice is to be wary of unskilled translations which may badly misrepresent legal issues: *A Beginner's Guide to Purchasing Property in Spain* (Manchester: Pannone, www.pannone.com, 2015) p 11

⁶⁴³ Two random pieces of advice to this effect, among many, are to be found in *Independent* January 14th 2006; and Harvey Jones, 'Beware buying property abroad' *The Observer*, 12 August 2013 (attributed to Stefano Lucatello).

⁶⁴⁴ H Dyson 'Joint Ownership of Land in France' (1989) 133(3) *Solicitors' Journal* 69 at 71.

⁶⁴⁵ Pannone's *Guide to Spanish Property* (n 107) p 11. Although the notarial role in Spain during the boom times has been questioned, especially in failing to prevent abusive clauses in mortgage contracts and not reporting money laundering, many of these issues have been addressed since the 2007 crash: S Nasarre Aznar, 'Malas prácticas bancarias en la actividad hipotecaria', *Revista Crítica de Derecho Inmobiliario*, n^o 727, 2011, pp 2665 to 2737; S Nasarre Aznar, 'La vivienda en propiedad como causa y víctima de la crisis hipotecaria', *Teoría y Derecho*, 16/2014, pp 10 to 37.

experience of British buyers in Spain shows clearly that full advice on public law aspects of the title to a property must be fully explained. Full transparency is required about what advice is and is not included in the service provided.

10.5.5. Help with finding a lawyer

Advice to make your own choice of lawyer is useless if a buyer does not have a simple and rational way of making a choice. The UK Government guidance on 'How to Buy a Property in Spain' combines advice to obtain separate representation with a clear assumption that most people will not do so. The guidance needs to be realistic.

There are some lists, for example lists of lawyers and translators held by the British government to help buyers in Spain.⁶⁴⁶ In Germany it is said to be easy for an English buyer to find a multilingual notary.⁶⁴⁷ However, given the magnitude of the commitment in a purchase one wants more than a list, but a list with some guarantee of quality. Appropriate solutions are

- a requirement for a conveyancer to self-certify competence to act when accepting instructions to act for a cross border purchaser.
- guidelines as to the criteria for self-assessment.
- kitemarking of people offering professional services;
- computerized databases of kitemarked professionals;⁶⁴⁸ and
- a gradual move towards a dedicated profession.

10.5.6. Market research

We have had to piece together what works and what does not work so well in terms of the needs of a cross border residential purchaser from a patchwork of evidence. This is clearly a substantial and increasing market and we believe the case is made for obtaining proper and reliable data about the market in cross border legal services. We believe that the existing patchwork of notaries and translators in a market that lacks transparency is not always working well, but it would be much better to base proposals on statistically reliable data.

10.5.7. Towards a European conveyancing profession

The European legal profession has an important opportunity to meet the demands of the cross border conveyancing market. They have to facilitate a collaboration between professionals with four sets of skills – competence in two property systems and two sets of legal language. Superficially a suitable service to the public would best be achieved by recognising business structures including collaborations between lawyers and legal translators, such a structure might well provide the most cost effective solution to the undoubted costs involved in such a business. We think it is clear that in the short term professionals have to be kitemarked so as to give the public a rational basis for making

⁶⁴⁶ www.gov.uk, respectively 'List-of-Lawyers' and 'List-of-Translators-and-Interpreters'.

⁶⁴⁷ The British embassy in Berlin has a list of English-speaking lawyers and translators.

⁶⁴⁸ The online agent rightmove.co.uk recommends the Association of International Property Professionals; another source recommended in the British press is a solicitors' database which groups all registered lawyers in Spain: Nicole Blackmore, 'We're having problems buying property in Spain. What's the process?' *Daily Telegraph*, June 2nd 2015 (reporting an interview of Miranda John, international manager at mortgage broker SPF Private Clients).

choices about their representation, and that in the long term a structure needs to be set up to train people to specialise in cross border conveyancing. In the long run it seems much more likely that the desired mix of competences could be delivered through a European conveyancing profession involving corporate vehicles. The main factor preventing the emergence of a bilingual conveyancing market suitable to the needs of buyers may be that volume flows would be too slight to support a practising profession as between certain pairs of EU states. Reliable statistics are needed as a first step into the future of the European homes market.

10.6. Recommendations

Member States are entitled to restrict conveyancing to lawyers with specific expertise in the conveyancing of that state, and most do so by restricting conveyancing to Latin notaries. It is not the purpose of this report to review the suitability of that arrangement where the parties to a transaction are nationals of the Member State where the land is sited. However, many of the difficulties encountered by cross border purchasers have come about because of a narrow concentration of notarial practice on the private law aspects of the transaction to the exclusion of providing proper advice on the public law title to the property and also from a narrow focus on the creation of real rights to the exclusion of advising on the aspects of a transaction giving rise to personal obligations (whether in contract, delict or unjustified enrichment). These problems are exacerbated in the case of cross border purchasers encountering a language barrier in their purchase.

A cross border purchaser needs to have professional representation that is independent and competent to understand the home state preconceptions that the purchaser brings to the transaction. The only issue is how to achieve this.

Recommendation 10-A – Given that our recommendations are likely to prove extremely contentious, we suggest that any action needs to be based on indisputable empirical evidence. We therefore suggest as a first step that the EU should commission detailed empirical research into the experience of cross border purchasers, which should seek an objective basis for assessment of conveyancing services, bearing in mind that clients are not well placed to judge the quality of service they receive. This research should consider all aspects of the conveyancing experience including translation issues. When this evidence was available it would be possible to appraise how well cross border purchasers are served by the various methods of organising conveyancing services.

Recommendation 10-B – Generic information should be made available about the professional assistance available to purchasers.

Recommendation 10-C - A notary or other conveyancer acting on a sale of new build property should be required not to act for cross border buyer, who should always be entitled to appoint a conveyancer to act for him. If this change cannot be achieved by agreed changes to Practice Rules, legislation is needed. This change is particularly essential when new build property is being sold by a developer so that the buyer requires consumer protection.

Recommendation 10-D - A notary or other conveyancer acting for a private seller should also be required not to act for cross border buyer, who should always be entitled to appoint a conveyancer to act for him. Any fee should be split between the two conveyancers.

Recommendation 10-E – A notary or other conveyancer accepting instructions to act for a cross border purchaser would be required to certify his competence to act when accepting instructions. Practice Rules on competence would have to address competence in the property laws of both states and language competence.

Recommendation 10-F – A notary or other conveyancer accepting instructions to act for a cross border purchaser should be required to provide comprehensive advice on all aspects of the transactions as established in Practice Rules, including public law matters affecting the value of the property and any personal obligations.

Recommendation 10-G – A scheme of accreditation of cross border conveyancers should be established, so that the cross border buyer is enabled to exercise his right to representation independent of the seller or developer.

Recommendation 10-H – Consumer protection of a cross border purchaser could be withdrawn where independent legal advice is provided before any obligation is undertaken by the purchaser.

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- R Geimer, 'The Circulation of Notarial Acts' (XXIII International Congress of Latin Notaries, www.bnotk.de)
- Xavier Ibarrondo in 'Linking Up National Land Law Systems across the EU – Some Practical Steps' in D Wallis MEP & S Allanson *European Property: Rights & Wrongs* (Brussels: www.dianawallis.org.uk, 2011)
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- Peter Sparkes, *European Land Law* (Oxford: Hart, 2007) ch 7
- J Yaigre & J-F Pillebout, *Droit Professionnel Notarial* (Paris: Litec, 10me edn, 2015).

11. PROCESS

KEY FINDINGS

- In most of Europe a buyer signs a preliminary contract without any legal advice. There is therefore a strong case for consumer protection of buyers.
- Process differs widely across Europe, so it is important that the process is fully transparent to the buyer.

11.1. Transparency of process

Britons are warned officially that:⁶⁴⁹

If you're considering buying a property overseas you'll need to bear in mind that the legal system and steps to follow may be very different from those you have experienced in the UK.

This is a statement of the obvious. It applies to any EU citizen from any Member State buying anywhere in Europe. When Professor Schmid investigated *Conveyancing Services* in 2007, he found that

In many EU countries, the professional regulation and practice surrounding the conveyance of property has failed to keep pace with and address social and technological change (eg introduction of on-line land registries). In some EU countries, the system and its regulation has not changed significantly for centuries.⁶⁵⁰

This retains a partial truth even today, a decade after this report - a decade of rapid technological advance. A citizen moving within the EU should therefore expect to encounter a practice radically different from what is familiar from previous purchases back at home.

Conveyancing process is largely mechanical for the majority of properties. A single market can accommodate variant mechanisms, provided there is enough transparency of procedure to enable the market to function smoothly. A buyer needs to understand fully the manner in which his transaction will proceed, the very first of Dr Sylwia Lindqvist's five dimensions of transparency; she called for openness about regulatory systems and procedural models.⁶⁵¹ Transparency requires not only that the buyer should be aware of the procedure, but also that the buyer is alerted to crucial differences from his native experience; the buyer needs to be steered away from potential surprises and alerted in a timely way to forthcoming surprises. Tested against criteria of information deficit, potential unfamiliarity and language barriers,⁶⁵² our investigation considers the following aspects of the conveyancing process:

⁶⁴⁹ 'Guidance on Buying Property Abroad', (London: www.gov.uk January 2016).

⁶⁵⁰ CU Schmid *Study on Conveyancing Services Market* (Bremen: ZERP, COMP/2006/D3/003, 2007), para 52.

⁶⁵¹ Sylwia Lindqvist, *Transaction Cost and Transparency in the Owner-occupied Housing Market: An International Comparison* (Stockholm: PhD dissertation at KTH Royal Institute of Technology, www.dissertations.se, 2011). Other dimensions of transparency identified were: (2) legal information available from national land registries; (3) financing especially information about mortgage products; (4) taxation; and (5) transaction costs.

⁶⁵² Xavier Ibarrondo in 'Linking Up National Land Law Systems across the EU - Some Practical Steps' in D Wallis MEP & S Allanson, *European Property: Rights & Wrongs* (Brussels: www.dianawallis.org.uk, 2011), pp 58, 59.

- negotiation;
- provisional agreement and preventing premature contracting;
- money laundering checks;
- checks on title;
- execution of documents;
- completion; and
- post completion steps.

11.2. Negotiation

A potential buyer starts with a search for suitable property, narrowing the field to a single property which he wishes to buy. At this preliminary stage, as already considered,⁶⁵³ technology will assist to a great extent, though only within the confines of the property advertised on the internet. In practice, on-line advertisement has opened the market to non-native buyers, if not with effective access on terms equal to those of native buyers, at least with a welcome derived from the recognition that their money improves the prices obtainable on sales.

Once a particular target property is identified, there follows a process of negotiation. Market participants need a degree of common understanding before negotiation can proceed effectively. Most cross border purchasers will negotiate through agents, so the main issues seem to be the availability of generic information about the negotiation process and overcoming any language barrier. It must always be remembered that the agent is employed by the seller to maximise the price and is not in a position to advise the buyer dispassionately. This imbalance is well recognised when goods are being sold or services are being provided, but is lost sight of in relation to land – many consumer protections are withdrawn on the assumption that independent legal advice will be provided though in fact the buyer is actually dealing only with an agent appointed by and representing the seller. Once the parties have come to a consensus that they wish to sell and to buy at a particular price, conveyancing procedures generally have the same three stages:

- entry into an obligational contract;
- execution of a transfer of the property; and
- registration of the transfer.

Variant terminology is a real problem here and in particular the words 'contract' and its qualifier 'preliminary' and 'transfer'. The first step after conclusion of the negotiation is very different in different parts of the continent; negotiation will lead to:

- signature of a preliminary contract – in most of continental Europe (but preparation of a combined obligational contract and transfer deed in Germany); or
- a 'subject to contract' agreement – in the Anglo-Celtic tradition.

A foreign purchaser of immovable property is unlikely to be aware in advance of how the whole contracting process will pan out.

⁶⁵³ See point 3.2 above.

11.3. Preliminary contracts (civilian states)

11.3.1. Prevalence

In much of Europe, and certainly throughout the Latin states of southern and western Europe, the general practice is for negotiation to be concluded by signature of a preliminary contract. This is prepared by the agent using a standard form and signed by the purchaser, usually without legal advice. The matter will then be passed to a notary to prepare the purchase deed. This occurs in France,⁶⁵⁴ Italy,⁶⁵⁵ and the Netherlands.⁶⁵⁶ [In Belgium,⁶⁵⁷ the preliminary contract is prepared by the notary and signed before the notary. The agency prepares a form, which is called '*promesse de vente*', a promise to purchase.] So, too, in Spain, where the parties make a private contract (*contrato privado, arras*) before the final public deed (*escritura pública*). All conditions of sale are included in the private contract. The contract is legally binding and, in connection with it, the buyer pays a deposit, typically 10 per cent of the purchase price. If the buyer cancels the deal beforehand, the buyer will not get the deposit back, unless this has been agreed in the contract. If the seller cancels the sale, the buyer is legally entitled to receive twice the amount of the deposit. Similarly in Portugal, property transactions usually entail a preliminary contract stage at which the buyer pays a deposit. This initial agreement (*contrato de promessa de compra e venda*) is a legally binding contract that sets forth the conditions of the sale. The buyer pays a deposit that usually amounts to 10 per cent of the purchase price. Generally speaking, the signing of the final contract and deed (*escritura de compra e venda*) will occur within three to four weeks of the execution of the initial contract for sale.

11.3.2. Need for consumer protection

If a buyer is advised by a lawyer, it is unnecessary to provide extra protection to ensure that he is fully informed and free from undue pressure. Buyers of immovables are denied the consumer rights of buyers of movables on the basis that people buying land receive legal advice. This however is not expressed in terms of conditionality as one would expect. This reasoning may break down in countries adopting the preliminary contract since the buyer may incur obligations long before he receives legal advice. French law addresses this logical dislocation by allowing non-professional buyers to withdraw freely from any contract for the acquisition of a residential property for a period of seven days after receipt (by registered post) of a copy of the contract;⁶⁵⁸ this mandatory term cannot be excluded.

The one country that has regulated estate agency in detail is France with the Loi Hoguet.⁶⁵⁹ A buyer could easily be persuaded by an agent to sign a preliminary contract before he is really sure that he wants to buy, and affording a period for reflection could be an important

⁶⁵⁴ H Dyson *French Property and Inheritance Law – Principles and Practice* (Oxford, Oxford University Press, 2nd edn, 2003) ch 4 (*compromis de vente*); Peter L Murray, *Real Estate Conveyancing in Five EU Member States: A Comparative Study*, (Harvard: www.dnoty.de/, 2007) p 174.

⁶⁵⁵ Luz M Martínez Velencoso, '*Los Principales Sistemas de Transmisión de la Propiedad De Los Bienes Inmuebles en el Derecho Europeo*', in FJ Orduña Moreno & F De La Puente Alfaro, *Los Sistemas de Transmisión Propiedad Inmobiliaria en el Derecho Europeo*, ((Madrid: Civitas, 2009), p 81.

⁶⁵⁶ Cornelius Van Der Merwe, *European Condominiums* (Cambridge: Cambridge University Press, 2015), p 107; Arthur S Hartkamp, Marianne MM Tillema & Annemarie EB Terheide, *Contract Law in the Netherlands* (The Hague: Wolters Kluwer, 2011), p 192ff.

⁶⁵⁷ Vincent Sagaert & Alexis Lemmerling, 'The Transfer of Immovable Property in Belgian Law', in Andrea Pradi, *Transfer of Immovable Property in Europe*, (Trento: Università degli Studi di Trento, 2012) pp 52-53.

⁶⁵⁸ *Code de la construction et de l'habitation*, art L271-1; Dyson *French Property* (n 7), 31.

⁶⁵⁹ Loi Hoguet January 2nd 1970; Dyson *French Property* (n 7), 27.

safeguard in some cases. There is a good case for mandatory information and withdrawal rights following the models of the Consumer Rights Directive⁶⁶⁰ and the Mortgage Credit Directive.⁶⁶¹ These rights might be withdrawn for any obligation incurred under a contract on which the buyer has had legal advice before signing the contract. (However, some buyers in Spain have not been able to recover their reservation fees when a sale fell through despite having legal support.⁶⁶²) Consumer protection will be justified in a cross border transaction because the preliminary contract is put forward by an agent standing in a T2C relationship to the buyer.

Preliminary contracts are generally on standard printed forms with blank spaces to be filled in by the agent. There is no one form in use within national systems, and they vary both in appearance and in content and, in particular, to the degree of favourability to the purchaser.⁶⁶³ Standardised contracts presented by agents to individuals buying property will be subject to the European unfair terms regime.⁶⁶⁴ Dr Sylwia Lindqvist called for the standardization of contract forms as a means of reduce the transactional risk undertaken by inexperienced buyers and to overcome the asymmetry of the information available to seller and buyer.⁶⁶⁵ There seems to be scope for kitemarking of contracts and even a case for Member States to prescribe the terms of contracts.

11.3.3. Potential problems with preliminary contracts

The Schmid Report on *Conveyancing Services* concluded that preliminary contracts were dangerous for consumers.⁶⁶⁶ This conclusion is irrefutable. The system of preliminary contracts carries numerous risks for buyers (not all of which apply in every system):

- in Spain⁶⁶⁷ a binding contract could be entered into orally – contrary to normal expectations;
- a binding contract (which must therefore include all legal terms) is drafted by an agent who is acting for the seller and lacks legal training;
- the buyer accepts a risk which in some systems is limited to the deposit but in other systems extends to the whole purchase price;
- in most states (eg Spain) the amount of the deposit is unlimited, but the larger the deposit, both in percentage terms and in absolute terms, the greater the risk that the buyer is accepting;
- the deposit can be lost on the insolvency of the seller (eg in the Netherlands);
- risk could pass without the parties realising it, so that the buyer is required to insure the property and liable to pay in full for a property that is destroyed after signature of the contract;
- the contract may be subject to preconditions (such as receipt of a satisfactory mortgage offer) on which the buyer has not received advice and which is beyond his control;
- withdrawal from an arrangement because the conditions are not fulfilled could be difficult and would be likely to be disputed;

⁶⁶⁰ Consumer Rights Directive, 2011/83/EU, OJ 2011 L304/64; see above point 6.5.2.

⁶⁶¹ Mortgage Credit Directive 2014/17/EU, OJ 2014 L60/34; see above point 9.2.

⁶⁶² Nicole Blackmore, 'We're having problems buying property in Spain. What's the process?' *Telegraph*, 2 June 2015.

⁶⁶³ *A Beginner's Guide to Purchasing Property in Spain* (Manchester: Pannone, www.pannone.com, 2015) p 7.

⁶⁶⁴ Unfair Contract Terms Directive, 93/13/EEC, OJ 1993 L95/29; E Ramaekers *European Union Property Law* (Antwerp: Intersentia, 2013), ch 4.

⁶⁶⁵ Lindqvist, *Transaction Cost and Transparency in Owner-occupied Housing*, (n 3).

⁶⁶⁶ Schmid, *Conveyancing Services*, (n 1) para 91.

⁶⁶⁷ Spanish CC art 1278. Writing is required eg in France (CC art 1532) and Italy.

- property could pass to the buyer in some systems (notably Belgium and Spain though not in France) unless the preliminary contract expressly avoids this;
- the system does not encourage structural checks; and
- a Briton moving to France or Spain will find himself contractually bound much earlier in the transaction than he would be at home.

More generally, any foreign buyer could be induced to sign a binding contract at a premature phase of a transaction. The risk of a purchaser succumbing to blandishments may be greater when the buyer is not operating in a language in which he or she is fluent. Overall, there are inadequate safeguards against premature contracting.

Two specific examples may suffice. In Spain it is common to sign a preliminary contract to buy a property subject to the receipt of satisfactory mortgage finance. Some households have faced difficulties due to credit crunch in obtaining the mortgage loan in order to finance the acquisition of the property once the construction finishes. The Spanish Supreme Court have not accepted the resolution of the preliminary contract in these circumstances,⁶⁶⁸ so the buyer still have the duty to obtain the money in order to perform his obligation of payment; otherwise he will be liable with all his present and future assets.⁶⁶⁹ In France, on the other hand, because property passes under any contract for sale (even an oral contract)⁶⁷⁰ there is a severe risk that a party without legal advice may inadvertently become the owner of property prematurely.⁶⁷¹ In practice the proprietary effect is postponed by agreement between the contracting parties, but the question is how a buyer without legal advice would know that this was necessary. No doubt the preliminary contract commonly avoids this problem and provides for ownership to transfer in front of a notary, when payment is made.⁶⁷²

11.3.4. Process in Germany

Germany has arrived at a distinctive process of completing a conveyancing transaction because of a quirk of the notarial monopoly. Pre-contractual arrangements relating to immovables are valid only if authenticated by a notary, and, as a result, these pre-contractual arrangements are not common in Germany.⁶⁷³ Commercial parties sometimes sign a non-binding letter of intent to set out their mutual negotiating positions. Non-compliance with a letter of intent before the transaction begins can lead to compensation claims because there is a duty to negotiate in good faith.⁶⁷⁴ The final deed incorporates within a single document both an obligational contract and the transfer of property (*Auflassung*), two contracts both requiring notarisation but legally completely detached

⁶⁶⁸ STS 17-1-2014.

⁶⁶⁹ The condition is also common in France, though it has not created the problem indicated in Spain: Dyson *French Property* (n 7), pp 46, 47.

⁶⁷⁰ Peter L Murray, *Real Estate Conveyancing in Five European Union Member States: A Comparative Study*, (Harvard: <http://www.dnotv.de> 2007), p 174.

⁶⁷¹ According to Velencoso, one weakness of the French consensual system is that: 'While it transfers the authority to protect the property into the hands of the buyer, who is naturally the subject interested in preserving the property in good condition, it means that the ability to protect the property is conceded to a subject that does not have it at his disposal. This subject, who does not have the possession of the property in question, is therefore not in a position to detect potential threats to it': Luz M. Martínez Velencoso, 'Economic questions concerning the rules for the transfer and publicity of immovable property', in Pradi, *Transfer of Immovables* (n 7), p 17

⁶⁷² Mariano Alonso Pérez, 'Título y Modo de Adquirir en el Código Civil', cit., p. 180; Frédéric Planckeel, 'Introduction to the French System of Transfer of Immovable Property', in Pradi, *Transfer of Immovables* (n 7), p 97.

⁶⁷³ C Hertel, National Report for 'Germany', in CU Schmid & C Hertel, *Real Property Law and Procedure in the European Union* (Florence: EUI, 2005), p 19.

⁶⁷⁴ Pre-contractual liability, or *culpa in contrahendo*, under sections 241, 280 and 311 BGB.

from each other. The notary sends a draft contract to all parties, and the buyer should, if necessary, have it translated and review it carefully.⁶⁷⁵ This procedure enables the notary to fulfil his obligation to draw up and give advice on the obligation contract;⁶⁷⁶ the notary will also advise on the mortgage.

This system leaves the risk of arrangement for sale and purchase breaking down at a very late stage, which could be extremely inconvenient to a cross border purchaser who needs to arrange for the internal transfer of his furniture and effects. This possibility could easily be avoided by a change of notarial practice.

11.4. 'Subject to contract' agreements (Anglo-Celtic states)

In England, and also in Ireland, an agreement on the price for a sale and purchase will usually be facilitated by an estate agent since the use of agents is almost universal. (In Scotland, however, solicitors often market properties for sale and then act for the seller in the conveyancing transaction). The agent will then notify the agreed terms to the conveyancers chosen by the parties. The deal remains 'subject to contract' at this stage. Most of the conveyancing procedures will now be carried out – enquiries of the seller, agreement on fixtures and fittings, a local search for the public law title, receipt of the mortgage offer and also investigation of (registered) title. All needs to be ready both in the immediate transaction and all associated transactions within the same chain; much of the work of a conveyancer involves coordinating the chain. This will lead to exchange of contracts. Throughout this stage there is no contractual obligation and usually (since parties are not required to negotiate in good faith) no obligation at all. This can, of course, lead to transactional breakdown – very often because another link in the chain breaks. There is no requirement in English practice for consumer protection because all parties have separate legal representation before any legal commitment is undertaken and throughout.

When all transactions in a chain are ready to proceed, the contracts all along the chain are exchanged. The seller's conveyancer will have drawn up a draft contract using the Standard Conditions of Sale,⁶⁷⁷ and this will have been approved or amended by the buyer's conveyancer. This is then drawn up into two identical parts and each part will be signed by one of the parties. When exchange is to take place the buyer's part will be sent to the seller's conveyancer with the (10%) deposit and the contract is formed when the seller's part is sent to the buyer's conveyancer. This is always referred to as a 'contract' in the full sense without any 'preliminary' character.

The common law process of buying and selling land is not based on notarisation, but rather on the use of formal documents. The intention is to prevent premature contracting before parties have legal advice and to prevent them from becoming bound by exchanging texts or e-mails. In England contract formalities are laid down by s 2 of Law of Property (Miscellaneous Provisions) Act 1989 while in the Republic of Ireland less restrictive formalities are set out in s 51 of the Land Conveyancing and Law Reform Act 2009. The English formality either requires both parties to sign a single contractual document or for identical signed contract parts to be exchanged. Although there is not any conditionality on

⁶⁷⁵ 'Buying a House or Apartment in Germany' (How to Germany, www.howtogermy.com/, 2014).

⁶⁷⁶ Section 925a BGB; Wicke, National Report 'Germany', in Schmid & Hertel, *Real Property in the EU* (n 25), p 35. The notary is not responsible for the correctness of the owner's property description or the economic balance of the contract.

⁶⁷⁷ London: Law Society, 4th edn, 2003.

the provision of prior legal advice (as perhaps there ought to be) this formality is in practice sufficient to ensure that informal arrangements are not treated as binding contracts. English law requires that the written statement of the contract must contain all terms expressly agreed between the parties. The formalities should be rethought to ensure that lay parties do not contract by mistake.

In English law risk passes under a contract so it is necessary for the buyer to insure from the time of exchanging contracts,⁶⁷⁸ but the buyer will have legal advice at this stage and the firm acting for the buyer will usually carry a block insurance.

11.5. The work of the conveyancer (across Europe)

Once a conveyancer is appointed, the processes undertaken by a conveyancer are broadly similar wherever he or she happens to be practising on the continent.

11.5.1. Money laundering checks

The EU has acted firmly against money laundering in the conveyancing market, action which was much needed since the purchase of land is a primary means of laundering the proceeds of crime. The current legislative framework is the Fourth Money Laundering Directive.⁶⁷⁹ Conveyancers – both notaries and other independent legal professionals are 'obliged entities' when they act in any real estate transaction, that is in buying and selling real property (but also planning or assisting such transactions).⁶⁸⁰ The main issues are identifying the parties to a land transaction, the beneficial owners and the source of the funds. The basic responsibilities of conveyancers are to:⁶⁸¹

- Know Your Client, in particular when forming a new business relationship;
- identify any beneficial ownership exceeding 25% (eg in a trust fund); and
- undertake ongoing monitoring.

Checks may be enhanced in some cases or reduced in others on a risk sensitive basis. Enhanced customer due diligence may be needed when a transaction is not conducted face-to-face; here identification may require additional documents, certification, certification by a trusted institution, or by requiring payments through an account with an institution.⁶⁸²

Customer due diligence is required when:

- establishing a business relationship (though exceptionally checks can take place while the relationship is being established so as not to interrupt the normal course of business); or
- before carrying out the transaction.⁶⁸³

UK solicitors generally treat taking instructions from a conveyancing client as an act of establishing business relations, presumably because they are commonly acting for one client in a chain of transactions involving a sale and purchase, whereas continental notaries appear to consider it sufficient to establish identity immediately before notarising the deed to complete the transaction. Thus in Germany and many other continental states, money laundering checks are subsumed into the identity checks a notary carries out as part of the conveyancing and registration procedure. As this report argues, this takes a narrow view of

⁶⁷⁸ Standard Conditions of Sale (4th edn) condition 5.1.3..

⁶⁷⁹ Money Laundering Directive, (EU) 2015/849, OJ 2015 L141/73.

⁶⁸⁰ Money Laundering Directive (n 31) art 2.

⁶⁸¹ Money Laundering Directive (n 31) art 11.

⁶⁸² Money Laundering Directive (n 31) art 18, Annex III.

⁶⁸³ Money Laundering Directive (n 31) art 14.

the responsibilities of notaries and hence a narrow view of the actual transaction, and future legislation should establish a level playing field.

The British profession appears to be also far more active in submitting suspicious activity reports to the authorities than the continental profession as emerges from the following tabulations:

Table 32 Suspicious transaction reports by conveyancers in 2010

No	EU-28 Member State
4-5K	UK
3-4K	-
2-3K	-
1-2K	-
500-1K	-
100-500	ES, NL, RO
50-100	IT, EE
20-50	LI, HR, LAT, FI
10-20	AT, LU, DE
1-10	CY, BU, PT, DK, SL, SI
No data	CzR, IE, PL, SE

Source: Eurostat 2013.⁶⁸⁴

Table 33 Suspicious transaction reports by conveyancers in 2010

Conveyancer type	Total
UK solicitors	4878
Latin notaries	1102
Continental lawyers	157

Source: Eurostat 2013.⁶⁸⁵

11.5.2. Preparing for completion

When a lawyer is appointed to conduct conveyancing, the procedures to be carried out will be broadly similar wherever the property is situated with of course, much scope for local idiosyncrasy.⁶⁸⁶ Typical steps involve:

- Checking the registered title and cadastre;
- Drafting the transfer deed;
- Checking for public law issues such as zoning certificates or planning permissions;
- Obtaining environmental reports such as Energy Certificates;
- Meeting local requirements such as soil condition reports in Belgium and termite and asbestos reports in France;
- Securing clearance from public rights of pre-emption;

⁶⁸⁴ *Money Laundering in Europe* (Eurostat, 2013) p 29.

⁶⁸⁵ *Money Laundering in Europe* (n 36) p 29. Figures for notaries include real estate agents in Scandinavia.

⁶⁸⁶ English and French procedures are functionally similar: Dyson *French Property* (n 7), pp 60-61.

- Carrying out checks to secure priority for the purchase;
- Preparation of a mortgage deed;
- Checks on the solvency of the borrower;
- Insurance where required during the conveyancing process.

We would assume that a professional service would require a detailed report to the client.

The main issue here would be that the purchaser is made aware of the timescale leading up to completion. The time taken for each step in a conveyancing procedure is indicated in the World Bank annual *Doing Business* reports.⁶⁸⁷ Some steps appear to take a lengthy period, for example 30 days to secure zoning certificates in Belgium and 20 days to secure clearance from public rights of pre-emption in France. Other states such as Italy, the Netherlands and Spain have remarkably expeditious online procedures.

In Poland there will be two meetings, a preliminary check on identity and title to sell followed by a meeting at which the title deed is completed. Country where deed can be amended at the completion meeting.

11.5.3. Standardised forms and procedures

The position of a cross border purchaser who is struggling with language comprehension can be greatly assisted if information is provided in a standardised format. In many countries conveyancing is becoming increasingly standardised. IBERJURIS, the Spanish branch of the EUROJURIS network, decided to standardise their legal consultations and services relating to the purchase and sale of property in Spain. They came up with the practical guide, including services necessary to complete a purchase in safety. This involves, they believe, checking not only whether the property is properly registered, but also looking at urban planning rules and local building laws, as well as carrying out a study of the financial and tax aspects of the transaction. Based on this guide, the lawyers of IBERJURIS will, when consulted, follow the points on the checklist giving more certainty for the purchaser.⁶⁸⁸ A similar practical tool should be created in every Member State.

In England the Conveyancing Protocol sets out standardised forms and procedures for solicitors to use in conveyancing, though this might be improved if it as some reference to overseas clients or language difficulty! Germany is an example of a state, in which there is no official form of a real estate purchase contract, though there are of course precedents,⁶⁸⁹ so the drafting of documents is the responsibility of the notary. At least in Germany a draft is provided in advance,⁶⁹⁰ whereas in France and elsewhere it appears that the notarial deed is redrafted at the completion ceremony.⁶⁹¹

⁶⁸⁷ *Doing Business 2015* (Washington DC: International Bank for Reconstruction and Development, www.doingbusiness.org, 2015) p 37 ff.

⁶⁸⁸ Ibarrondo, 'Linking Up Land Law Systems (n 4), p 61.

⁶⁸⁹ Hertel, German National Report, (n 25), p 19.

⁶⁹⁰ 'Buying a House or Apartment in Germany' How to Germany, December 2014, at <http://www.howtogermany.com/pages/housebuying.html>.

⁶⁹¹ Dyson, *French Property* (n 7), pp 59-60.

11.6. Completion

11.6.1. Continental Europe

English buyers invariably encounter a culture shock when they discover that they are required to attend in person at completion in the offices of the notary.

Thus if an Englishman is buying in Germany, he will be called to a meeting at the office of the notary including the seller (or sellers if the house is held by a couple), himself as buyer and any partner with whom he is buying, a translator and the estate agent. Proceedings begin with all parties showing their legal papers (that is their identity card or passport).⁶⁹² After that the deed (including both the obligational contract and the property transfer) is read out in full – this is a legal requirement in Germany and also in Poland – with a translation recited by a translator in the case of a foreign buyer. A party may interrupt the proceedings to ask questions, and any questions that arise need to be answered and may lead to changes or additions.⁶⁹³ The notary has the task of ensuring that all parties understand what they sign in the end. When all is finalised the parties and the notary then sign the document. The contract is irrevocable after signing. The mortgage has also to be read over before it is signed. Personal attendance at completion is also general in the Latin states such as France⁶⁹⁴ and Spain. The notarial completion needs to be appraised for utility.

A power of attorney can be used to avoid travelling to the notary for completion, the buyer may appoint a delegate to act for him by a power of attorney (in Spanish a *poder notarial de compraventa*).⁶⁹⁵ The procedure is extremely inconvenient. The document needs to be drawn carefully to limit the power of the attorney to a specific property at a particular price, and is probably best if executed in bilingual form. In order for it to be effective abroad it needs to be notarised (a problematic issue in Britain and Ireland where few notaries practise) and it must then be legalised for use outside the country where it is executed (in the case of the UK by the execution of an apostille by the Foreign and Commonwealth Office).⁶⁹⁶ There seems to be no reason to retain a procedure based on distrust of foreigners within the single market.

11.6.2. Anglo-Celtic states

In England most transactions involve a chain of sales and purchases all completed on the same day. On the day of completion the seller removes his furniture and effects into a removal van leaving the property clear from completion and then travels to the property he is buying where, once the keys are released after completion via the agents, the furniture and effects can be unloaded in the new home. This system saves large sums in storage costs. Clearly the parties have no wish to interrupt what is already a busy day visiting a lawyer for a recital of the terms of an incomprehensible sale document. Instead, a transfer is prepared by the buyer's conveyancer, it is signed by the buyer (if a couple)⁶⁹⁷ and then sent to the seller's conveyancer who obtains execution by his client(s). A registered land transfer is very short and simple and it is unlikely that the clients would require detailed

⁶⁹² Markus A Stuppi, *Buying Real Estate in Germany — An Overview*, (www.notar-stuppi.de), p 4. For the corresponding procedure in France see Dyson *French Property* (n 7), ch 7.

⁶⁹³ A buyer can ask for a prior meeting, but at extra cost, and presumably few do so.

⁶⁹⁴ Dyson *French Property* (n 7), pp 3-4, ch 6.

⁶⁹⁵ In France: Dyson *French Property* (n 7), ch 19.

⁶⁹⁶ Stuppi, *Buying German Real Estate* (n 44), p 4; Dyson *French Property* (n 7), pp 3-4, *A Beginner's Guide to Purchasing Property in Spain* (Manchester: Pannone, www.pannone.com, 2015), p 13.

⁶⁹⁷ This declares the trust affecting joint proprietors (see point 12.3.3 below); the buyer(s) will also execute the mortgage deed.

advice about it – detailed advice about the property will have been provided before contracts were exchanged. The transfer document needs to be executed as a deed – this requires wording in the document indicating that it is intended to be a deed and signature by each party and attestation ie witnessing of the signatures. There is no requirement that all parties execute at the same time. When it is executed by the seller the document will not be a deed since it is delivery that brings it into effect. Delivery takes place at completion after payment of the price. The lead author of this report is old enough to have attended a personal completion at which the two solicitors met and exchanged a banker's draft for the deed of conveyance and title deeds, but it is now very rare for the two conveyancers to meet in person. Most transactions take place in chains and most completions on Fridays, so completions take place at a distance, usually by e-mail exchange following an electronic transfer of funds. Practice relies heavily on undertakings given by the lawyers, for example an undertaking to post the transfer document on the day of completion.

In short an English completion is likely to be much more client friendly than one in France or Germany or Spain.

11.7. Post-completion process (across Europe)

11.7.1. Synchronising the receipt of the purchase price and transfer

In most countries there are conveyancing procedures to minimise the risks arising from the mechanics of receiving and disbursing the purchase money and bringing the transfer into effect and registering it. In English practice an official search will provide a priority period during which the lender and buyer are protected against adverse registrations; this makes it safe to pay the purchase price to the seller as soon as completion occurs (usually for use the same day in the seller's purchase). The title is secure so long as the mortgage and purchase are registered within the priority period of the search. Germany has a similar procedure using a priority notice (*Vormerkung*) to protect the buyer, this being included in the overall notary fee. The procedures appear to remain slightly out of date in Poland in that the seller is at risk after signing the deed of sale, and usually accompanies the buyer to the bank right after the notarial deed has been signed in order to witness the transfer of funds being made.

In Latin countries there are various procedures to synchronise the payment of the price and execution of the notarial deed. Usually – in Belgium, France,⁶⁹⁸ the Netherlands and Spain, the purchase price is paid to the notary's account before the parties sign the notary deed,⁶⁹⁹ but in Italy it apparently remains common for the buyer to pay the seller directly. These procedures are buttressed by a reservation of ownership in France or a lien on the property in most states. In Portugal, as in the UK, practice relies on a banker's draft or electronic transfer.

11.7.2. Stamping

Tax will be due on transfers in almost all states, and this will have to be paid before the transfer can be registered.⁷⁰⁰

⁶⁹⁸ Until recently it was necessary to delay disbursement of the price by up to two months: Dyson, *French Property* (n 7), p 67.

⁶⁹⁹ European Law Firm, *Purchasing a Real Estate in Europe*, 2011/2012, pp 7, 21, 33, 39, 43, and 49.

⁷⁰⁰ See above point 8.4.2.

11.7.3. Registration

When a transaction is completed, the conveyancer (or buyer) needs to register the title, the mortgage needs to be protected in such a way that no one else secures priority over the buyer or the mortgage. There is inevitably a period of time during which the register does not reflect the transaction that has recently taken place, the period known in England as the 'registration gap'. It does not, within reason, matter how long it takes to register a title so long as the priority of the mortgage and purchase are protected throughout. However, registration exceeds reason if a buyer does not have a registered title by the time that he wishes to sell the property on and a transaction is delayed by slow registration procedures.

Registration procedures vary in duration; however a straightforward registration can be completed within a week in many states, including France, Italy, Poland and Spain.⁷⁰¹ Belgium is behind the curve in terms of adoption of electronic procedures and registration is said to take a month. Registration may take longer in England and Germany, but provided the application is made within the priority period of the search (England) or pursuant to the priority notice (Germany) there is no risk to the lender or buyer.

The one Member State where registration procedures appear to be inadequate is Cyprus, because registration of a new build flat cannot occur until the entire development is completed. There are some homes which have been standing for 10 or 20 years yet still do not have a title deed.⁷⁰² In the interim period the buyer can be at risk of further borrowing by the developer which can secure priority over the buyer, the so-called 'hidden mortgages'.⁷⁰³

11.7.4. Actions required post-completion of the buyer

Buyers may not in some cases calculate correctly the time needed before completion. Among other things, in Spain, a non-resident buyer will need to obtain a local tax number (NIE). In Portugal, the buyer of real estate is obliged to obtain a fiscal number from the local tax office; the procedure is simple, completing a simple form, and does not require much time.

As a general rule, foreign purchasers of real estate are not subject to any restriction due to their nationality or residence, but this statement is not one hundred per cent true as there are some administrative limitations imposed by public law. In Italy⁷⁰⁴, the buyer must be registered at the *Agenzia delle Entrate* with a proper tax identification number (*Codice Fiscale*). The same takes place in Portugal⁷⁰⁵, where it is required a Portuguese taxpayer number and a fiscal representative for tax purposes, in Spain, where it is compulsory to request the NIE (foreigner's identification number),⁷⁰⁶ and in France⁷⁰⁷, where French co-owners are required to employ a managing agent with an address in France. This implies in the end transactions costs for the foreign purchaser. However, in the case of Spain, the interested party may personally apply for an N.I.E. at the Directorate-General of the Police, either directly or through Spain's Consular Posts abroad.

⁷⁰¹ *Doing Business 2015* (n 39), passim.

⁷⁰² According to Eileen Hardy, an estate agent, in Julian Knight, 'Strong Cyprus housing market attracts Britons' *Independent on Sunday*, November 21st 2010.

⁷⁰³ See above point 6.8.2.

⁷⁰⁴ European Law Firm, (n 48), p 33.

⁷⁰⁵ European Law Firm, (n 48), p 49.

⁷⁰⁶ Royal Decree 557/2011, dated April 20th, art. 206

⁷⁰⁷ Peter Sparkes, *European Land Law*, (Oxford: Hart, 2007), p 81.

11.8. Research projects on cross border conveyancing

The main arising issues related to problems confronting the cross border acquisition of real estate in the EU are the lease contract and conveyance, registration and mortgage finance. International research projects tackling these matters may be summarized as follows:

11.8.1. Main projects

These are shown in the Table below.

Table 34 Research projects targeting stages of a conveyancing transaction

Pre-contractual relationship	• DCFR (2009) • CESL (2011)
Cross border property sales contract	• Real Property Law and Procedure in the European Union' (Bremen, 2005) • Protection of immovables (Common Core, 2015) • <i>Ius Comune</i> Casebooks-Property • Eurojuris
Cross border form of sales contract	• Conveyancing Services Market (2007) • EUFIDES • EuroTitle
Registration of cross border sales contract	• EULIS • CROBECO • Cadastre and land registration knowledge exchange network • European Land Registry
Protection of mortgage borrowers	• Eurohypotheque (1960's-) • Runder Tisch (VdP, Berlin, 2006-)
Mortgage enforcements	• Promoting protection of the right to housing - Homelessness prevention in the context of evictions (2014-2015)

Source: Sergio Nasarre Aznar.

11.8.2. CROBECO

The European Land Registry Association (ELRA)⁷⁰⁸ heads the CROBECO (Cross Border Electronic Conveyancing) Project, whose main purpose is to set up a framework that allows cross border acquisition of real estate. To achieve this goal, they have conducted a pilot programme among the Land Registers of Spain and the Netherlands so as to achieve a cross border purchase made entirely through electronic means.

The CROBECO process is based on a bilingual deed, executed by a Notary public in the buyer's home country. The deed is written in two languages: the buyer's native language and the official language of the country in which the plot is located. The contract stipulates that the law of the buyer's home country governs all contractual and non-contractual obligations. Once the public deed is concluded, it is sent through electronic means to the land register where the property is located, once the land registrar of the buyer's country has examined the document.

In this sense, CROBECO 1 established a framework of rules and principles, the so-called Crossborder Conveyancing Reference Framework. For its part, the follow-up of CROBECO 1,

⁷⁰⁸ www.elra.eu/2013/12/about-crobeco/.

CROBECO 2, aims to implement the specific tools to support these notaries when advising Dutch and English buyers about property rights located in Spain and Portugal, such as a repository that contains examples of clauses accepted by the Land Registrar of the country of that land and the system Netpro, which has been developed to support foreign notaries. It contains a map search facility to select the relevant Land Register in Spain and the foreign notary can hire support from a Netpro assistant (local specialists, who help in fulfilling formalities and preventing pitfalls for foreign buyers). It has been pointed out⁷⁰⁹ that the Crobeco Project will likely reduce the transaction costs for future cross border real estate transactions without diminishing their legal certainty, but also that there are problems concerning the cost of the identification of boundaries by a professional surveyor and the intervention by legal professionals and other conveyancers from the country where the land is located.

Nevertheless, this system has been criticised by Spanish notaries for the following reasons⁷¹⁰:

- a) CROBECO as a copyists academy. It must be distinguished the "act" of executing the deed and the "paper" in which it is documented. The latter is easier to copy because all basically say the same thing; but the problem is to know whether or not the notary has properly advised the parties about Spanish law if the deed is executed in another Member State. Due to the fact that foreign notaries cannot advise the parties properly about this legal system, CROBECO has created a copy system of Spanish deeds that can provide the naive buyer with the feeling that they are like the Spanish ones. It is true that a repertory of clauses available to the foreign notary exists, but one thing is just copy the contractual terms and another one is understand its legal implications.
- b) CROBECO as the 'miracle of transubstantiation'. The application of the Rome I Regulation guarantees the validity of the legal transaction, but it has nothing to do with the document, which is governed by strict formalism, and with the transfer of ownership, which differ from one country to another. In order to overcome these problems, CROBECO applies the "miracle of transubstantiation", so when a foreign sale contract meets the legal requirements as for the legality of the transaction, it is assumed the validity of the form and the transfer of ownership.
- c) Thanks to the intervention of local specialists, CROBECO allows the parties to create a document without notarial legality check, without notarial advice and without following the "administrative formalities".

Also Notaries of Europe have expressed their concerns about the CROBECO Project⁷¹¹:

- a) The first land registrar issue a non-binding statement of validity directed to the land registrar in the country where the real estate is located, who will scrutinize the documents in compliance with national register law. It argues that the cumulative involvement of a notary and two conveyancers is opposed to the genuine idea of facilitating cross border real estate transactions.
- b) The Project sacrifices the legal certainty as the contract is drawn up and issued in their usual language by a professional who in fact is largely ignorant of the subject matter dealt with in the contract.
- c) As the land registrars are different in Europe, in many cases they do not have the professional competence to judge the full legality of a real estate act.
- d) The application of the law of the State of the buyer sacrifices the interests of the seller.

⁷⁰⁹ [www.elra.eu/wp-content/uploads/2014/05/Costs-and-Benefits-of-Cross border-Electronic-Conveyancing_Prof.-Dr.-Benito-Arru%C3%B1ada.pdf](http://www.elra.eu/wp-content/uploads/2014/05/Costs-and-Benefits-of-Cross-border-Electronic-Conveyancing_Prof.-Dr.-Benito-Arru%C3%B1ada.pdf).

⁷¹⁰ *Proyecto registral CROBECO: trampa y fracaso histórico*, at "El Notario del siglo XXI", Jan.-Feb. 2015, no. 59, www.elnotario.es/index.php/hemeroteca/revista-59/seccion-corporativa/3948-proyecto-registral-crobeco-trampa-y-fracaso-historico.

⁷¹¹ www.notaries-of-europe.eu/files/position-papers/2011/Position-CNUE-CROBECO-18-11-11-final-EN.pdf.

e) Lastly, it could be dangerous the possibility to conduct cross border real estate transactions in a system that does not follow the Latin-type notariat.

11.9. Recommendations

Recommendation 11-A – Generic information about the aspects of process identified in this chapter should be made available from the point of view of a cross border purchaser.

Recommendation 11-B – An EU citizen buying in another EU state will feel much more comfortable with a transaction as it progresses if the process is clearly mapped out in his or her own EU language. We therefore recommend that the whole process should be wrapped up into a single Cross Border Conveyancing Protocol which would guide the parties and their advisers through the process in an organised manner.

Recommendation 11-C – Cross border purchasers of new build property are entitled to full consumer protection even though what they are buying is an immovable. This should be aimed at securing that purchasers are fully informed so as to be able to contract in an equal market and are fully protected against problems arising during the construction process. EU consumer protection is not required if independent legal advice is provided before the purchaser comes under any obligation. This legal advice should cover all aspects of the transaction and not just the establishment of valid real rights.

Recommendation 11-D – Cross border purchasers of second hand residential property are entitled to consumer protection even though what they are buying is an immovable. This should be aimed at securing that purchasers are fully informed so as to be able to contract in an equal market. EU consumer protection is not required if independent legal advice is provided before the purchaser comes under any obligation. This legal advice should cover all aspects of the transaction and not just the establishment of valid real rights. Therefore standardised information should be provided to purchasers before they enter into any obligation and they should be given time for reflection and time to secure legal advice before any obligation becomes binding upon them.

Recommendation 11-E – The notarial system traditionally required personal attendance at completion in order for identity checks to be conducted, but modern money laundering procedures need identity to be established before the conveyancer forms a professional relationship with the client, and personal attendance at subsequent stages of the conveyancing process may be very inconvenient for a buyer living elsewhere on the continent. A cross border purchaser should be able to opt not to be present at the completion of the transaction, without additional cost.

Recommendation 11-F – Generic information should be available about non-legal requirements such as registration with the authorities in the locality of the home purchased and buyers should be directed towards this.

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12. THE BUYER'S FAMILY

KEY FINDINGS

- Cross border transactions within civilian Member States give rise to potential conflicts of matrimonial property and succession regime, but these are largely resolved by EU Regulations.
- Major issues arise in purchases that cross the common law/civilian divide in either direction, since the United Kingdom have opted out of those Regulations buyers will need detailed advice on family and succession issues.

12.1. Family/trust

Anyone buying a property abroad will need to make a series of decisions affecting the entitlements of his family in relation to the property he is buying. The issues can easily become extremely complex, and for the purpose of simplifying analysis it is easiest to think of a traditional nuclear family consisting of a (married or unmarried) couple and their children. That said the issues become even more pressing where one or both of the parties has divorced and remarried so that there are two or three families to consider, and it is always necessary to bear in mind the extent to which human rights jurisprudence has transformed our conception of the nature of the family.

The main concerns will be:

- co-ownership of the property between the couple;
- rights to the property if the couple split up;
- succession on the death of the first to die;
- the destination of the property on the death of the second partner; and
- inheritance taxation.

Proper ways of dealing with these matters will differ radically according to whether the property is situated in a civilian or a common law state.

12.1.1. Civilian states

So far as the issue arises in a civilian state, matters are now covered by a proposal for an EU Regulation governing matrimonial property regimes and an EU Regulation governing succession.⁷¹² Differences are so entrenched in national psyches that it is unrealistic to expect that succession regimes can be or should be harmonised even within civilian Europe. The main concern is therefore to ensure that buyers on the continent have an awareness of the terms of the EU Regulations. Denmark has opted out, so, although its domestic law is not radically different, special advice would be needed for any conflict involving Denmark. Where the civil law applies, the three guiding principles are:

- habitual residence is the connecting factor;⁷¹³
- lifetime relationships depend upon the matrimonial property regime, if any; and

⁷¹² See below points 12.2.1 and 12.2.2.

⁷¹³ This continues the law in eg BE and FR; DK also adopts habitual residence though not via the Regulation; nationality was the primary connecting factor previously in AT, DE, ES, IT, NL, PT etc.

- relatives of a deceased are entitled to reserved shares on the death of a co-owner.

12.1.2. Common law states

Much more fundamental is the difference in the common law. In English law parties are allowed far more autonomy and in particular enjoy freedom of testation. Further, both Ireland and the United Kingdom have opted out of the Matrimonial Property and Succession Regulations, adding further complexity and the most difficult issues arise when buyers cross the civilian/common law boundary – in either direction. Where the common law applies, the three guiding principles are:

- domicile is the connecting factor rather than habitual residence;⁷¹⁴
- lifetime relationships depend upon co-ownership and there are no special matrimonial rules for married couples or for cohabitees; and
- freedom of testation applies on death.

12.1.3. Patterns of cross border purchase

Four main patterns of cross border transaction emerge from this analysis:

- an habitual resident of a civilian state buys a residence in another civilian state (eg a German buying a home in France);
- an habitual resident of a civilian state buys in a common law state (eg a French person buying in England);
- a person domiciled in a common law state buys in a civilian state (eg an English person buying in France or Spain);
- a person domiciled in a common law state buying in another common law state.

Transactions of the second and third kinds cross the civilian/common law boundary, a factor which adds greatly to the complexity of the family planning aspect of conveyancing. The fundamental issues therefore seem to be:

- ensuring that foreign nationals become aware of the issue at the earliest stage of a proposed transaction;
- ensuring that the conveyancer sees it as his function to provide advice;
- providing advice that is clear and simple;
- allowing foreign nationals where possible to opt for the arrangements with which they are familiar; or, where this is not feasible,
- ensuring that a reasonably priced avoidance technique (such as a company or a trust) is available to foreign nationals.

Anecdotal evidence suggests that buyers are often left to work out these issues for themselves because notaries do not view it as their function to provide general advice in the context of a conveyancing transaction.

⁷¹⁴ The common law usually reflects the deceased's intentions closely (at the expense of complexity and uncertainty) by employing the concept of domicile: *Gaines-Cooper v Revenue & Customs Commissioners* [2006] UKSPC 00568, (2006) 9 ITLR 274.

12.2. Civilian buying in another civilian state

If a person resident in one civilian state buys a home in another civilian state, the connecting factor that will be applied is habitual residence. This is more enduring than pure residence – if a German resident dies whilst on a fortnight's holiday in Tallinn the accident of death should not lead to an Estonian succession. On the other hand nationality is too permanent, dished out arbitrarily at birth and insufficiently susceptible to change to reflect the deceased's likely intentions. Habitual residence provides a happy medium and is now the accepted European standard.

12.2.1. Matrimonial property regimes

A proposal for a regulation will select the matrimonial property regime to be applied to the property of spouses habitually resident in civilian states of continental Europe.⁷¹⁵ This was supposed to come into force at the same time as the Succession Regulation (discussed below) but its enactment has been delayed. Nevertheless this report assumes its enactment to obviate the need to recover all the ground involved in those proposals. The default selection will be of the state of the common habitual residence first established after the marriage,⁷¹⁶ but it will be possible to make a choice either at the time of marriage or afterwards from:

- the habitual residence common to both spouses (or of either spouse if living apart); or
- the nationality of either spouse.⁷¹⁷

Differences between matrimonial systems in different countries can cause hesitation for foreign buyers. According to German notaries and discussions among potential buyers, the matrimonial system presents a dilemma for foreigners, and a potential source of confusion if the regime differs from that with which they are familiar in their own countries. Under the German statutory matrimonial property regime, all property purchased after the marriage belongs jointly to the spouses.⁷¹⁸ If the names of both spouses are registered, then neither of them may dispose of the property alone, but a problem may arise if the property is registered in the land register in the name of one spouse alone.⁷¹⁹

The main cause for concern is the provisions about jurisdiction. Matrimonial property issues might well be resolved by the courts of habitual residence at the time of the dispute. This court may well end up applying foreign law – a situation which is generally undesirable and conducive to costly litigation – where the law applying to the couple's matrimonial regime remains that of the state where they married.⁷²⁰ As usual there is a big conceptual leap when moving from a civilian state such as France or Germany to a common law jurisdiction such as England. A pre-nuptial contract operating under French or German law can be

⁷¹⁵ Proposal for a Matrimonial Property Regulation COM(2011) 126; a very similar proposal would apply to the property of registered partnerships: COM(2011) 127. Neither will apply to Denmark, Ireland or the United Kingdom.

⁷¹⁶ Matrimonial Property Proposal (n 4) art 17.

⁷¹⁷ Matrimonial Property Proposal (n 4) art 16.

⁷¹⁸ Section 1363 BGB.

⁷¹⁹ As an exception, a spouse may only with the other spouse's consent agree to dispose of his property as a whole. Section 1365 BGB. According to case law, an asset representing 80 per cent of the matrimonial property of the disposing spouse can be considered his or her property in its entirety. These conditions can be met in the case of real estate.

⁷²⁰ Matrimonial Property Proposal (n 4) arts 3-5.

considered by the family courts in Britain when exercising the powers to redistribute property on divorce.⁷²¹

This situation does not require further discussion, since the two proposed Regulations have been put forward recently and further appraisal is redundant. When a purchase coincides with a change in habitual residence, it is possible to make a choice of matrimonial property and the couple will need advice about whether or not this is desirable. Advice needs to be included within the conveyancing transaction, but a problem may arise if the balance between the principal and secondary residence shifts over time.

12.2.2. Unitary succession in state of habitual residence

Mobility has increased the volume of cross border successions in Europe to 450,000 every year, representing a combined value of more than EUR 120 billion.⁷²² Uniform rules have been adopted⁷²³ for all deaths on or after August 17th 2015, always excepting the United Kingdom, Republic of Ireland and Denmark.⁷²⁴

The basic principle henceforth is that 'the law determined shall govern the whole succession'.⁷²⁵ Death no longer divides land and chattels nor (those three states apart) property situated in different EU Member States. Treatment of a deceased estate as a single undivided whole was already the case in the majority of European civilian states:

Table 35 How civilian states are affected by the Succession Regulation

States already with unitary law	AT, DE, EL, NL, PT, SE, ..
Previously unitary except for immovables	ES, IT
Previously divided but becoming unitary	BE, FR, LU, CY, MT

Source: Hayton⁷²⁶

It is noteworthy that many of the Member States where the law has been changed are those where second homes are most common.

Where it applies the Succession Regulation hands jurisdiction to deal with a cross border succession is handed to one single court which usually applies its own law. Any decision relating to a succession given in one EU country must be recognised and enforced in other EU countries.⁷²⁷ The advice commonly given in the past to people buying abroad was to make multiple wills, one for each state in which the testator owned property, the idea being to simplify the process of securing administration of the estate in each of those states. This advice no longer holds good where the person dies with habitual residence in a Regulation state because there will now be a unitary succession in that state.⁷²⁸

⁷²¹ *Granatino v Radmacher* [2010] UKSC 42.

⁷²² http://ec.europa.eu/justice/newsroom/civil/news/150817_en.htm

⁷²³ Regulation (EU) No 650/2012 ('Brussels IV') on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession.

⁷²⁴ Succession in these three Member States will continue to be governed by their national rules. Danish rules are similar to the Regulation though.

⁷²⁵ Succession Regulation (n 12) art 23. This will not necessarily be true of a succession involving property in Denmark, Ireland or the United Kingdom.

⁷²⁶ DJ Hayton *European Succession Laws* (Bristol: Jordans, 2nd edn, 2002), appendix C.

⁷²⁷ 'Inheritance in the EU: Cross Border Successions Made Simpler', (Brussels: Commission, 2015), p 2.

⁷²⁸ It may still be useful where a person dies domiciled in the UK or other refusing state.

Citizens are able to choose whether the law applicable to their succession should be that of their last habitual residence or that of their nationality.⁷²⁹ As usual, the Regulation on cross border succession in no way alters the substantive national rules on successions. Each nation has legislated separately to determine basic questions such as who is to inherit and what share of the estate goes to the children and what share to the spouse.⁷³⁰ Forced heirship is usual on the continent as it the reserved portion held for the nearest relatives, and a bar on disposal of anything except the balance by will. These rules often commonly include a clawback by which gifts made during a deceased's lifetime (possibly long before his or her death) can be brought back into the estate to make good the reserved share of the estate; the effect can be to upset what appear to be long settled gifts. Detailed rules vary between each civilian state.

12.2.3. Succession following cross border acquisitions

The basic situation under discussion is where a couple habitually resident in one civilian state buy a residence in another civilian state, for example a German buys a home in France. This subdivides into three separate cases.

- (1) A secondary residence is acquired which does not alter the couple's habitual residence, for example the purchase of a holiday home. In such a case where the habitual residence has not changed, the couple can simply rely upon their habitual residence in their state of origin to ensure that existing expectations about inheritance continue. When either of them dies, the succession to the secondary home will be governed by the law of the state of their primary residence.
- (2) Purchase of a primary residence resulting in a permanent move (eg a move for work or retirement). Here the default rule is that the whole succession will be governed by the law of the state to which they have moved, and this may require reappraisal of any existing arrangements made for succession. The couple should consider in these circumstances whether to opt instead for the law of their nationality, though this may be awkward if they are of different nationalities.
- (3) Purchase of a secondary residence followed later by a change of habitual residence. The Succession Regulation applies to pre-existing wills made by people dying on or after August 17th 2015. Earlier wills may not cope properly with a situation in which that single succession applies to all property. It is unusual for legislation to affect existing wills and there may be human rights pitfalls ahead. Again, here, a choice of the law of nationality may be sensible, but certainly the matter needs to be considered.⁷³¹

12.3. Civilian buying in a common law state

Family issues figure large in any purchase which crosses the civilian-common law divide, but they may fall into one of two patterns.

12.3.1. Habitual residence remains in a civilian state

In this case there may well be a divided succession. The home state will assert jurisdiction over the entire estate of the deceased, but this assertion will be nugatory in relation to

⁷²⁹ Succession Regulation (n 12) art 6.

⁷³⁰ Succession Regulation (n 12) art 2.

⁷³¹ In some cases the new rules might affect existing testamentary dispositions eg the rule for commorientes that no one involved in contemporaneous deaths should have any rights to the succession of the other or others: Succession Regulation art 32; this may or may not correspond to the law in force when a will was drafted.

assets in a state (such as Ireland the United Kingdom) which does not recognise the Succession Regulation. So far as land is concerned a common law succession will follow so far as the land is sited within the common law state; the law to be applied to chattels will depend upon the common law doctrine of domicile,⁷³² which may well refer the chattels back to be dealt with under the law of the home state of the deceased.⁷³³

12.3.2. Habitual residence established in a common law state

If a civilian moves permanently to a common law state, so that habitual residence is established within a common law jurisdiction, the succession will be a common law succession unless steps are taken to avoid this. The home state will decline the succession if habitual residence is established elsewhere and the common law state will assert jurisdiction over the estate where the deceased is domiciled, excluding land sites overseas; the practical effect is that the estate will be split. This move therefore risks upsetting existing succession arrangements and requires full advice to be given about its effects. There may also be a considerable problem if a person buys a holiday home in a common law state and afterwards retires there, thus moving his habitual residence. This will have a radical effect on existing succession arrangements. A person is likely to receive legal advice when buying a home but not when retiring, so it would have been better if the European regimes had been immutable.

12.3.3. Basic steps required in a common law state

A purchase of a property by a couple in a common law state requires two steps which will be unfamiliar to a civilian purchaser:

- A declaration of trust - stating that the couple buy either as joint tenants or tenants in common; the former is more common and will give rise to a survivorship; consideration should be given to whether the declaration of trust would be recognised in a civilian succession; and
- A will - exercising the owner's freedom of testation either in relation to the deceased's share (in the less usual case of a tenancy in common) or to the whole property (acquired by survivorship on the death of the first co-owner in the more usual case of joint tenancy) which falls to be disposed of on the death of the second co-owner. If no will is made, intestacy rules will operate. For example, if an unmarried couple buy a home together as joint tenants, the entire property will pass on the first death (say A) to the survivor (B) and so eventually to the children of the longer liver (B).

This should not prove too problematic because an English or Irish conveyancer would be required to give comprehensive advice about these aspects of a transaction. The main risk is that the conveyancer may not be aware of the big conceptual divide between common law and civilian successions.

⁷³² Though not necessarily, because of the distinction between domicile and habitual residence.

⁷³³ Differential treatment of movables and immovables was an error propounded in the first edition of Jarman *on Wills* (London: 1st edn, 1844) 4 fn; JA Clarence Smith 'Classification by the Site in the Conflict of Laws' (1963) 26 *Modern Law Review* 16-33, 17; *Freke v Lord Carbery* (1873) LR 16 Equity 461 Lord Selborne; G Maher 'Beneficial Interest in Immovable Property as a Ground of Jurisdiction' [2003] 7 *Scottish Law Times* 57-62; A Grahl-Madsen 'Conflict between the Principle of Unitary Succession and the System of Scission' (1979) 28 *International and Comparative Law Quarterly* 598.

12.4. The English couple abroad

Undoubtedly the most serious problems in cross border acquisitions will be encountered by a buyer from a common law state seeking to buy elsewhere on the continent of Europe. The archetype is an English couple with children buying a home together in France, though each family set up needs careful consideration and each civilian state varies slightly in its rules.⁷³⁴

12.4.1. Purchase of a main residence coupled with a permanent move to France

Habitual residence in France (or any other Regulation state) will result in a succession being civilian and unitary. Essentially therefore the English couple will become subject to French succession law, with its forced heirship, the share reserved for children (the 'reserve legale'), claw back of gifts made during the deceased's lifetime, and strict limits on the expected freedom of testation (which is restricted to the *quotité disponible*).

12.4.2. Purchase of a holiday home in France, retaining a primary residence in England

In this case the Succession Regulation will pass the succession to England, the state of habitual residence, and English law will differentiate the assets in England from those in France. The succession will therefore be split. The buyer may or may not be aware that the succession arrangements made for his property in England will not apply to the property in France.⁷³⁵ Again the English couple will become subject to French succession law - with its forced heirship, the share reserved for children (the *reserve legale*), claw back of gifts made during the deceased's lifetime, and the limit on freedom of testation to the *quotité disponible* – but this time only for the assets in France.

If the couple subsequently decide to switch the structure of their life and to reside most of the time in France, then the position is likely to be that in the preceding paragraph – that is the entire estate and not just the assets in France would be affected by French property law.

As an aside, the position of Britons moving to Spain between 1974 and 2015 was not in accord with the Succession Regulation. Under amendments to the Spanish Civil Code⁷³⁶ (applicable to deaths after 1974 but before August 17th 2015) English law was applied to the succession to land in Spain owned by a British national. Thus, in *Re Adams*,⁷³⁷ a flat in Alicante passed to the surviving spouse of the owner under his English will, without their son having any reserved share; English rules applied. *Denney v Denney*⁷³⁸ concerned an art collection on loan to Toulouse, which passed under English freedom of testation since the owner was an English national; even though the testator was living in Spain; thus the Spanish Supreme Court upheld freedom of testation and the unity of the English succession.

The Succession Regulation may therefore upset a lot of testamentary arrangements.

⁷³⁴ H Dyson *French Property and Inheritance Law – Principles and Practice* (Oxford, Oxford University Press, 2nd edn, 2003), ch 20 and part II; L Delanoë 'French estate of an English client' [2009] March 26th *Law Society's Gazette* 18.

⁷³⁵ *Nelson (Earl) v (Lord) Bridport* (1846) 8 Beaven 547 (Admiral Nelson's Brontë estate on the foothills of Etna); *Birtwhistle v Vardill* (1840) 7 Clark & Finnelly 895.

⁷³⁶ Spanish Civil Code art 12. Spain is plurijural but the conflicts code applies throughout.

⁷³⁷ *Re Adams* [1982] July 31st Browne-Wilkinson VC.

⁷³⁸ *Denney v Denney* [1999] May 21st Spanish Tribunal Supremo (an English text is available on the internet).

12.4.3. Civilian succession law

A couple with land in France will be subject to French succession law either on the whole estate or at least the assets in France. Essentially therefore the English couple will become subject to French succession law, with its forced heirship, the share reserved for children, claw back of gifts made during the deceased's lifetime, and strict limits on the expected freedom of testation. It may be possible to avoid this by a choice of English law (depending on the interpretation of the Succession Regulation⁷³⁹), a choice of English law almost invariably being correct when possible. A choice made before August 2015 should also usually be respected.⁷⁴⁰ Otherwise it may be possible to avoid all this with purchase through a company,⁷⁴¹ though it seems undesirable that a corporate mechanism should be needed. It may also be possible to ameliorate the position with a trust domiciled in the buyer's home state, though careful advice is needed as to whether a trust would be recognized in a civilian succession.⁷⁴² However, once the couple have become 'French' at least by residence, they will have to accept their estate being split between their children and sub-divided further between their grandchildren. Anecdotal evidence suggests that *notaires* very often fail to advise English couples sufficiently, or, to put it another way, do not regard it as part of their function to advise in a conveyancing transaction on future succession issues.

Inheritance taxation will certainly be levied on the assets abroad by the host state, whatever the succession regime.

12.5. Taxation concerns of a purchaser

European citizens surely understand that buying abroad involves acceptance of the taxation rules of the host nation. Non-national buyers will be catapulted into a world with an unfamiliar taxation regime, and buyers therefore need advice on both land taxes and any implications of their purchase for more general taxation. The real issue given the wide divergences in taxation rules is to ensure that:

- buyers are made aware in a timely fashion of rules that may cause problems; and
- legal advisors have sufficient understanding of the divergences between the two systems to understand when the buyer may be induced to act under a misconception.

Anecdotal evidence suggests that these desiderata are often not met in practice so that, for example, real estate taxation elsewhere in Europe is a recurrent problem for Finnish buyers.⁷⁴³ A purchaser needs to know the taxation structure that will affect the property, for example capital gains tax and inheritance taxation. A purchaser in the UK is well protected because the conveyancer is obliged to give taxation advice on the consequences of the transaction.⁷⁴⁴ Thus in Germany, the task of the notary includes explaining to the buyer all taxes relating to the transaction, but tax advice on issues beyond the immediate purchase must be obtained from a general lawyer. The main concerns will be

- Residence rules for income tax;
- Capital gains tax;

⁷³⁹ A choice can be made of the law of a Member State of which the person making the choice is a national; it is assumed that the United Kingdom is to be treated as such even when not participating in the Succession Regulation (n 12).

⁷⁴⁰ However, then a choice was often made for foreign assets alone, and this would not comply with the Succession Regulation (n 12).

⁷⁴¹ Dyson *French Property* (n 23) ch 9; *A Beginner's Guide to Purchasing Property in Spain* (Manchester: Pannone, www.pannone.com, 2015), p 16.

⁷⁴² A testamentary trust was ruled incompatible with Spanish law in *J v Asuncion* [2008] RJ 2685.

⁷⁴³ Karoliina Liimatainen, 'Ulkomailta asuntoa ostavan kannattaa varoa riskejä', *Helsingin Sanomat*, 6 July 2013.

⁷⁴⁴ See above ch 10 fn 74.

- wealth tax (especially if account is taken of overseas assets);
- few cover inheritance tax⁷⁴⁵
- Double taxation arrangements;

Inheritance taxation lies outside the succession regime, but an attempt is being made to limit double taxation⁷⁴⁶ where there are no existing bilateral agreements.⁷⁴⁷ Most states levy taxes on inheritances on the death of a person, and most also tax gifts by living persons in the last few years of their life. Various connecting factors are used but taxes are almost always based on the location of assets, that is on the site of land. Increasing mobility leads to double taxation, though administrative relief was common. The aim is to secure that the overall level of taxation is the same as the highest IHT rate. Tax relief should be allowed on relief on immovable property situated in another Member State.⁷⁴⁸ More difficulty exists with movable property because the possible personal links increase; priority is given to a personal link to the deceased rather than the heir. Where a single person has multiple personal connections, there is a procedure to adjudicate between the taxing authorities, based on a sequence of permanent home, centre of vital interests, habitual abode and nationality.

12.6. Recommendations

Recommendation 12-A – generic information must be made available to potential purchasers about the choices open to them in relation to co-ownership, choice of matrimonial regime and succession.

Recommendation 12-B – A conveyancer accepting instructions to act for a cross-border purchaser must undertake to provide competent advice to the purchaser about matters of co-ownership, matrimonial regimes and succession.

Recommendation 12-C – When the Succession Regulation is reviewed, this needs to include an assessment from the perspective of a cross-border purchaser to ensure that choices recommended by conveyancers when a residence is bought remain effective if the buyer changes his habitual residence. It also needs to ensure that choices made by purchasers from Member States not participating in the EU conflicts regimes are effective.

Recommendation 12-D – Cross border buyers need to be directed towards accurate and up to date information about taxation regimes. Conveyancers will inevitably give advice about the tax payable on the immediate conveyancing transaction, but we do not recommend that this should be widened (as in England) to the giving of general financial advice as a result of the transaction. What we do recommend is that generic information should be readily available and that the conveyancer should be required to point the client towards these sources of information and made aware of pathways to appropriate sources of advice .

⁷⁴⁵ 'Don't let your holiday-home plans come tumbling down' *Independent on Sunday*, August 13th 2011.

⁷⁴⁶ Commission Recommendation 15 December 2011 relief from double taxation on inheritance 2011/856/EU.

⁷⁴⁷ F/GB double tax treaty of 21 June 1963, arts 5, 6.

⁷⁴⁸ Commission Recommendation 2011/856/EU part 4.1.

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13. EU COMPETENCE

KEY FINDINGS

- EU competence in residential purchases is very limited because whereas goods can move readily across national boundaries, land is immovable, other reasons being the property shield in TFEU art 345 and the operation of subsidiarity.
- EU competence is mainly founded on the liberalisation of capital movements, both investment in land and the movement of fund to pay for land, but there are numerous checks on EU actions. This explains why EU action has not resolved notorious problems such as the 'land grab' laws in Valencia, but it could have solved the 'hidden mortgages' in Cyprus.
- The EU has competence to regulate some transactional aspects of cross border acquisitions of residences.
- The most fruitful method of progress in relation to the general land market will be detailed research aimed at enabling national property systems to work together in harmony.

13.1. EU competence over land law

13.1.1. Goods (movables) and land (immovables)

Treaty provisions have prevented the creation of a substantive EU property law – there is no European owner, no European ownership nor even an amalgam of freehold, *propriété* and *Eigentum*, and no European register. Competence does exist to regulate transactional aspects of dealings with land, since land is a form of capital, but cross border acquisitions of land have rarely reached EU agendas. This is a sharp contrast with the effort devoted to ensuring that cross border acquisitions of goods are unrestricted. The difference perhaps stems from the facility with which movables can be transported from one Member State to another. Land is immovable and tied to its site and its location within a particular Member State. It is not immediately obvious that any steps are needed to open the market in land. However, there are things which are legally immovable but which can in fact cross national boundaries, one obvious example being mortgage lending. Residential debt represents more than half of EU-28 GDP,⁷⁴⁹ so the exclusion of land leaves a large segment of the EU-28 economy outside the scope of the Treaties. In the very long term the current Treaty position is surely unsustainable, and it would be desirable to lay down foundations in research that could show the way forward, whilst recognising that this report is concerned only with alleviating the current problems.

There is no compelling case for a single land law. Immovability prevents land itself (and most rights in land) from crossing a border from one legal system to another. Land is characterised by a fixed site. This ties a particular parcel of land to a single Member State and (in a regionalised state, to a particular system of land law within it), determines both the law to be applied to disputes about the land and the forum in which disputes are to be resolved. At its simplest, a dispute about the ownership of a house in Paris is resolved in the French courts using French law. Europe respects the territoriality of its Member States in relation to land, creating a market which works reasonably well with a conflicts based approach to land law. Classification of a particular thing as an immovable determines the sectoral classification within the EU conflicts regimes, and hence its allocation to a

⁷⁴⁹ *Hypostat 2014, A Review of Europe's Mortgage and Housing Markets*, (Brussels: European Mortgage Federation, 2014).

particular property system according to its site. The land regime is based on site-based exclusive forums, the differentiation of property rights and personal obligation, selection of the land law of the site and the mutual recognition of property judgments.⁷⁵⁰

Any prospect of a harmonisation of land law can be dismissed out of hand when the fate of the work on a European contract law is considered. Academic work over a quarter of a century demonstrated a clear consensus on the desirability of some form of harmonisation of contract law, though it must be admitted that there was no consensus whatsoever on the form that the new contract law should take.⁷⁵¹ A business case for intervention could be made out.⁷⁵² Academic work was formed into a Draft Common Frame of Reference ('DCFR')⁷⁵³ from which emerged – not a Common Frame of Reference but – a proposal for a Regulation introducing a Common European Sales Law ('CESL').⁷⁵⁴ The intention throughout was to exclude land, a matter of very considerable nicety, both from the Common Frame of Reference⁷⁵⁵ and from the proposed Common European Sales Law.⁷⁵⁶ Even with this narrowing of scope, the proposal has not found political favour, either as a 29th regime to be added to the national contract laws of EU-28, nor even as an special code limited to cross border transactions. Last year (December 2014),⁷⁵⁷ the European Commission suggested a yet more limited role for the European contract law as a response to 'the potential of e-commerce in the Digital Single Market'; it may become a set of 'rules for online sales of both physical goods like shoes or furniture and digital content, like e-books or apps'.⁷⁵⁸

A European land law code is therefore a non-runner. For one thing it would be far harder to achieve than a contract law code – because all systems share a single conception of personal obligation whereas there are fundamental disagreements about the conception of property between civil law codes and the common law, so there can be no certainty that it would be technically feasible to codify land law. Whether or not this is the case, the political climate which has killed the Common European Sales Law shows that a property codification is inconceivable.

13.1.2. The property shield

What we have sought to do is identify technical problems with how conveyancing systems mesh from the point of view of a person moving from another Member State to buy a home, and formulate proposals designed to make cross border conveyancing work properly. This is a technical exercise. There follows the much more tricky phase in which responsibility for putting things right has to be allocated between the various players in the market. There is major tension between the competence of Member States and the competence of the EU.

⁷⁵⁰ E Ramaekers *European Union Property Law* (Antwerp: Intersentia, 2013), para 4.5.9.

⁷⁵¹ The spectrum of opinion is perhaps best illustrated in S Grundmann & JH Stuyck, *An Academic Green Paper on European Contract Law* (The Hague, Kluwer, 2002).

⁷⁵² S Vogenauer & S Weatherill, 'The European Community's Competence for a Comprehensive Harmonisation of Contract Law – An Empirical Analysis' [2005] *European Law Review* 821, 826-828.

⁷⁵³ C Von Bar, E Clive & H Schule-Nölke, *Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference* (Munich: Sellier, 2009).

⁷⁵⁴ COM/2011/0635 final.

⁷⁵⁵ P Sparkes, 'European Contract Law: How to Exclude Land?' in M Kenny and J Devenney, *The Transformation of European Private Law – Harmonisation, Consolidation, Codification or Chaos?* (Cambridge: Cambridge University Press, 2013), pp 78-99.

⁷⁵⁶ Common European Sales Law (n 6) art 3.3.e.

⁷⁵⁷ European Commission Work Programme for 2015, www.europarl.europa.eu/EPRS/EPRS-Briefing-545732-Commissions-2015-work-programme-FINAL.pdf.

⁷⁵⁸ 'Proposal for a Directive on Certain Aspects Concerning Contracts for the Supply of Digital Content' COM(2015) 0634; 'Proposal for a Directive on Certain Aspects Concerning Contracts for the Online and Other Distance Sales of Goods' COM(2015) 0635.

All EU-28 Member States assert their territoriality through the enactment of a specific law regulating the land lying within their boundaries and see a native realisation of ownership, as an essential pillar of their private law systems with effects in their administrative law (eg. planning, taxation) and family and succession laws. Land laws, registers and conveyancing systems are essentially site based. EU-28 has close to fifty land laws on account of the regionalism of many member states: Scottish law affecting heritable property is very different from English land law, and the law applied to Welsh land is beginning to diverge from that in England; Catalonia has its own civil code distinct from the Spanish Code applying to most of the remainder of Spain, and so it goes on.

This diversity is protected by the Treaty provision commonly described as the property shield since, according to article 345 of the Treaty on the Functioning of the European Union,

The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership.

Whilst the precise meaning of this provision is a matter of some controversy, it can to some extent be read at face value. It could clearly be used to block a full scale land law code and it restricts more limited proposals. National systems are free in their essentials from European interference, and any institutional intrusion will require strong justification.⁷⁵⁹ No European element enters into pure property law such as the ownership right, the *numerus clausus* (the list of real rights recognised in each system), succession on death, and family law. Thus far we have stuck to rather obvious platitudes, but, since the precise meaning of article 345 is important in framing our proposals, some notice must be taken of the competing views.

Akkermans and Ramaekers⁷⁶⁰ take the view that what is now article 345 is to be read in the light of its history. This article found its way into the Treaty of Rome (article 295) from the Treaty setting up the European Coal and Steel Authority,⁷⁶¹ in which context the function of the article was to preserve neutrality between producers that were nationalized and those that were in private ownership. In other words the origin of the provision was concerned to prevent the Authority from dictating the proprietary structure of the ownership of coal and steel producing undertakings. This argument, if correct, takes article 345 almost completely out of play and would in fact cede competence to the EU to harmonise property law codes contrary to the apparent wording of the article now found in the Treaty in the Functioning of the EU.

A second view is more general because it appears to provide a better balance between European and national competences. Unfettered freedom to organise property rights locally would end up in paralysis of the power of the EU. Intervention in property law by the EU is permitted where it falls within some recognised head for intervention,⁷⁶² such as conflicts rules and consumer protection. This explains why the property shield has not prevented the regulation of timeshares, mortgage credit and matrimonial property regimes.⁷⁶³ By far the most important qualification of the property shield is the four fundamental economic freedoms underpinning the single market. A European property law first emerged in the field of intellectual property/industrial property,⁷⁶⁴ but much more potent formants are the

⁷⁵⁹ Case 56/64 etc *Consten v Commission EC* [1966] ECR 299 ECJ, 366, Advocate General Römer

⁷⁶⁰ B Akkermans & E Ramaekers, 'Article 345 TFEU ..., Its Meanings and Interpretations', *European Law Journal* 16 (2010), p 310.

⁷⁶¹ European Coal and Steel Community Treaty (Paris: April 1951) art 83

⁷⁶² P Sparkes, *European Land Law* (Oxford: Hart, 2007), p 195 (2nd edn in preparation).

⁷⁶³ See above respectively point 6.5.2 and fn 30, point 9.1 and fn 8 and point 12.2.1 and fn 4 (the latter is currently a proposal).

⁷⁶⁴ Case 24/67 *Parke Davis v Probel* [1968] ECR 55 ECJ, 59.

free movement of goods (for movables) and the free movement of capital (for immovables). Thus national land laws have to yield to the extent necessary to secure the efficient operation of the internal market. This explains why European land law is transactional in character. This rationalisation has been supported by the European Court of Justice. Thus in a contest between an Irish scheme for the compulsory consolidation of agricultural land and the basic freedom of establishment, the European rule of non-discrimination remains in play.⁷⁶⁵ Most commonly issues arise in relation to the free movement of capital,⁷⁶⁶ notably when Golden shares (entrenching state power over utility companies) fall foul of the principle that investors should be free to put their capital into companies on a level playing field.⁷⁶⁷ Removal of distortions in the single market is the proper basis for EU action. As Akkermans says:

'Member States may be free under the Treaty provisions to legislate in the area of property law. In the exercise of that freedom as well as in respect to the exercise of the property rights so created, the provisions of the EC Treaty apply.'⁷⁶⁸

This limited EU competence under article 345 still requires clearer discussion of its jurisprudential and rational underpinnings.

13.1.3. Subsidiarity

Subsidiarity is a vital component of any federal structure, such as the EU in its relations with its Member States. Decisions should be taken as closely as possible to the people affected by them. Property law is a typical area in which EU competence, based on free movement of capital investment in land, overlaps with national and regional property laws. Subsidiarity is an important counter weight to Brussels power. Although Europe is a continent of many systems of property law, it does not follow automatically that differences in the private laws as between member states gives rise to distortion in the internal market or reduces trade between member states.⁷⁶⁹ In practical terms this means our proposals should only recommend EU action where there is a clear need for action to secure a free market in land or proper consumer protection, and other recommendations should be directed to Member States to amend property systems for themselves.

13.1.4. Cross border transactions

EU competence is restricted to cross border transactions. The sale of a cottage in the Dordogne is solely a French concern when one local sells to another, or to a Parisian as a holiday home. Regulation of French land owned by its citizens and paid for with French funds is (largely) a matter for the French state.⁷⁷⁰ A European element into what remains primarily a French concern when the transaction involves a cross border element, most notably if the purchaser is a national of another EU Member State – perhaps a Briton or a German or a Finn buying a bolthole in the Dordogne. A more limited cross border element arises when a French national moves back from abroad to make a purchase in France or when he draws his funds from a non-French bank.

⁷⁶⁵ Case 182/83, *Robert Fearon and Company Ltd v The Irish Land Commission* [1984] ECR 3677.

⁷⁶⁶ See http://ec.europa.eu/internal_market/capital/framework/treaty/index_en.htm.

⁷⁶⁷ C-503/99 *Commission EC v Belgium (Golden Share)* [2002] I ECR 4809 ECJ

⁷⁶⁸ Case C-367/98, *Commission v Portugal* [2002] ECR I-4731, para 48; Case C-483/99, *Commission v France* [2002] ECR I-4781, para 44; Case C-503/99, *Commission v Belgium* [2002] ECR I-4809, para 44.

⁷⁶⁹ Cases C-376/98 etc, *Germany v Parliament and Council*, [2000] ECR I-8419.

⁷⁷⁰ *Robert Fearon* (n 16); Case C-478/98, *Commission EC v Belgium (Eurobonds)* [2000] ECR I-7587, ECJ, paras 16-17; NN Shuibhne 'The Wholly Internal Rule' (2002) 39 *Common Market Law Review* 731-771; C Ritter 'Purely Internal Situations' (2006) 31 *European Law Review* 690-710.

The word 'largely' in the previous paragraph requires some explication. There are cases in which the European Court of Justice has undertaken a consideration of purely internal cases because internal facts raise a legitimate European issue on cross-border facts. Thus in *Reisch*⁷⁷¹ the buyer was an Austrian interested in a second home in Salzburg who was precluded from buying his holiday home by legislation which was invalidated not on account of the prejudice to him (Reisch) as an internal party but on account of a hypothetical Swede or Greek who might be hindered by the existence of the legislation. In the more recent *Flemish Welfare Aid*⁷⁷² case, a scheme of care insurance which was only available to those working and residing in the Dutch-speaking and bilingual regions of Belgium was struck down as a restriction on the free movement of workers and the freedom of establishment. Migrants considering working in Flanders or Brussels might, reasoned the Court, be put off moving to live in Belgium because they would lose eligibility for those benefits if they afterwards moved to the French speaking Walloon region. Any EU national working in these regions must be eligible for these schemes regardless of the region in which they were living. However, Belgian nationals could lose the benefit by moving from Flanders to Wallonia, that is when the facts are merely cross-regional.⁷⁷³

EU principles can operate in purely internal situations because Member States are generally reluctant to engage in reverse discrimination, that is to allow a non-national a particular right based on EU law that is superior to the rights applied internally to a national. In some states such as Austria the prohibition on reverse discrimination is entrenched in domestic law.

Around one per cent of the European market in residential property involves cross border transactions.⁷⁷⁴ On one hand, one per cent of a very large pie represents a very substantial market, both in terms of house sales and of conveyancing services. Against that, a one per cent market share can be seen as relatively marginal and does not require the entire housing market to be driven by what is perceived to be beneficial to cross border activity.

13.2. Particular heads of EU competence

13.2.1. Transactional competence based on freedom of capital

Because EU competence is mainly premised on the need to secure effective freedom of the movement of capital, it follows that EU competence over land is focussed on those aspects of transactions which involve capital freedom. If it impacts mainly on commercial transactions, such as investment in land, pledges and mortgages, it also has a presence in family gifts and settlements. Capital has traditionally been regarded as a resource which can be invested to yield an income, but at Maastricht the movement of capital was assimilated to income payments and the two categories were amalgamated.⁷⁷⁵ This turned land into a commodity.

The single market in capital leaves investors free to convert their capital into land. Transactional rules must be fettered to the extent needed to achieve to create a single internal market.⁷⁷⁶ Matters which might justify intervention are restrictions on purchase,⁷⁷⁷ provisions discriminating between nationals and non-nationals,⁷⁷⁸ any dissuasion for EU

⁷⁷¹ Case C-515/99, *Reisch v Burger Meister Der Landeshauptstadt Salzburg* [2002] ECR I-2157, ECJ; Case C-300/01, *Salzmann*, [2003] ECR I-4899, ECJ.

⁷⁷² Case C-212/06, *Government of French Community and Walloon Government v Flemish Government (Flemish Welfare Aid)*, [2008] ECR I-1683, ECJ.

⁷⁷³ *Flemish Welfare Aid* (n 24) paras 37–38, 48.

⁷⁷⁴ See above point 2.2.1.

⁷⁷⁵ TFEU art 63, paras 1 and 2 respectively.

⁷⁷⁶ Case 4/73 *Nold (No 1)* [1974] ECR 491, ECJ.

⁷⁷⁷ C-302/97 *Konle v Austria* [1999] ECR I-3099, ECJ,

⁷⁷⁸ C-30/90 *Commission EC v UK (State Aids)* [1992] ECR I-829, ECJ; *Robert Fearon* (n 16).

citizens in investing in land and or rendering capital freedoms illusory.⁷⁷⁹ Reliance on the property shield in such contexts is 'spurious'.⁷⁸⁰

Arguably, competence extends beyond these examples to aspects of capital efficiency. Transfer of property, also cross border, has a lot to do with secure title. People are prevented from taking full advantage of the productive uses of the land by any insecurity in the title. The United Nations link security of title and of tenure with the realisation of development.⁷⁸¹ The World Bank states 'formal titles are a necessary condition to developing a fully functional housing market, particularly a housing finance system'; European systems are all of 'high quality' but efficiency varies from Sweden where it is judged to be high to Belgium which is thought to be very inefficient.⁷⁸² Business is facilitated by reducing the time taken, the cost or number of procedures required. Among the most common improvements were reducing property transfer taxes, combining or eliminating procedures, and introducing computerized procedures. Greece has made the greatest improvements in terms of ease of registration property with reduced taxes/fees (also Spain did that in the EU) and reduced procedures, while Ireland enhanced its land registry's computerized system and implemented an online system for title registration. The importance of bailour conditionality can be seen.

13.2.2. Facilitation of movement to engage in economic activity

Decisions that the EU should intervene in property laws to secure capital freedom can often be replicated by action to secure the economic freedoms against national laws, notably freedom of establishment⁷⁸³ and service provision⁷⁸⁴ and the free movement of workers.⁷⁸⁵ In the context of this report the relevant issue is the purchase of residential property to house entrepreneurs and migrant workers. Any obstacle should be overridden, so EU action will be justified, but the practical results duplicate the decisions about freeing capital investment in land purchases.⁷⁸⁶ Controls of any kind require justification and their justification will be an uphill battle.⁷⁸⁷

13.2.3. Facilitation of EU citizenship

The EU Citizenship Report suggests that:

Those who are taking advantage of the European project by extending aspects of their life beyond national borders, through travel, study, work, marriage, retirement, buying or inheriting property, voting, or just shopping online from companies established in other Member States, should fully enjoy their rights under the Treaties.⁷⁸⁸

This report examines particularly the experience of EU citizens in effecting cross border purchases. Is the EU now competent to intervene simply to improve the experience of the

⁷⁷⁹ C-163/94 *Sanz de Lera v Spain* [1995] ECR I-4821, ECJ

⁷⁸⁰ C-463/00 *Commission EC v Spain (Golden Share)* [2003] ECR I-4641, ECJ.

⁷⁸¹ *Monitoring Security of Tenure in Cities: People, Land and Policies*, (Nairobi, Kenya: UN-HABITAT, 2011), p 5.

⁷⁸² R Buckley & J Kalarickal 'Land Market Issues: The Mystery of Capital Revisited' in R Buckley & J Kalarickal, *Thirty Years of World Bank Shelter Lending: Directions in Development Infrastructure*, (Washington DC: World Bank, 2006), p 30, Figure 1.8.

⁷⁸³ TFEU arts 49-55.

⁷⁸⁴ TFEU arts 56-62.

⁷⁸⁵ TFEU arts 45-48; Residence Directive, 2004/38/EC, OJ 2004 L158/77.

⁷⁸⁶ Case 305/87 *Commission EC v Greece (Border Regions)* [1989] ECR 1461, ECJ, Case 63/86 *Commission EC v Italy (Housing Aid)* [1988] ECR 29, ECJ.

⁷⁸⁷ Case C-197/11, *Eric Libert v Gouvernement Flamand*, EU:C:2013:288.

⁷⁸⁸ EU Citizenship Report 2010 on dismantling obstacles to EU citizens' rights, COM(2010) 603, p. 3.

market to citizens? In an internal transaction, nationality prevails (though it is apparent that the introduction of European citizenship has also put pressure on the 'wholly internal situation'⁷⁸⁹) but when a cross border element is involved, EU citizenship has become progressively more significant since its introduction in the Maastricht Treaty,⁷⁹⁰ and 'is destined to be the fundamental status of nationals of the Member States'.⁷⁹¹ That said, the current status of EU citizenship remains hotly contested. It provides a focus for movement by individuals, residence,⁷⁹² and family rights of international families (some 13% of EU marriages), and it would seem logical for it to develop in future into a focus for the ownership and transactional rights of migrant owners of immovable property. There is thus a potentiality for citizenship to become more central to the subject of this report,⁷⁹³ and to bridge the gap between those economically active and those inactive in the market.⁷⁹⁴ If nothing else EU citizenship can be made more effective by raising awareness of rights and improving access to information.

13.2.4. Consumer protection

Consumers of goods and services within the internal market require protection, which can only be provided by EU led harmonisation, both in terms of substantive rights and of the procedure by which rights are enforced (forum and applicable law). Most consumer protection is targeted at those buying goods or using services, so buyers of land are seen as peripheral for two reasons:

- Immovable property is rarely seen as a product requiring consumer protection,⁷⁹⁵ though there are exceptions where the market does cross boundaries, notably
 - some aspects of marketing;
 - mortgage credit;⁷⁹⁶ and
 - services affecting land, such as conveyancing services.
- Consumer protection is applied in contracts of the T2C (trader to consumer) pattern, which rarely applies to sales of land; two exceptions considered elsewhere in this report are:
 - sales of new build property by developers;⁷⁹⁷ and
 - the provision of conveyancing services.⁷⁹⁸

13.2.5. Competence in 'regular' cross border conveyancing

The Maastricht Treaty gave full rein to the freedom of capital movement since when land has been a form of capital and the purchase of land has involved a movement of capital. EU competence exists whenever a transaction involves a cross border element. This report has sought to base all its proposals on internal market and consumer protection principles and to respect subsidiarity. The basic premise is that action is needed to enable cross border

⁷⁸⁹ P Craig & G de Búrca, *EU Law — Text Cases & Materials* (Oxford: Oxford University Press, 5th edn, 2011), pp 832-833.

⁷⁹⁰ TFEU art 20 provides that 'every person holding the nationality of a Member State shall be a citizen of the Union.' This is 'additional to' national citizenship.

⁷⁹¹ Case C-34/09, *Ruiz Zambrano*, [2011] ECR I-1177, ECJ, para 42

⁷⁹² Case C-413/99 *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091, ECJ; Case C-200/02 *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-9925, ECJ.

⁷⁹³ Case C-408/03 *Commission v Belgium* [2006] ECR I-2647, ECJ.

⁷⁹⁴ Case C-520/04 *Turpeinen* [2006] ECR I-10685, ECJ; Case C-224/02 *Pusa v Osuuspankkien Keskinäinen Vakuutusyhtio* [2004] ECR I-5763, ECJ.

⁷⁹⁵ Consumer Rights Directive, 2011/83/EU, OJ 2011 L304/64, arts 2-3.

⁷⁹⁶ Mortgage Credit Directive 2014/17/EU, OJ 2014 L60/34; see above ch 9.

⁷⁹⁷ See above ch 6.

⁷⁹⁸ See above ch 10.

purchasers to exercise their capital freedom, and that this is particularly required when the purchaser is crossing a language barrier. Our proposals have been designed to enable, so far as possible, a citizen moving to another Member State to participate in the residential market in the same way as a citizen of the host Member State. In other words a citizen should be able to invest in the purchase of a property in another EU Member State and obtain a secure title whilst being fully informed about all aspects and implications of the purchase. In the rare cases in which a dispute or problem arises the purchaser should have clear avenues of redress so that his investment will not be lost.

13.3. 'Irregular' conveyancing

This report has identified a small number of instances where citizens have been let down by conveyancing processes, so that the purchaser of a home has become embroiled in intractable problems as a result of buying a home, without any apparent avenue of redress. These include:

- the infrastructure laws in Valencia (colloquially known as the 'land grab' laws);
- purchasers of coastal properties which have become vulnerable to demolition as a result of changes in official attitudes to the enforcement of coastal restrictions;
- purchasers of property in the northern sector of Cyprus which is outside the de facto control of any EU Member State;
- purchasers of flats in Cyprus who have not been safe against remortgaging of blocks by the developers after sales are completed (so-called 'hidden mortgages'); and
- the imposition of 'haircuts' on the proceeds of sale of houses in countries that seek bailouts.

These cases have appeared to fall between the three stools of capital freedom, consumer protection and human rights protection, but it is recommended that steps are taken to make these protections mesh together so that purchasers who have undertaken proper conveyancing should have a guarantee of the protection of their investment.

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14. POLICY RECOMMENDATIONS

KEY FINDINGS

- This chapter sets out an approach to resolving the problems identified in this report.
- Ten policy recommendations are formulated to address those issues.

14.1. Approach to framing recommendations

Purchase of a home by an EU citizen in a host state is a transaction fraught with the potential for difficulty, which, as this report has demonstrated, often manifests itself in practical problems. Some at least of these problems are of a cross border character and therefore within the potential for EU wide action, whereas others appear to arise from a failure by member states to appraise conveyancing systems from the perspective of a non-native purchaser and might be adequately tackled within the framework of subsidiarity. Before reaching specific recommendations and framing an appropriate level for a response, it is necessary for us to set out our approach to framing recommendations.

Except in a very few instances, the problems in cross border acquisitions do not arise from substantive defects in the property systems of Member States. In any event the property shield prevents any move towards harmonisation of substantive land laws, and the problems we have investigated are clearly not of the order of seriousness that would merit consideration of Treaty changes. Most Member States reserve conveyancing work for professionals with a recognised expertise, for example notaries or conveyancers, and the provision of legal advice by conveyancers is a valuable and legitimate defence against fraudulent transactions.

Our first criterion for taking action is that proposals have a clear scientific basis. Unfortunately some of the essentials to enable this to be carried through are not in place. The statistical framework for our analysis has proved to be almost non-existent, and it will be no surprise to find a recommendation for better collection of statistics and for further research later in this chapter. However, our review of the literature of comparative conveyancing, limited as that is, provides us with sound jurisprudential underpinnings for our recommendations.

A second criterion is transparency. We believe that it is perfectly possible for a non-national to operate effectively in a different housing market on a level playing field with a national provided that it is possible to bridge the information gap between a person with (access to) expertise in the national market and a person inexperienced in the market. Many titles have some doubts or problems, but really serious defects should be rare, and the job of the conveyancer is to winnow the mass of information gathered into categories; in some cases the buyer merely needs to be informed of a burden that is commonly accepted, but in other cases the buyer needs to be given a very strong warning; cases of the latter type resolve themselves in cases where the buyer can be allowed to make an informed choice having been informed fully of the risk and cases where the only professional course of conduct is to advise the buyer to withdraw. These kinds of judgement are made every day by conveyancers when they report on title to clients or to mortgage lenders, so the main requirement in our opinion is to identify points at which conveyancing procedures need modification where a purchase transaction crosses boundaries. A conveyancer operating in a cross border transaction needs to make the same judgement about a title as he or she would for a native buyer but then needs to inform the client clearly of defects and their

problems in a form which the client can digest and also appreciate and communicate aspects of the transaction where the buyer may well have made hidden assumptions which are inaccurate. The essential solution to the problems which have emerged in cross border transactions is timely communication of information to the purchaser, an approach fully familiar from the context of consumer transactions and arrangements for consumers to obtain mortgage credit.

The converse of our second criterion is that divergences of property law are not in themselves problematic provided that the buyer is given clear and complete information on which to base transactional decisions.

A subsidiary issue in deciding what information is required is the problem of information overload, the danger that a vital warning may be lost if large volumes of paperwork are thrown at a client in an undigested form, especially if there is also a language barrier. We therefore concentrate on benchmarking or kitemarking solutions; a client merely needs to be told for the future who is responsible for maintaining fences, but needs to be warned forcefully and in capitals not to buy a property subject to a GBP 250,000 liability to repair part of the parish church.⁷⁹⁹ In essence a conveyancer checks a title against the criterion of marketability every time he or she recommends that a lender accepts the title as security for a loan, and this is our approach to reports on title, mortgage offers, surveys, public requirements and standards of conduct for conveyancers.

Information rights are closely connected to a third aspect of our approach to making recommendations, that is to recognise the language rights of the cross border buyer. Again, language rights are familiar through the consumer acquis, and they are clearly necessary in acquisitions of new build where the transaction falls into the T2C pattern. However, we believe that normal conveyancing transactions carry so much risk for buyers that equivalent protection is required, in straightforward transactions between two citizens, just as much as the Mortgage Credit Directive applies to protect borrowers through the European Standardised Information Sheet (ESIS), and we discuss possible bases of competence accordingly. The conventional approach is to secure translation of conveyancing documents at the cost of the buyer, but we address the question of whether a non-lawyer can provide effective translation of conveyancing documents and if not what approach could alleviate the problem. Associated with this is the secondary point that national conveyancing systems have rarely been appraised from the point of view of someone with weaker language skills – whether national residents from minority populations or inwards migrants. Judged from that standpoint the requirement upon a German notary to read out a contract for sale and purchase word for word in German does not look helpful; a non-German buyer will be better off taking away a copy of the document and studying it line by line with the aid of a dictionary and better still if advised on it by a professional both skilled in conveyancing and fluent in the buyer's native language. Ultimately a new profession is required.

A fourth criterion will be familiar to European legislators used to careful examination of existing practices against rational criteria for utility. Traditional conveyancing needs to be reassessed against modern market conditions. For example, the notarial involvement is premised on proof of identity to protect registers, whereas effective prevention of money laundering requires that identity is established right at the outset. Our study has naturally subjected conveyancing processes to scrutiny from the perspective of the buyer, mirroring in this way the Schmid study of Conveyancing Services.⁸⁰⁰

⁷⁹⁹ See above point 5.7.1.

⁸⁰⁰ CU Schmid, *Study on Conveyancing Services Market* (Bremen: ZERP, COMP/2006/D3/003, 2007).

Our fifth criterion is based on the premise that there is a fundamental distinction between having a legal commitment and being in negotiation. These stages need to be clear to a native buyer and even more so it is necessary for there to be clear cut migration between the stages for non-native buyers. Conveyancing systems should be designed to prevent premature contracting and to guide buyers towards timely (pre-obligational) legal advice.

A sixth, and final, criterion, is the avoidance of disputes and the easy resolution of disputes that do arise. Conveyancing transactions are generally guided by professional conveyancers who should be expected to avoid big ticket items and when occasionally things go wrong their insurers should bear the loss. Existing guidance is generally that litigation is needed if there is something wrong with the house, but this is wholly unrealistic for cross border purchasers and conveyancing should be directed to the avoidance of disputes and the provision of a guarantee against defects that do emerge. Disputes should be relatively trivial, about the removal of fixtures, rubbish left, minor delays in completion, and so on, and often these can be avoided by crystallising precisely what is or is not agreed. Where a matter cannot be resolved, litigation under EU conflicts rules will rarely be appropriate until alternative dispute resolution has been attempted. Dispute resolution becomes central in two contexts, defects in new build property and service charges on residential apartments, both contexts falling within consumer protection competence.

Recommendations have been framed in the context of the discussion in particular chapters (with the chapter number followed by a letter indicating the specific recommendation in bold). These are referred to below in square brackets, but now reordered into a coherent sequence and numbered numerically. We make ten recommendations in all.

14.2. Recommendations

Recommendation 1 – Statistics

EU Regulations covering the collection of statistics should be amended to ensure that when a purchase of property is registered, Member States collect information about whether the transaction is purely domestic or involves a cross border element, and ideally also the category of migrant into which the buyer falls. **[2-A]** The easiest way to facilitate this in those states in which a foreign buyer requires a tax number is for this to be included in the form to be completed with the application for registration. This will have the benefit that foreign purchasers can be integrated into the taxation and administrative systems of the host Member State. This recommendation is for EU legislation, though this could leave Member States a wide discretion in implementation.

Recommendation 2 - Generic information

The EU should ensure that generic information about the home buying process in each Member State is made available (to the extent that this is not already the case) via a web portal in all official EU languages. This could be via a link from the eJustice portal. The information might be maintained by governments of Member States or by the professional bodies responsible for regulating conveyancers. This should cover

Home buying in general **[3-A]**;

Physical extent of the land **[4-A]**, in particular:

- how is the physical extent of land determined;
- whether property can be lost to adverse possessors/squatters;
- formal boundary procedures; and

- presumptions about boundaries (eg ownership of hedges or of roads in front of homes); and
- any risk that the cadastre and land register may conflict.

Surveys **[4-B]**, in particular:

- for a civilian buyer in a common law state – general information needs to be provided to the buyer to explain the options available to him about a survey;
- for a buyer from a common law state in a civilian state – a warning needs to be provided about the dangers of buying without a survey and information about how to secure access to surveying services where this is not generally available;
- for both information about the requirements of lenders.

Ownership **[5-A]**, in particular:

- The paradigm of ownership in the national legal system and any commonly accepted variants of it;
- Other ownership interests and how they fall short of the paradigm;
- The real rights recognised as burdens in the legal system;
- Any real rights which could affect property without appearing on the register; and
- Any steps a buyer is expected to take to draw possible burdens to the attention of his conveyancer;

Flat schemes **[6-A]**;

New build **[6-C]**;

Public land law rules **[7-B]**;

Taxes, fees and costs involved in a conveyancing transaction **[8-A]**;

Non-legal requirements such as registration with the authorities in the locality of the home purchased **[11-F]**;

choices open to a purchaser in relation to co-ownership, choice of matrimonial regime and succession. **[12-A]**

Information about domestic taxation regimes **[12-D]**

The languages in which information is made available needs to be linked in a sensible way to likely flows of citizens. This recommendation is for implementation by Member States either through administrative action or through coordination of action by professional bodies, within a framework coordinated by the Commission.

Recommendation 3 – Controls on the content of advertisements of residential property

The EU should legislate to require Member States to formulate:

- a paradigm of one or more ownership interests that are regarded as fully marketable and mortgageable; and
- a description of any ownership interests falling short of that paradigm and appropriate warnings about these (for example a warning by directing the reader of an advertisement to generic information).

Advertisements of property by traders (eg estate agents' particulars or newspaper advertisements) should be required to carry an appropriate warning when the interest for sale falls outside the paradigm of ownership **[5-B]**.

This is an aspect of consumer protection. A Directive would be needed since each Member State would have to form its own judgement about what ownership interests could legitimately be marketed as such.

Recommendation 4 – Standardised information before a cross border purchase

Cross border purchasers should be entitled to consumer protection even though what they are buying is an immovable. This should be aimed at securing that purchasers are fully

informed so as to be able to contract in an equal market. EU consumer protection is not required if independent legal advice is provided before the purchaser becomes under any obligation. Legal advice should cover all aspects of the transaction and not just the establishment of valid real rights. **[11-C]**

(1)New build

The sale of new build property falls within EU competence because it falls into the T2C pattern and hence into consumer protection principles. Existing consumer protections largely exclude land, but this report demonstrates that the inbuilt assumption (that legal advice is available before buyers commit to a purchase) is not necessarily true across Europe. There is a strong case for consumer protection along the lines of the Mortgage Credit Directive discussed above in chapter 9. We therefore recommend that no obligation should arise under any proposed sale of new build property until the buyer has been provided with detailed information in a standardised format. This should be modelled on the European Standardised Information Sheet introduced by the Mortgage Credit Directive and should cover all the issues spotlighted in this chapter. This information requirement would apply to all EU languages. It would be:

- (a) limited where an aspect of the development met European benchmark standards; and
- (b) excluded where legal advice was provided before the onset of any obligation from a qualified conveyancer (along with full cost information). **[6-B]**

(2)Second hand property

The EU should legislate to require the access of information in a standardised format to a purchaser of land before that purchaser becomes liable under any obligation under a preliminary contract put forward by an estate agent except to the extent that:

- (a) cadastre and land register information (about the title and not the owner or his indebtedness) is freely accessible via an open web portal; with a cross border purchaser the portal would need to be suitable for cross border use, delivering information in a language suited to the purchaser and its availability made known to the purchaser in advance; or
- (b) full legal advice from a conveyancer is available before any (real or personal) obligation is incurred (along with full cost information).

This recommendation falls within the consumer protection head of competence of the EU – there being a T2C relationship between the agent putting forward a preliminary contract and the buyer. The information would be on the model of the recent Mortgage Credit Directive. **[3-B]** and **[11-D]**

(3)Costs fees and taxes

A cross border purchaser should be entitled to a complete breakdown of costs on a form designed to overcome language barriers when a conveyancer took on instructions to act for the buyer **[8-B]**. This should include:

- details of deposit payments, any stage payments and the balance;
- warnings where appropriate about currency fluctuations;
- information about payments;
- conveyancing costs;
- any other professional fees eg for agents or surveyors;
- land transaction taxes and any VAT;
- registration fees; and
- details of running costs such as

- utilities;
- local taxes;
- service charges; and
- costs of positive obligations.

Observance would be secured by making the removal of full consumer protections conditional on compliance with this condition.

(4) Benchmarking of information

Member States should seek to establish benchmark standards for various aspects of the conveyancing transaction with a view to increasing the transparency of all stages of the process (along the lines of the kitemark of the British Standards Institute and many similar schemes). These could be used to sift through the mass of information in a conveyancing transaction and highlight issues of particular concern. This would make standardised information of greater utility to a purchaser from a different language background.

This could be coordinated by the Commission but implemented by Member States either administratively or through the professional bodies; we believe professional bodies would be keen to be involved in this exercise.

Recommendation 5 – Cross border conveyancing protocol

An EU citizen buying in another EU state will feel much more comfortable with a transaction as it progresses if the process is clearly mapped out in his or her own EU language. We therefore recommend that all our recommendations should be wrapped up into a single Cross Border Conveyancing Protocol which would guide the parties and their advisers through the process in an organised manner **[11-A]**

An aspect of the protocol would be a form to clarify the condition in which the property is to be handed over on completion. **[4-C]**

Again, this could be coordinated by the Commission but implemented by Member States either administratively or through the professional bodies; we believe professional bodies would be keen to be involved in this exercise.

Recommendation 6 - Legal representation

(1) A notary or other conveyancer acting for a seller should be required not to act for cross border buyer, who should always be entitled to appoint a conveyancer to act for him. Consultation should take place to establish whether this essential reform could be achieved by changes to Practice Rules or whether legislation is needed to impose this requirement. We consider this to be single most important recommendation that we are making. This change is particularly essential when new build property is being sold by a developer when the buyer requires consumer protection, but should not be restricted to that case. Any fee should be split between the two conveyancers. **[10-B]**

(2) A notary or other conveyancer accepting instructions to act for a cross border purchaser would be required to certify his competence to act when accepting instructions. Practice Rules on competence would have to address competence in the property laws of both states and language competence. **[10-C]**

(3) A notary or other conveyancer accepting instructions to act for a cross border purchaser should be required to provide comprehensive advice on all aspects of the transactions as established in Practice Rules, including public law matters affecting the value of the property and any personal obligations. **[10-D]**

(4) A scheme of accreditation of cross border conveyancers should be established, so that the cross border buyer is enabled to exercise his right to representation independent of the seller or developer. **[10-E]**

(5) A conveyancer accepting instructions to act for a cross-border purchaser must undertake to provide competent advice to the purchaser about matters of co-ownership, matrimonial regimes and succession. **[12-B]**

An EU Regulation based on consumer protection would be needed to secure compliance.

Recommendation 7 – Documentary completion

The notarial system traditionally required personal attendance at completion in order for identity checks to be conducted, but modern money laundering procedures need identity to be established before the conveyancer forms a professional relationship with the client, and personal attendance at subsequent stages of the conveyancing process may be very inconvenient for a buyer living elsewhere on the continent, and the requirement for personal attendance at completion should be prohibited **[11E]**. In the medium term we would expect electronic conveyancing to evolve, which will obviously require steps to be taken well in advance of completion to enable parties to give effect to their transactions electronically.

Recommendation 8 – Reform of property laws of EU Member States that conflict with the free movement of capital

EU action is required to prevent a repetition of the situation that has arisen in Cyprus with hidden mortgages. We would suggest that requirements for a transaction to be compliant with free movement of capital should be formulated by the Commission and then tested against existing property laws to ensure their compliance. **[6-C]**

Recommendation 9– Research

(1)Flats

Flat management schemes are vastly complex even for buyers familiar with the language of the scheme and are a nightmare if formulated in an unfamiliar language. Van der Merwe has laid the foundation for comparative knowledge of flat management schemes. This needs now to be taken forward with detailed comparative research to see whether it is not possible to produce a generally accepted standard that could be benchmarked and applied (as a first step) to new build schemes. **[6-A]**

(2)Public land law rules

Chapter 7 has demonstrated that lack of transparency and lack of advice about public law aspects of land purchases have been a major factor in problems encountered by cross border purchasers. Research is needed as to how residential property is affected in Member States and potential Member States.⁸⁰¹ **[7-A]** Aspects of the research would be:

- developing a benchmark for the safe and unsafe public aspects of transactions;
- identification of any public law rules which might threaten the title of an honest purchaser and hence infringe the principle of legal certainty;
- identification of any changes needed to Protocol 1 article 1 of the European Convention of Human Rights (which protects the 'right to property');

⁸⁰¹ Future discussions of membership applications should consider the necessary adaptation of public land law rules.

developing a graphical portal that could demonstrate the impact of public rules on private residential property in the way that the planning rules in England are presented to the public (www.planningportal.gov.uk/permission/house); this should reduce the cost of developing alternative language versions; consideration of the feasibility of a full integration of public and private titles as Wallis suggested;⁸⁰² and consideration of changes to rules of professional practice to ensure that the needs of clients as regards information about applicable public law rules are met.

(3) Conveyancing market

Given that our recommendations are likely to prove extremely contentious, we suggest that any action needs to be based on indisputable empirical evidence. We therefore suggest as a first step that the EU should commission detailed empirical research into the experience of cross border purchasers, which should seek an objective basis for assessment of conveyancing services, bearing in mind that clients appear to be ill-informed about the legal process and so not well placed to judge the quality of service they receive. This research should consider all aspects of the conveyancing experience including translation issues. When this evidence was available it would be possible to appraise our provisional conclusion that cross border purchasers are sometimes poorly served by existing conveyancing provision. **[10-A]**

Recommendation 10 - Future reviews of EU legislation

The review of the Mortgage Credit Directive due before March 2019 **[9-A]** should include:

- a review of the operation of the Directive from the point of view of the cross border borrower; and
- a consideration of forms of credit not covered by the Directive, namely
 - guarantees of business debts secured on the entrepreneur's personal residence;⁸⁰³
 - equity release mortgages, ie the use of a home free of mortgage to generate spending money eg to pay for care in old age;⁸⁰⁴ and
 - Islamic finance products.

When the Succession Regulation and proposed Matrimonial Property Regulations are reviewed **[12-C]**, the review needs to include a review from the perspective of a cross-border purchaser to ensure that choices recommended by conveyancers when a residence is bought remain effective if the buyer changes his habitual residence. It also needs to ensure that choices made by purchasers from Member States not participating in the EU conflicts regimes are effective.

⁸⁰² 'Linking Up National Land Law Systems Across the EU – Some Practical Steps' in D Wallis & S Allanson *European Property: Rights & Wrongs* (Brussels: www.dianawallis.org.uk, 2011), pp 68-69.

⁸⁰³ In England some protection is afforded by *Barclays Bank v O'Brien* [1994] 1 AC 180, HL; *Royal Bank of Scotland v Etridge (No 2)* [2001] UKHL 44.

⁸⁰⁴ Detailed warnings about Equity Release Schemes are given by the UK Government in its advice on 'How to Buy Property in Spain' (London: www.gov.uk, 2013). The Equity Release Victims Association may be contacted at www.erva.es.

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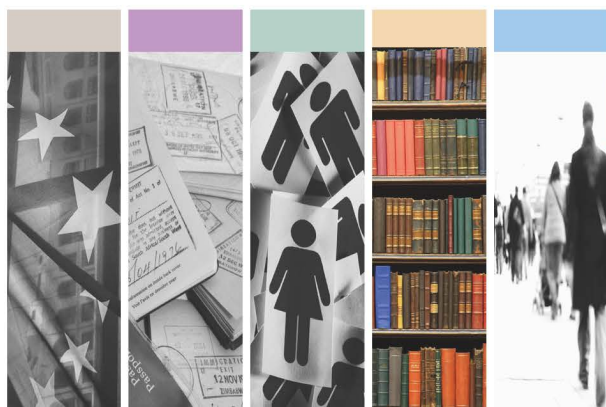
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