European Property Rights & Wrongs

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Introduction

A few words from Diana Wallis MEP

Since I was elected as a Member of the European Parliament in June of 1999, now twelve and half years ago as I write, there has been one recurring theme of constituents from Yorkshire & the Humber and indeed beyond who contact me about problems. That is the issue of property and related rights. 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. Each one represents the life of an individual, or the life of a family ruined, perhaps the biggest investment of their life lost. The stories are heart rending. Of course this should not obscure the many who doubtless do manage such purchases and investments in another EU country without problem. However the numbers and reoccurring nature of the problems are such as to merit closer investigation on behalf of those I represent.

As an MEP my main policy focus over these last twelve and a half years has been around the civil and commercial law of the European Union in relation to the Single Market and our citizens' rights arising from this. There has been much time

and effort expended by the European Union during this time to extend consumer rights, to give a real boost to shoppers' confidence in what should be a borderless Internet retail experience across Europe. Sometimes it seems strange that we have expended so much legislative time and effort to make sure we can buy a book, a hairdryer or television cross-border but have ignored the horror of what can go wrong if you make potentially the biggest investment of your life and buy a piece of real estate or property cross-border. Even in financial services we have not got it right, as I saw dealing with the sad cases of non Brits who had invested for would-be pensions in the collapsed financial services giant Equitable Life. Even in a case as notorious as this getting redress cross-border was again the proverbial legal nightmare of being pushed from pillar to post, with no regulator or ombudsman wanting to take responsibility for non-nationals.

As a member of the Parliament's Petitions Committee I have also followed at first hand the string of petitions arising from property problems in Spain, which have been the subject matter of all too numerous hearings, visits and reports by Parliament. We have done our best but it still falls short of expectations, and the problems continue, with some families facing the loss of their homes and investments, made in good faith. This cannot be right.

One could all too easily draw the conclusion that we have created a European Union of freedom of movement but without the proper safeguards and access to justice. Again, the recurring theme of much of the correspondence that I have received over the years is a touching belief that Europe is there in the widest sense as a defender of rights; a final guarantee or bulwark against the unfair or unjust decisions, legislation or operation of this or that Member State of the Union. This perception will only be enhanced with the recent entry into force of the Lisbon Treaty which envisages the European Union as a direct signatory and participant in the European Court of Human Rights (ECHR) and Council of Europe. The expectation is huge and somehow or other the Union has to deliver for its citizens. Viviane Reding, Commissioner for Justice, has proposed that the year 2013 be designated the 'European Year of Citizens'; during that year we will need to demonstrate a European system of justice that has the capability to link, overlay or check national legal systems in a way that can produce some sort of coherent whole as citizens go about their daily lives.

As we settle down to working under the new Lisbon Treaty and in anticipation of 2013 it seemed an appropriate moment to review where we have got to

with property rights (this being such a fundamental right) and what the prospects might be for the future. I therefore decided to put together a seminar with my Catalan colleague, Ramon Tremosa MEP, on property rights – and wrongs – in the EU. This current publication is based around the contributions made on that day in June 2011 and subsequently submitted for this collection.

The European Union principles

It is one of the fundamental principles of the European Union as set out in the Treaty of Union[1] at Article 3 that the Union allow free movement of people and capital across borders with the objective of strengthening the union of the peoples of the EU member states. The opportunities for citizens to purchase property as an investment or to relocate to live in another state for economic, leisure or lifestyle or cultural reasons have been enthusiastically embraced by EU citizens. The figures for 2009[2] show that the highest percentage of EU member state nationals living in another European state were located in Cyprus and Spain, topped only by Luxembourg, with its preferential tax regime and proportionally high number of international institutions.

The movement of citizens across borders has led to increased cultural diversity and settlement that enhances the Union and strengthens the links between people across the continent. This is one of the highest aims of the Treaty of Union, "*…to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty…*" and "*…desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions…*".[3]

The new freedoms granted by the treaties have brought with them economic benefits, along with a number of economic problems. The unsustainable speed

1 Consolidated version of Treaty on European Union 30 March 2010 (OJ 2010 C83/01)

2 Figures from Eurostat 2009 published 2010 Cyprus 9.8 % foreign national residents from EU states, Spain 12 % – no Eurostat data is available on the actual numbers of property purchases though some state land registries do keep local data on purchases by EU nationals

3 From preamble to the Consolidated Treaty as above

of the development and lack of integrated planning in many states has led to the bubble bursting where state nationals become priced out of the property market and the inward investment levels off, leaving unsold units. Property bubbles have temporarily boosted the economy of states such as Bulgaria which peaked in 2008; and then saw a drop in average house prices by around 30 % by 2010[4]. Lack of infrastructure often means that completed developments are unusable without access to mains utilities, transport links or sanitation. Turkey has been the latest "hot spot" for investors who are looking to its membership application to the EU although in the prevailing economic climate there may a much reduced bubble effect with less easy mortgage finance and falling property prices leaving "bargains" in more established states.

The legal treatment of land and real property within the EU

Given the high priority placed on the movement of citizens and strengthening of ties between nations, one could assume that the purchase of "real property" (the technical term for land property), a home, might be protected outright in EU legislation. This is not the case; in fact the Treaty of Rome makes special exception for the purchase of real property at Article 295 stating that it "… shall in no way prejudice the rules in Member States governing the system of property ownership". Academics are continuing to debate the meaning and impact of Article 295 on the development of legislation in this area.

Whilst substantive land law remains national, EU legislation has developed in a piecemeal or sectoral way, which can however impinge on certain elements of real property transactions. Regulations relating to the sale and purchase of time share rights in property and the effects of the unfair contracts terms legislation are examples, though a weakness in the latter is that this will only apply when purchasing from a business such as a developer and not between private citizens. A further major barrier to a coherent European approach to land or property law lies in the principle of subsidiarity upheld by the EU member states, this enshrines the competency of a State to deal with matters relating to it at the most local

4 National Statistical Institute of Bulgaria, Annual data on average market price of dwellings http://www.nsi.bg/otrasalen.php?otr=45

level and provides a counterweight to centralised Brussels-based decision making. This conundrum is well illustrated by the sometimes shrill debate over the European Contract Law Project; a common or coherent approach to contract law is seen as having the potential to increase legal certainty and confidence and deliver a huge boost to cross-border trade. Whatever the benefits this is seen as encroaching on the sensitive core of national civil law born of separate legal cultures and traditions. The final way out of this impasse has been to go in the direction of an optional instrument which parties to a cross-border transaction can elect to use. This might in future have the potential to help certain surrounding elements of a property purchase.

The reasons that real property, real estate, land, bricks and mortar – whatever you may call it – are treated differently lie in their immovability. The subject of the purchase is literally part of the land of the state where it is located; the way in which it is treated affects not just the property itself but the environment of the whole neighbourhood or region. Similarly, the rights created and passed on relate to the cultural fabric of the community, the way the citizen, the family and marriage are viewed and treated in law. There are two basic underlying approaches of dealing with real property, these are represented by the two main european legal traditions the Civil Law and the Common Law. The Civil Law tradition is based on the reception of Roman law and the establishment of a predictable and standardised model of rights and obligations used by courts; whereas Common Law is based on the historical decisions of Courts and Tribunals and the interpretation of those decisions by Judges.

Both traditions have their advantages and supporters, and it must be borne in mind when considering any reform that such basic issues as the rights to the land under our feet and the roof over our head are based on legal practice that has developed over hundreds of years; they cannot be unpicked at a stroke by a simple regulation or directive. The issue is even more complex when the future expectations of those who will inherit real property are taken into account, wills, trusts, estates planning, pension funds and matrimonial rights are all affected. Again many of these elements are already the target of the European legislator in a search to facilitate daily life in the European space.

Part of the problem for those purchasing property in another state may be a conceptual one, the very notion of ownership and other property rights may be completely different from the one they are familiar with. In addition, the practice

of the professionals assisting them will vary considerably according to the customs and culture of the state. For example purchasers maybe be unaware that a lawyer advising them can also within his or her legal system quite legitimately also be simultaneously advising the developer and or the seller. The unwary purchaser may not know who is the correct legal professional to advise them in a different legal culture, and may unwittingly be led astray. An estate agent may be selling on 100 % commission and under great pressure to make a sale, a town hall official may be issuing a certificate knowing that the Regional government will not ratify it later and the home will be built "illegally". The tricksters can be there in any country, it is just that in our own culture we are better aware of what to look out for.

For the purpose of this publication the contributions which follow fall roughly into three categories; Firstly those which deal with the experience of campaigning groups from Spain that have served to highlight in stark relief the problems; the second which deals with both the current and developing EU legal framework; and the last, which sets out some of the practical means in which EU legal systems, administration and professionals can be more linked up. ●

European Property Wrongs
– what can the EU do?

The areas affected

It is important to bear in mind that many EU citizens do successfully purchase property in other member states, including those outlined below, and peacefully enjoy their property without any problems. However, where problems are encountered there tends to be underlying local causes and trends, local to the region or wider state. The real challenges for the purchaser lie in being alert to and understanding the social, cultural, commercial and legal aspects behind the system of transactions and property rights in another country; a challenge especially great when all the dealings may be carried out in an unfamiliar language.

It cannot be ignored, however, that some states have thrown up more problem cases than others. Perhaps in greater numbers because the country experienced a bubble of development, the pricing was advantageous to sterling buyers, the infrastructure geared up for tourism and the critical mass for taking action and bringing the problem to wider attention was present.

Spain has thrown up some difficult issues, where in regions such as Valencia and Andalucia, planning law is devolved to the autonomous regional government. Valencia introduced a law, the Ley Reguladora de la Actividad Urbanistica (LRAU) in 1994 allowing for the expropriation of rural land where the developer could obtain permission to have the land re-classified as suitable for development.

The law was introduced at the start of the housing boom with the intention of preventing say one local farm owner from holding back the development of an area by refusing to sell land, the balance of rights historically lying with the community rather than the individual. Unfortunately the law was not well drafted and allowed developers to take advantage of its terms to propose a development scheme over land they did not own. They would then be able to legally take over inhabited land in these areas with minimal compensation paid and a bill to the former land owner for the installation of services such as street lighting which they did not want or need. This law was revised two years later and became the Ley Urbanística Valenciana (LUV) which did not address the central concerns of land owners. A similar law was also in place in Andalucía with the same effects. Nationally, a re-prioritisation of environmental issues and planning for sustainability has led to a desire by Regional Governments to re-claim for the public and future heritage some of the coastal region and special rural places given over to rampant development in the 1980s and early 1990s in what is known as "urbanisation". The painful process of finding a balance between public natural spaces and sensible urban planning has left many innocent victims in possession of homes that have been declared illegal, despite having been purchased with apparent full compliance. Sadly, criminal prosecutions and convictions of local public officials and developers continue to demonstrate that corruption in the real estate sector played a part in this picture.[5]

Bulgaria saw an unprecedented property boom when EU membership talks began in 2000, with six years of growth as an investment hotspot, and figures for 2005 showing 23 % of sales to foreign buyers and a capital price increase of 37 %.[6] Most of the foreign buyers' difficulties arose from properties purchased "off-plan", i.e. not yet built, with a lack of sustainable infrastructure and uncertain and under-regulated planning, legal and sales advice. The majority of problem areas arose as a result of ambitious promises of large returns on investment for properties bought off-plan through aggressive marketing with oversupply and the downturn in the market leading to many developments going bust and being left unfinished. In addition, the Pirin National Park became overdeveloped as a ski

5 Transparency International Global Corruption Report 2009

6 http://www.channel4.com/4homes/buy-sell/homes-abroad/country-region-guides/bulgaria-08-05-29

area particularly in the resort of Bansko due to developers cashing in on the boom and a lax application of regulations leading to environmental damage.

The Republic of Cyprus has a long history of tourism and the advantage for sterling buyers of a heritage as a former British colony; with its membership of the EU in 2004 a boom in foreign investment took place. While the economic crisis affected the total number of property transactions in 2010, those coming from foreign buyers registered at the Land Registry were still 22 % of the total property sales registered[7]; an increase from 2009. Most of the problems experienced by foreign buyers arose from anomalies in the legal system in place which led to the withholding of title deeds, a practice that by 2008 had left an estimated 29,000 foreign buyers[8] waiting for deeds. The particular circumstances of the Cypriot title deeds issue have allowed unscrupulous developers to re-mortgage a property once it has been sold, to increase an existing mortgage or build without relevant permits in place, all without the knowledge of the purchaser. The State has brought forward legislation to address the problem this year and transactions will now require the specific performance of transfer and registration of title deeds.

The fluctuations in the world economy have affected the cross-border property market within the EU, as demonstrated by the recent difficulties in Ireland. Investment in real estate across Member State borders, particularly in Bulgaria, but also Spain and Turkey, was promoted heavily in Ireland during the boom years and many people purchased hoping to make a profit on a quick re-sale or "fly-to-let" basis. Agencies in Ireland are now targeting Russian buyers to re-sell these unwanted investments as people face negative equity and a falling market. Property in Ireland itself has seen a dramatic crash following the Celtic Tiger building boom, and is now the target of foreign buyers looking for an investment.

The types of problems encountered

It is useful to consider some of the types of problems encountered. This is not an exhaustive list but does illustrate some pitfalls.

7 http://www.international-adviser.com/article/home/news/cyprus-property-sales-expected-to-fall-in-11

8 http://www.cyprus-property-buyers.com/law/title-deeds.htm

Purchasing off plan: buying a property not yet built with only the developers' designs to go on may seem like a major risk in these more careful times, but in the property booms of the early 2000s the opportunity to make big profits buying and selling on seemed like a risk worth taking. The off-plan price was significantly cheaper than the built price (to reflect the risk that it was not built) and investors would then aim to re-sell at a profit once built. 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.

Bank guarantees: For purchasers buying off plain in Spain Ley 57/68 required developers to bank deposits or instalments in a bank guarantee account where the funds would be kept separate and returned to the purchasers should the developer file for bankruptcy or fail to finish the property for another reason. Unfortunately some banks have refused to honour the scheme; 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 pay out. This is causing hardship to those affected who need to find the up front cost of lengthy litigation proceedings and legal advice in order to obtain the Court order, the costs will be recoverable in the end but many will not have the funds upfront, or the appetite, to take on litigation.

Planning legislation: The so called "land grab" laws in Valencia illustrate the risks posed by the LRAU and LUV planning laws, a model that was copied in other regions. These laws were first proposed to allow the urbanisation or development of rural areas to progress, but were applied too loosely and drafted too widely, allowing abuses by developers and unfettered urbanisation in an unsustainable way.

Lack of information or due diligence: This can arise from uncertainty as to which tier of administration to consult for permits or certificates; for example in Spain there are certain documents which must be obtained from the municipal government and others from the Regional government. Public information may

not be readily accessible to be searched; for example the land registry may not be available to search online or notices about issues affecting a property are posted for public view in accordance with the law but not sent direct to the owners' address, with the owners remaining in ignorance of the official procedure for posting notices.

Preparation for local conditions of transactions: The Cyprus Title Deeds situation is now well known, however there is a backlog of foreign buyers still waiting for their title deeds who are currently exposed to massive risks as a result of not holding their deeds. Preparation and choice of legal advisor are key in this situation where local anomalies may result in an increased risk to the investment.

Lack of legal certainty: this can arise from the inconsistent application of laws, for example the Ley De Costas (Coastal Law) in Spain was passed in 1988 at State level but not routinely or predictably enforced for many years and lay on the books to be enforced during 2008, leading to cases where legally built houses became viewed as non-legal. This can also arise from a legal services industry which may not offer the comprehensive service expected in other states, or which may not be transparent when acting for other parties in the transaction, for example also acting for a developer.

Corruption or failed administration at local level: For example, in Andalucía 300,000 houses were built in rural or protected areas on the edges of communities with "permits" from the town hall[9], 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[10].

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9 http://www.spanishpropertyinsight.com/buff/2010/06/29/andalucia-looks-to-turn-the-page-on-illegal-building/

10 Various cases outlined in article "Corruption and urban planning in Spain" by Robert Tenison published in the Olive Press in 2009 www.roberttenison.com

Diana comments from experience

Against this background of the types of problems encountered by European citizens in relation to property issues, it is helpful to assess the different options that may be open to them in terms of those who contact MEPs.

There is a category who just need access to independent and understandable legal advice in the country where they have purchased or attempted to purchase. Sometimes as an MEP (and using my old knowledge as a former solicitor) I have been able to put people into contact either with English lawyers who have a working relationship with a lawyer on the ground in the relevant country, or to find a lawyer in the country who speaks good English and can understand the preoccupations of a client from a different legal culture. The more such reliable relationships and partnerships develop between legal professionals across the EU, the better they will be able to serve the needs of an increasingly mobile European population.

Clearly, this category relates to problems with the purchaser, normally matters relating to private contract law. Often if an apartment block or a development is involved there can be a number of purchasers (often from different European countries) having the same argument with a vendor or developer; indeed my office has on one occasion be able to facilitate access to a sympathetic lawyer in Spain who put together a small and potentially successful joint action on behalf of such a group. We can only surmise how much simpler such action might be if there were a proper system of collective redress at European level, that has for so long been talked about.

Then there are those whose complaint, rather than being with the vendor has to do with the local or national administration. In such cases, it may sometimes be possible for the Commission's alternative dispute system known as SOLVIT to be approached.

The most complex group are those systemic problems, in some Member States of the European Union, which appear to raise questions as to whether local, regional or national action or legislation by the relevant administration has breached either EU law or human rights pursuant to the ECHR. It is in relation to these categories of problem that a string of petitions have been brought to the Petitions Committee of the European Parliament over the last years. Every European citizen (indeed resident) has the right to petition the European Parliament, on possible breaches of EU law, and this provides us with a very helpful sounding board as to

the issues confronting citizens. Sometimes we are able to provoke action against a Member State or to instigate a possible policy change or new legislation. The Commission is obliged to investigate and where appropriate take action. Thus with the problems in Spain, which are enumerated later, the Commission investigated potential breaches of EU environmental law, and more recently actually took action before the Court of Justice in relation to potential public procurement issues, albeit finally unsuccessfully[11].

What remains elusive is the potential of the European Union to act where there are apparent breaches of human rights in relation to the right to property, as specified in Article I of Protocol I of the European Convention on Human Rights. The expectation was that this impasse would be unblocked with the entry into force of the Treaty of Lisbon and the EU's direct adherence to the ECHR. However, these new developments seem still to be interpreted in a narrow way which says the the EU can only enforce human rights issues against Member States when they relate to EU law whereas, of course, most property or planning issues stem from national law and therefore the remedy has to be sought in national courts and ultimately at the Strasbourg Court of Human Rights rather than in Brussels or Luxembourg. All this is rightly infuriating to the citizens or group of citizens threatened with losing their home; when if they had thought Europe was about anything, they thought is was about guaranteeing certain fundamental rights.

The following contributions set out some of the experiences of various groups in approaching the European Parliament and working with parliamentarians.

How citizens have organized to defend their property rights

Groups of residents have organized together to campaign, lobby and publicise their particular issues. The groups that have grown up also show support and solidarity for neighbours who are from many different Member States. Often the ex-pat communities demonstrate the advantages of being a true European citizen living and working and contributing to the local community alongside people from all over the EU. Many groups often have a large domestic support base,

11 Judgment of the Court (Third Chamber) of 26 May 2011 — European Commission v Kingdom of Spain (C-306/08)

where the property problems are affecting Member State nationals as well as ex-pat communities. It should be noted, however, that there are critics of the activities of some groups who may levy a high membership fee or offer seminars to provide information at a cost, creating a market out of hardship. There are many reputable groups, however, providing a collective and organised stand against what they see as injustice. In many cases they have successfully worked with MEPs to bring their case to the attention of the European Parliament through the Petitions Committee or by lobbying.

Mr Charles Swoboda[12], co-founder and Vice President of Abusos Urbanísticos NO! (AUN) describes the beginnings of this campaign group:

Our association, Abusos Urbanisticos N0! (AUN) began its existence in 2002. The very personal event that prompted its creation was the intrusion of a team of topographers on our property in Benissa, Alicante. It turned out they were scouting our property for a very unfriendly developer and the plan, had it been agreed by the town hall back then would have ruined what we had built, totally legally over the previous decade- and us financially (luckily, the plan was then shelved indefinitely, but still hangs over us to this day). This left us in a small panic, we had read about the urbanisation land laws in the Valencian region and about some of the victims, but we trusted in the sanctity of our legally acquired property.

The more we investigated, read, and consulted lawyers, the more concerned we became. Once we had defined the problem, our first task was to analyse our situation and develop a strategy to deal with what we saw as a nearly impossible position, so familiar to many others. That is, small property owners are cast as David vs. the Goliath of a system involving developers, promoters, town halls and the region's laws, which together conspire in the now infamous 'land grab'.

Shocked as we were, we quickly learned that we were far from unique. It turned out that thousands of small property owners, Spanish citizens and foreigners alike, faced the predatory and unjust practices that were sustained by the Valenican LRAU.

12 Mr Charles Swoboda Vice President of AUN and FAUN Federation of *Abusos Urbanisticos No!* groups throughout Spain

Realizing that on our own, or even with our similarly threatened neighbours, we could accomplish nothing, we formed our Valencia-wide association, AUN, within a few months. Soon we became aware that our region was far from unique in Spain with similar versions of the Valencian approach evident elsewhere.

Along the way, the sudden, retroactive and arbitrary application of the national coastal law dating from 1988, but largely ignored until a few years ago, has left tens of thousands of property owners, Spanish ones included, in 'illegal' dwellings, with Andalucía and Valencia being the regions most affected. To this must be added the thousands of homes also found to be illegal due to jurisdictional issues between local and regional authorities. Many homes have been demolished, but thousands more are currently under threat. Every scheme to regularize these homes has met with almost insuperable delays, legal complexities and outrageously high costs.

It was difficult initially to get coverage for these issues in the foreign media and non-Spanish language press here, simply because there was a degree of scepticism concerning the harsh and unfair nature of the land laws. Perhaps more so because the media outlets concerned were heavily reliant for advertising revenue on real estate agents, financial institutions, town halls and specialist lawyers, who held a vested interest in the property boom.

Our collective purpose as an association became, not just the protection of property rights, but concern for the widespread environmental degradation that accompanied the 'urbanismo sin fronteras', as we witnessed in the Valencian Community, especially in the coastal areas. This suggested to us that we had to develop media contacts and strategic allies in our campaign. As for the political arena, AUN decided that forming its own electoral group was not a viable option to pursue. We chose instead to lend support to those local independent parties and groups which in turn backed our ideals.

At the level of the European Parliament we have received support from almost all political groups, also key was the support of successive regional ombudsmen, the 'sindic de greuges' in Valencia, who issued a series of reports that in their recommendations, closely mirrored our own. Other allies we developed were the Ambassadors of many EU countries, existing associations of foreigners, notably 'Ciudadanos Europeos' and the ecologists' movements. These movements have

provided many of those who have become our members either individually or collectively bringing our total to in excess of 30,000. This is a considerable achievement for a volunteer, not for profit association.

Via several petitions and complaints AUN has formulated or encouraged to the European Parliament and the Commission, we have sought the intervention of the European Courts of Justice and have assisted in bringing cases to the European Court of Human Rights. The Parliament, through the instrument of the Petitions Committee has sent an unprecedented number of fact finding missions to Spain to investigate urbanistic abuses extending most recently to areas beyond Valencia. The result has been three very critical reports all approved by substantial majorities and a clear direction to the executive and judicial branches of the EU towards action to end the abuses. We live in the hope that these developments and the extensive media coverage they have received will not be lost on those politicians and others who make decisions here.

We will not hesitate to expose new violations of property rights or damage to the environment and we will encourage others to do the same. Clearly, these activities on the part of AUN are ongoing, and the story is far from concluded. In a short time, because the abuses we first identified and experienced in Valencia have also become commonplace in other regions, AUN has established a national federation of like minded associations (FAUN). Recently a UK based association of British owners of Spanish property (POPPIE) has been set up with our support. We will also keep up our contact with politicians at all levels.

Mr Charles Swoboda AUN 2011

Case study of Empuriabrava

The inland seawater canal area of Empuriabrava was developed from the old town of Cadanques in Catalonia in 1967. Most of the properties have canal frontage and a private mooring space and were designed to appeal to purchasers who wanted access to the water for a private boat, the properties were sold at premium prices and have attracted a community from all over the EU. The original marketing campaign was focussed on Germany, Benelux and France from the outset attracting an international community.

The difficulties have arisen from the Ley de Costas (Coastal Law), passed in 1988 at National level, the intention was to provide a protected strip of public access to the coast and prevent further loss of coastline to rampant development. Whilst the law was in force it was not uniformly or actively applied until a change in state priorities in 2008, during the preceding decade of non-enforcement the coastline had seen unprecedented levels of development of both private homes and holiday complexes. The law in this case applies to all saltwater, so that instead of the protected coastal strip running 6m/19ft from the edge of the sea and beach the protected strip is now being applied as if it were woven inland along each canal. This has the effect of cutting 6m from the frontage of each property; the owners would lose their mooring, patio and often most of the front rooms.

A fund of compensation has been set aside by the State government, which residents state would not compensate them for the loss of amenity and value of their property, the plan affects around 5,000 properties which would be effectively uninhabitable and unsaleable should it proceed. The residents have established an action group The Owners Association of Empuriabrava (APE) which charges a fee for membership and has obtained legal opinions and organised meetings with local government members, MEPs and organised demonstrations, forming an active lobby. The website is written in 5 languages demonstrating the international makeup of the residents.

Petitions Committee and The Auken Report

The European Parliament Petitions Committee has conducted multiple fact-finding missions and reports into property rights issues. In response to over 100 petitions signed by approximately 15,000 people asking for protection from development abuses received during the parliamentary year 2007 the petitions committee nominated Margarete Auken MEP as rapporteur for the committee. She produced a report[13] highlighting the situation in Spain. The report was adopted by the Parliament with a large majority[14] and followed by a legislative resolution fa-

13 Report 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 received (2008/2248(INI)) (A6-0082/2009)

14 349 votes in favour of the recommendations, 114 abstentions, 110 against.

vouring measures such as freezing EU Regional Development funding streams to Spain if sufficient progress were not made on tackling the urbanisations problem. Political reality has meant that funding streams have not been affected, although some groups continue to lobby for this approach. The Andalucían government at the time rejected the findings and criticised the report as biased. The Opinion note to the report prepared by the Committee on Legal Affairs takes a narrow view of the legal basis for the EU to intervene noting that "…the Spanish authorities act in pursuance of the Spanish Constitution and laws enacted and pursuant to the relevant provision of the Constitution. The fact that some of the people affected by the measures in question were Union citizens who had exercised on of the freedoms granted by the Treaty has no bearing on the matter. The proper means of seeking redress is through the Spanish courts and ultimately, once all domestic remedies have been exhausted, the Court of Human Rights at Strasbourg."[15]

The lobbying group AUAN (Abusos Urbanisticos Almanzora NO!) brought a petition in 2011 claiming breach of fundamental rights of the Treaty and Charter of the EU as they were not able to enjoy free movement of persons and capital due to the effect of local planning laws affecting the value of their property. The value of the Petitions Committee process is that they are able to hear evidence from those directly affected by the issues who can speak in person to the MEPs, on this occasion they were able to hear evidence from Helen Prior whose home was demolished in 2008 by the Andalucian regional government and has become a prominent spokesperson on the issues in Andalucia. The Petitions Committee can make recommendations to the Commission and Committees responsible, where appropriate, as a result of information gathered and evidence heard.

The European Court of Justice recently ruled on one aspect of the LUV laws; that of competition law in public procurement. They found that there was no infringement of competition regulations in the cases presented. Activists were aiming to take a direct hit at the laws themselves, however following the opinion of the Advocate General in September 2010, the competency of the Court was restricted to the competition points[16].

15 (A6-0082/2009) p31

16 Opinion of the advocate general Jääskinen delivered on 16 September 2010 (C-306/08)

The lobbying continues to find a political or legal route to challenge some of the state actions that are behind these cases. It remains to be seen how the crash in the world economy and loss of building development as a driver of economy will affect the outcomes. Perhaps as the building development lobby lose their powerful voice to influence thinking in policy, the environmental lobby will move to address the overdevelopment and environmental abuses that have occurred and move policy towards sustainable development.

Ms Jacqui Cotterill from the village of Parcent outlines how the EU institutions assisted in her case:

Parcent is a village with a population of just over 1000 in the province of Alicante, in the Valencian region of Spain. In January 2006 the local council voted to approve the construction of 3 building plans for urbanisations known as PAIs, with over 1800 new houses and a proposed increase in the population to 5,000. The urbanisations were to be built on the hillsides of the countryside surrounding Parcent, a devastating impact on the local environment.

The council meeting was held on the last day before the Valencian land law LRAU was due to be replaced by a new, reputedly more citizen-friendly law. Residents were concerned that the Local Council were attempting to rush the plans through before the new replacement law went into force.

During the council meeting 200 residents demonstrated in the rain outside the Town Hall and the next day formed the Association 'Veins de Parcent', neighbours of Parcent, with the plan to campaign to overturn the plans. Veins de Parcent became a very active campaign group, organising demonstrations, writing petitions to regional and national Ombudsman, launching a legal case which succeeded in temporarily halting the largest plan which became known as the Parcent Doctrine and launching a petition to the European Parliament's Petitions Committee.

The idea for the petition to the European Parliament arose after 'Veins de Parcent' attended a meeting in Madrid on urban planning abuses organised by the Green group of the European Parliament, with the then MEP David Hammerstein Mintz and the group's petitions advisor in attendance. During the seminar the process of submitting a petition was explained along with advice on what kind of violations of European Directives could apply in various situations. The advice and support of the Green group was invaluable.

The petition was submitted on line in April 2006, accepted and the first hearing of the Petitions Committee took place in November that year, with the President and spokesperson of 'Veins de Parcent' present, along with the then Mayor of Parcent defending the plans. Prior to the meeting all MEPs on the Petitions Committee were informed by email of the case and its implications, asking for their support and meetings were also held with a number of MEPS. Diana Wallis from the ALDE group was already knowledgeable on the subject of urban planning abuses in Spain due to her involvement in previous petitions from campaign groups such as the AUN.

Viens de Parcent was successful in gaining support from a broad cross section of MEPS. This united support, across country and political lines was key to the petition being kept open and the Commission becoming involved in examining potential violations of EU directives involved in the building plans. These challenges centred on the lack of environmental and water reports and the potential violation of free market regulations under the LRAU, an aspect which was subsequently sited by the Commission in infringement proceedings.

Whilst this process was continuing we were fortunate to be included in the fact finding mission of the Petitions Committee to the area and to be included in the subsequent report approved by plenary of the European Parliament in July 2007.

In May 2007 the administration in the Parcent Town Hall was changed and replaced by a CDP majority administration (Democratic Coalition of Parcent), a coalition of local people, including the President and spokesperson of Veins de Parcent, (who resigned their roles in the Association on being elected) who campaigned on a platform supporting a more sustainable development for Parcent. Subsequently the new council started the process of checking the legal status of the plans, confirming the lack of the necessary environmental impact and water reports.

The Mayor and Deputy Mayor represented Parcent on two further occasions in the petitions committee, where the Parcent case was investigated by Mrs Magrete Auken MEP and included in her report approved by Parliament in 2009.

The effect of the continuous support of members of the Petitions Committee for a resolution to the problems posed by the large scale urbanisation plans was crucial in the eventual outcome of the case. Firstly it hugely raised the morale of

the people of Parcent who welcomed the delegation with hope and passion and subsequently looked to Europe to defend their rights and interests.

The various reports by the Petitions Committee on urban planning abuses in Spain directly affected the Valencian land laws resulting in the replacement of the LRAU by LU and a greater respect for EU Directives. Also the interest shown by the European Parliament and the backing of so many MEPS from different parties and countries generated an enormous amount of publicity that helped keep the case of Parcent in the public eye and ensured the scrutiny of legal reports required for progress of plans.

The eventual outcome was the turning down of the plans by the Valencian regional government in November 2009, due in part to a negative report from the local water authority and negative reports on the impact of the plans on the affected forest areas, fauna and flora. This confirmed what we had upheld before the Petitions Committee, which an environmental impact report should have been carried out before the provisional approval by the council in accordance with EU directives and if this had been done, the plans would have been rejected at the first stage.

The people of Parcent will be forever grateful to the intervention of the Petitions Committee, which connects the citizen directly to the EU institutions and the support we received made the European Institutions and their actions relevant and necessary to the citizens here.

However, the story is not quite over. The local Council are still facing the outcome of criminal charges of breach of legal duty dating back to 2007, bought by the promoters of the original plans. The Council is also being sued for damages by the same building company for what they claim was the negligent administrative handling of their building plan by the current Council. We await a just resolution of these cases and hope that Parcent can return to being a peaceful, beautiful village in the mountains, without the threat and consequences of the environmental and social damage threatened by excessive urbanisation.

Jackie Cotterill 2011 ●

A European Land Law?
...and the Right to Property

The following contributions both map and comment on the current status of land law and property systems in the EU Member States and demonstrate how EU law and human rights law overlay these. It is a complex web which emerges and one that is hardly simple for the lay property purchaser or citizen with a problem to understand or access. Also it is quite clear that there is, as it were, much work in progress in order to attempt to make a reality of European citizenship and the rights that go with it, so as to make freedom of movement a practical reality.

In the meantime, the first issues confronting the would-be cross-border purchaser are the differing traditions of national law and legal systems. Traditions born of national history and politics, the differences are perhaps most marked as between the two great legal traditions of the civil and common law. The latter as manifested in England and Wales basing its property law on what is now little more than an anachronistic fiction that all property is owned by and held from the Crown. Try explaining this to a civilian lawyer used to an ordered system of property and property rights ownership. It is difficult to promote understanding of the differing systems between domestically trained lawyers, the hope that there may one day be such a profession as that of 'European conveyancer' remains a hope, but the reality is probably a long way off.

The differences in conceptual and indeed the resulting practical approaches become most marked when it comes to dealing with rights of third parties which affect a property through the operation of law, be it something as simple as a right of way, or the right to say pick fruit, more difficult are the rights of the family of the owners and his or her heirs and beneficiaries. All these rights have their origins in a national system of law, whilst the property stays in one place subject to the laws of where it physically is, the people who have rights can come from differing countries and can have gained or established rights according to the inheritance or trust law of yet quite another legal regime, not necessarily even that of the country where they reside. The various regimes can often come in to conflict, (especially in the event of death or insolvency) then we need the so-called 'conflict of laws rules' to identify which law should apply. In mainstream inheritance or succession law and land law, even the conflict of laws rules are not yet the same between EU member states. The legislative process, with regard to a proposal to simplify these rules in relation to wills and succession is well underway, but looks likely to proceed without the UK participating. This will be a great lacuna and will leave British citizens at a real disadvantage, not to mention those EU citizens from other Member States who purchase property in the UK.

Harmonisation of substantive property law is, in these circumstances as the various writers point out, hardly on the agenda. However the reality is that by logical extension of the rights of free movement, by continuous attempts at improving the operation of the Single Market law around the fringes of property law, that law itself is being adapted and 'Europeanised'. This is often on the basis of consumer protection, or level competition; this particularly in relation to financial services and cross-border loans or mortgages. Likewise, the proposal for an optional European contract law could very well impinge on property related contracts; with or without the UK.

Added to this are the expectations, already referred to, concerning the 'human right' to property. The current form of the European Union puts respect for fundamental rights at the core of its operation and requires member states to ratify the European Convention on Human Rights as a condition of membership. Importantly, Article I of Protocol I to the ECHR guarantees the right to property.

The Luxembourg-based Court of Justice of the European Union, which interprets EU law, holds the European Convention of Human Rights in regard when

making decisions which touch upon fundamental rights issues. In addition, the EU has developed its own Charter of Fundamental Rights[17] which gathers together all the rights of citizens in the EU including human rights. The Charter applies to Member States where they implement EU law and includes, in Article XVII, the freedom to own property.

While there has always been a formal distinction of sorts between the European Court and Convention on Human Rights and the European Union, the Union is soon expected to accede to the European Convention on Human Rights. This will give European citizens the right to bring an action against the EU or its institutions if they have violated the rights in the Convention whereas previously this right only existed against the individual Member States The EU's signing up to the Convention may well have an effect on the balance of rights in areas such as property law, though the likely impact has not been fully assessed and cannot be easily predicted.

This remains a developing area where the EU will have to provide a coherent answer either by ensuring a system of more simple enforcement of rights, or admitting that the EU does have a responsibility to ensure justice vis à vis Member States in this respect. What is certain is that citizens will not accept a situation where EU and Member States keep passing the problem to and fro to the detriment, and indeed anger of individual property owners.

17 Given legal effect in Treaty of Lisbon 2009

Peter Sparkes

European Land Law: too narrow for second home owners in Spain?

Professor **Peter Sparkes**, Professor of Property Law, University of Southampton; author of European Land Law (Hart, 2007) considers how a European Land Law may assist second home owners in Spain.

Many home buyers in Spain have fallen foul of the 'land grab' laws, particularly those in force in the south-eastern community of Valencia. Numerous complaints have been received by MEPs, Diana Wallis being among the most active and vocal in support of the victims. They have encountered limited success because, at bottom, the problem here is largely a matter of Spanish law and the complaints fall outside the remit of EU law. There is a European Land Law but it is narrow, and does not much help the victims in Spain. Current limits are easily stated but the more interesting question is whether any expansion is feasible or desirable.

Territoriality

Animals defend their nest and food supply instinctively. Humans erect fences to mark out the plot in their occupation and defend the ownership of it against all comers. States display the same principle when asserting jurisdiction over the land within the national boundaries. This is demonstrated by the enactment of a civil law to regulate the ownership of land and transactions with it, and by asserting exclusive jurisdiction to decide disputes affecting land. More, and to a very major degree, states assert an overriding power to regulate the use of land. This includes the ultimate power to buy private land for public uses (compulsory purchase, eminent domain, expropriation) as well the power to control private usage through, for example, planning regimes. These powers are essential attributes of statehood. There are many cogent reasons why decisions should be reached locally within member states and should not be coordinated at a pan-European level.

Property law reflects society and this varies widely across the continent, as does the nature of the land being regulated. Public opinion would not support a massive transfer of powers over property to Brussels. The treaties establishing the EU recognise the competence of each state to organise its own system of property. Subsidiarity requires that decisions should be made at a national level. Although some people support a common civil code and there is even a draft circulating (the Draft Common Frame of Reference) this development seems to be a political impossibility. There would be outrage were Brussels to impose, for example, a single planning system across the continent.

The flip side of this is seen when an EU citizen purchases a property in another State. The EU lacks the competence to deal with defects in domestic property law. Timeshare provides an ideal illustration. The very word makes the majority of the UK population shudder, the result of the aggressive marketing techniques once used. This was before EU legislation swept the Continent clear of malpractice. Europe has scored a major success in regulating aspects of marketing such as information and withdrawal, in banning unfair practices, and (under a new version of the Directive) resale and exchange. Around three quarters of complaints received by the Commission fall within the European ambit. This leaves one quarter to national laws, issues arising from the substantive law such as the ownership structure of timeshare blocks, management and problems with new build blocks. Excessive service charges are the new battleground.

This explains why victims of the 'land grab' laws in Valencia have not found redress through the EU and why MEPs have been frustrated in their efforts to help. If a rural property is urbanised and as a result infrastructure costs are imposed on the owner of a property, that action is controlled primarily by the law of the Spanish region where the property is sited, a law which operates within the regional and Spanish constitutions. If a property has been built illegally in a protected coastal zone, a decision to order its demolition is regulated in the same way. In both cases the Spanish authorities may be constrained by the principles of the European Convention on Human Rights, which guarantees the right to property, though as explained elsewhere this will only assist in quite exceptional cases. The law of the European Union draws a blank because states are allowed to organise their own systems of property law. (Where the EU does have competence, it must respect the right to property in the same way that states must do so.)

Two aspects of EU competence will now be explored, the freedom to move capital to buy second homes and the control of cross-border marketing.

Freedom to buy homes and second homes

Citizens of the EU have the freedom to invest capital anywhere within the 27 members of the EU, and this right also extends to the three additional members of the European Economic Area. This excludes, most notably Switzerland. An unfettered ability to move capital freely around Europe is relatively new, derived from the Maastricht Treaty. This means that an EU citizen can buy land in another EU or EEA state, can buy a main home and – a right exercised much more commonly – can buy a second home. There are associated rights of free movement for workers, those seeking work, and self-supporters; second home owners can visit anyway for short periods. Around 3 % of Britons have a holiday home abroad, and 2 % of UK net housing wealth is in Spain. The huge impact of the freedom to buy second homes can be seen in Spain. It is possible to impose controls on foreign buyers, as is done for example in the Austrian Alps, but these controls are policed very tightly by EU rules. Were Karl Marx at work today he would be writing about the Free Movement of Capital to Buy Second Homes. So the free market in land created at Maastricht provides the backdrop to the problems in the Spanish land market.

Cross-border marketing

One of the primary functions of the European Union is to provide a level playing field for the common market across Europe. It regulates cross-border transactions and ensures that domestic and foreign buyers and sellers are treated the same. This therefore opens the way for a European land law directed not to the substantive law affecting land but to the transaction aspects of land purchase, including marketing, consumer transactions and cross-border contracting. A brief return to the example of timeshare illustrates the potency of the EU. Although a timeshare deal is partly a land transaction (but really mixed in character) a European dimension arose, driven primarily by the volume of cross-border purchases. Europe acted to regulate marketing, giving rights to information and to withdraw from

transactions and controlling unfair commercial practices, almost too successfully since EU intervention has killed much of the market, locking existing purchasers into unsaleable timeshares.

Aspirations have moved on from participation in a timeshare to the ownership of a second home. This trend was stimulated by the increase in foreign holidays, but has been boosted by the growth of internet marketing which makes it very much easier to buy property in another country, but also much easier to buy without the necessary local knowledge. Traditionally one needed to decide where to buy, but the internet stands this logic on its head. Most property research is now done on the internet and, in the jargon of tv property shows, one merely has to decide what boxes to tick and then click the search button. Property portals usually have conventional estate agents behind them, and it has not yet become general to miss the professional marketing stage completely. Nevertheless modern marketing is creating a cross-border dimension. The internet facilitates a connection between a buyer, a portal operator, an agent, a seller, and some land, and each of these elements might be dispersed in separate countries.

Europe has a potential standing first in relation to the marketing, secondly in consumer transactions where a second home is bought from a developer and thirdly in relation to cross-border transactions for example in the payment of the purchase price across national boundaries. The EU might, for example, introduce rules that required for the future a formal notice to future buyers of the risk of incurring infrastructure charges, especially when a consumer buys a new build apartment direct from the developer. However, market and consumer rules do not provide a means to attack the substantive rules of Spanish property law and the rules currently in force would not enable a challenge to a purchase on the grounds of lack of information.

Notarial services

Whether Europe has a role in purchasing across internal borders depends on whether the major problem is seen to be dealing successfully with the purchase of land; or dealing with the administration of a cross-border purchase and the possible market surprise of a foreign buyer.

A lawyer equipped to handle the first aspect may not do well with the second. In many Spanish 'land grab' cases the second aspect predominates and some at least of the buyers were not made aware of the potential infrastructure costs.

Conveyancing is compartmentalised because property transactions and probate can be, and invariably are, reserved for notaries recognised nationally. In the short term this is the single biggest factor militating against the emergence of a single Europe-wide property law. UK law firms are much more anxious to embrace change, believing that wider markets means more business not less. The EU treaties enshrine the monopoly of national notarial professions and this precludes the emergence of a single market in legal probate and conveyancing services. The Spanish experience shows how unsatisfactory this can be. Spanish notaries advised buyers according to Spanish professional standards, and yet the information supplied was clearly inadequate to the needs of many foreign buyers. In the long run, the notarial monopoly is as unsustainable as the monopoly over conveyancing once enjoyed by high street solicitors in the UK, and the ultimate solution is the European conveyancer. This new profession cannot emerge under current EU law, but the Valencian saga suggests that this matter is urgent.

Towards a wider European land law

Land law is essentially a matter for each Member State. Three processes seem to be at work to create a European land law. (1) There is a gradual evolution of a European transactional law as a response to the large volume of cross-border purchases. (2) An increasing convergence of property systems operating within the same basic traditions, but that this form of soft harmonisation cannot overcome the basic structural dislocations between the common law, French, Germanic and Nordic systems. A particular driver is the evolution of computerised registration systems and efforts to ensure their mutual compatibility. (3) Moves towards a common contract law which might include a European code for the passing of property when goods are bought and sold. A proposal is circulating in the shape of the Draft Common Frame of Reference, though it seems unlikely that there is the political will for its adoption and it is extremely unlikely that the UK would participate in even the mildest reworking of this proposal. . Any move to harmonise contract law calls for a knock on reform of land law. Land would be excluded but it is by no means easy to draft an adequate exclu-

sion land as such because of the spectrum of contracts affected; if a contract to sell a house is national, what of a contract to rent a holiday cottage, a short term rental of a home or a mortgage? There will be no European contract for the purchase of land and the EU will not regulate the details of ownership regimes. If it did it would have to reserve to states the power to control land use in the public interest. The problems in Catalonia arise from land use rules that are out of line with the rest of Europe. That is not an EU problem, but the problem of information asymmetry might be.

Bram Akkermans

Property Law in European Union Law

Dr. **Bram Akkermans** LL.M, assistant professor in European Private Law at Maastricht University and fellow of the Maastricht European Private Law Institute (M-EPLI) considers the existence of property law with EU law.

Introduction

This contribution is a short written version of the contribution made to the ALDE conference *Property Rights and Wrongs* organised at the European Parliament on 14 June 2011.[18] This contribution focuses on land law, or the law relating to immovables, in the European Union and the existing EU property law relating to land and immovables.

Types of ownership of land throughout the EU

In Europe there are generally two different systems relating to land law. In the majority of European legal systems, which all follow the civil law tradition, there is a concept of ownership. Ownership is the most extensive entitlement a person can have relating to land. Because it is the most extensive entitlement, there can only be one right of ownership on each object. The right of ownership is, in other words, unitary and cannot be fragmented. Entitlement to this ownership of land can be shared in a co-ownership regime, but only – in these civil law legal systems – on a theoretical level entitling each holder to a share in the value. The second group of legal systems adhere to the common law tradition. In this common law tradition there is technically no right of ownership in the civil law meaning of the right. Instead there is an entitlement or interest to land (also known as estate),

18 See http://mepli.blogspot.com/2011/06/european-property-rights-and-wrongs.html

which can be held outright, on trust (which means it is managed by someone on behalf of someone else), or by several people jointly. Different from the civil law, the co-entitlement of interests in land is shared also at the practical level. It is therefore possible to be entitled to a part of a house or to a piece of land or a building on it for a limited (recurring) duration of time (timeshare). Civil lawyers refer to this as fragmentation of the primary entitlement to land. The common law tradition is followed in Member States such as the United Kingdom (Engand and Wales and Northern Ireland) and the Republic of Ireland. Finally, there is also a third category of legal systems that adhere to a mix between civil law (the first group) and common law (the second group). These mixed legal systems generally adhere to the civil law land law, but do except important influences from the common law. This last aspect generally includes the recognition of trusts with which entitlement to interests in land can be shared or fragmented (such as in a timeshare). Mixed legal systems are Scotland and Cyprus.

These differences are relevant beyond a mere theoretical level. Technically speaking the only owner of land in the civil law sense of the term in English law is the Queen.19 All other persons hold land from the queen in tenure, meaning that their rights are less than ownership in the civil law sense. These rights in respect to land are generally called estate. The forms of estates are standardised and can be a freehold estate, meaning an estate without further limitations, or a leasehold estate (or a term of years), meaning an entitlement to land for a limited duration of time. All other estates on land exist through a trust (such as a version of a life estate).

Generally, entitlement to land is transferred, or conveyed, between parties by adhering to the rules on transfer of ownership. Depending on the legal system there will be a contract of sale, but also further property law requirements such as registration. In some systems the validity of the contract of sale remains relevant for the conveyance, whereas in other systems the validity of the contract loses its importance at the moment of conveyance, i.e. the property effect of the transaction.

Besides the entitlement to land, also the way in which land is registered differs between Member States. Member States whose legal system is based on the French tradition, such as Belgium, Italy, Romania, follow a deeds registration system (or a negative system). In this system the land registry simply registers the title document that is prepared by a civil law notary, without looking at the ac-

19 Who holds a so-called demesne title.

curacy of the information offered. In Member States which follow the Germanic tradition, such as Austria, Poland, Greece, there is a title registry (or a positive system). In this system the land registry will only register the deed offered if the content proves to be accurate. This positive system is also adhered to in the United Kingdom (including Scotland). The differences between the registration systems are substantial, especially as in positive systems there is a principle of public trust in the accuracy of the land registry, which does not exist in negative systems. Moreover, registration in negative systems usually takes a day, whereas registration in a positive system can last up to 3 months.

So if person A from England seeks to acquire land in another Member States, say France, person a will acquire a right of ownership providing him with the principal entitlement to land, registration will be effected within a day. Moreover, because of the conveyancing system adhered to in French law, the ownership of the land will transfer between parties at the moment of creation of the contract. In order for this to have effect against third parties, registration is necessary. This is not so much different from English law, where the conclusion of a contract for the sale of land creates an interest under a trust for the buyer. However, if person A would have come from Germany, this effect would be completely unexpected. A from Germany would expect that besides a contract of sale, also further property law formalities are required before the property entitlement passes to him.

It therefore matters what legal system applies to a transaction. When there is a cross-border transaction, and legal systems come into conflict with each other, the rules of private international law provide a connecting factor to prevent or solve such a conflict of law (an issue looked at in more detail in the next chapter). In land law this is the rule of lex rei sitae or the law of the place where the object, ie land, is situated. Property law transactions therefore are governed, as far as the property aspects of the transaction are concerned, by the legal system in which the land is situated. As far as the contract of sale, or donation, is concerned, the Rome-I Regulation[20] applies and offers choice of law.

20 Ed: The Rome I Regulation governing the law applicable to contractual obligations of a cross border nature. This should not be confused with the Brussels I regulation, on the recognition and enforcement of judgements across Member State borders referred to later on this publication

Current EU law that effects land law

B2C Transactions

The European Union has been active in the field of private law for several decades already. Although the rules that have been adopted mostly concern the law of contract, also property law is effected by some of these. After all, the acquisition of land is also a legal transaction that starts with the conclusion of a contract. The rationale behind EU contract law legislation has not been to create a full European contract law, although there is a project currently underway that may change this, but to address situations of inequality between parties. Most of the EU contract law rules therefore apply to a business to consumer setting (B2C) where there is an unequal bargaining position that can be remedied by providing the consumer with additional information (pre-contractual) or empower him to withdraw from the transaction (post-contractual). In business to business settings (B2B), there has not been much regulation.

The Directive on Misleading Advertising applies to immovables and forces the seller to provide (additional) information to the buyer.[21] The same applies to the newly proposed Directive on Mortgage Credit, which forces the service provider to provide information.[22] The timeshare directive, both in its old and new version, and the package travel Directive (that applies to leases of land) do the same.[23]

The Directive on doorstep selling does not directly apply to land, but following the case law of the CJEU there are serious indications that in some situations

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21 Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising.

22 Proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property (Text with EEA relevance) SEC(2011) 355 final, SEC(2011) 356 final, SEC(2011) 357 final.

23 Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, and Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on protection of consumers in respect of certain aspects of timeshare, long-term holiday products, resale and exchange.

the doctrine of effectiveness (effet utile) requires Member States to extend the application beyond contract law into property law.[24]

Finally, the Unfair Commercial Practices Directive explicitly applies to land.[25] This is highly relevant, because the B2C sale of land therefore comes under the regime of this directive, closely monitored by the CJEU. Its application to conveyancing of land prevents many unfair marketing of land and therefore prevents misleading foreign buyers, especially because the Directive also sanctions the omission of relevant information.

C2C Transaction

In B2C situations, there is therefore a relatively effective regime in place to help and protect foreign buyers of land. The problem with land law is that it is far from certain that transactions take place in a B2C setting. It is far more likely that a foreign buyer acquires an entitlement to land from another private person. In such a situation, also if that person is represented by a professional agent, there is no unequal bargaining position and the rules of EU contract law described above do not apply.

Complexity; the example of the Timeshare Directive

Since 1994 there has been a Directive dealing with Timeshare arrangements, which was renewed in 2007. As highlighted above, a timeshare in the property law meaning of the term is a property law entitlement to land for a limited, usually recurring, period of time and is unknown to civil law systems as it requires a fragmentation of ownership. Unitary ownership as is adhered to in the civil law makes it impossible have this kind of arrangement. Instead, usually a legal person is created that gives out shares or certificates, which are sold as timeshare ownership. Timeshare arrangements are therefore offered in many Member States and

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24 See Case C-350/03 Elisabeth and Wolfgang Schulte v. Deutsche Bausparkasse Badenia [2005] ECR I-9215, Case C-481/99 Heininger [2001] ECR I-9945, Case C-229/04 Crailsheimer Volksbank eG v Klaus Conrads ea [2005] ECR I-09273.

25 Title and reference Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

since 1994 there are rules to protect buyers. However, these rules only concern the contractual aspects of the transaction and, due to the complexity and sensitivity of property law and the differences between legal systems, do not deal with the property law aspects.[26]

Complexity; negative integration (free movement of persons, services and capital)

Besides these positives attempts to harmonise private law, the law of the internal market, sometimes also referred to as negative integration has effects on property law. When a person moves to another Member States to establish himself there, or acquires land as a second residence or as an investment, or seeks to lease the foreign immovable for profits or hires someone to take care of the land in his absence, the law of the internal market applies. This law concerns the free movement of persons, capital and services respectively, and also has a harmonising effect to the extent that all similar cases will have to be dealt with in the same manner.[27]

The scope to legislate property law

There are major differences between the property law systems of Member States. However, there is an increasing conviction among academics that these differences are not such that they cannot be resolved. Property law concerns the freedom of ownership that is at the basis of any functioning economic system, ensuring free circulation of goods and the private entitlement to these. The European internal market, which is sometimes held to be governed by the European Economic Constitution certainly adheres to a concept of freedom of ownership. Contrary to what sometimes is held, Article 345 TFEU, which states that the treaties do not prejudice the rules of the Member States governing the system of property ownership, refers to the principle of neutrality in EU Competition law (meaning that the

26 The differences between systems are not that large in effect. See Sjef van Erp and Bram Akkermans (Eds), Ius Commune Casebook for the Common Law of Europe. Text, Cases and Materials on National and Supranational Property Law (Oxford: Hart Publishing, 2012).

27 See Bram Akkermans, Property Law and the Internal Market in Sjef van Erp, Arthur Salomons and Bram Akkermans (Eds.), The Future of European Property Law (München: Sellier European Law Publishers, 2011)

Treaties are neutral whether shares of undertakings are in private or public ownership) does not offer a restriction for the EU to deal with property law matters.[28] In fact there is existing and upcoming legislation dealing directly with property law.[29]

However, moving directly into the field of property law, especially land law, is a highly sensitive matter and politically very controversial. Property law, especially ownership, is the cornerstone of many legal systems and as such is the basis of other areas of law such as succession, marriage and taxation. However, in the light of the further completion of the internal market, there are good reasons to try and facilitate cross-border trader.

Currently there are two private initiatives that deserve consideration. The European Land Information System (EULIS) seeks to (electronically) link land registration systems of the Member States to enable buyers easier access to information on the land they are about the acquire. Secondly, the Cross-Border Electronic Conveyancing of Land (or CROBECO) project, initiated and coordinated by the European Land Registry Association (ELRA), seeks to work with existing legal systems and differences between these and attempts to create a situation where buyers can arrange all their affairs with their own notary in their own Member States, but effectively acquiring a principal property entitlement to land in other Member State.

Such projects show the need to increase cross-border trade in respect to land and the problems encountered by these projects may be the first areas in which the European Union can directly assist. An example of this can be the nationality requirement of notaries, currently under attack by the CJEU, or the requirement that a deed can only be registered if it was passed by a national notary.

If there is political will to move into the area of property law then Article 114 TFEU could offer a possible legal basis. This article can be used to remedy deficiencies with the internal market where there is a substantial hindrance to its function-

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28 See Bram Akkermans and Eveline Ramaekers, Article 345 TFEU (Ex. Article 295 EC Treaty). Its meanings and interpretations in European Law Journal (2010), 292–314.

29 Directive 2002/47/EC of the European Parliament and the Council of 6 June 2002 on financial collateral, Directive 2003/87/EC of the European Parliament and the Council of 13 October 2003 establishing a scheme for greenhouse gas emmission allowance trading within the Community and amending Council Directive 96/61/EC. Green Paper on Wills and Succession COM(2005) 65 final. See Bram Akkermans, The EU Development of European Property Law, in Christine Godt (Ed.), Hanse Law School in Perspective – Legal Teaching and Cross Border Research after Lisbon (The Hague, Kluwer, 2011).

ing. Alternatively, also Article 352 TFEU can offer a legal basis, but this Article prescribes a different legislative procedure, setting aside the European Parliament.[30]

And the future?

It is unlikely in the short and medium run that the European Union would move directly into land law as there are simply not enough cross-border movements at this moment and therefore not enough clarity on the exact problems to justify action. However, that is not to say that the European Union cannot do anything. First of all it can assist in the coordination of Member States, especially in those Member States where reform of property law is currently underway. Second, the European Union can assist in participating, as independent advisor, to private initiatives such as CROBECO, to learn more about the practical problems encountered by citizens acquiring land in other Member States. Problems encountered, such as the 'nationality requirement' of deeds offered for registration, can then perhaps be tackled.

The EU can continue to give attention to the e-justice portal and offer information to citizens and advice or institutions or parties from whom advice may be obtained. The EU and European Parliament in particular can continue to offer a forum to discuss and debate matters of property law in the European Union so that experts and interested parties from all across Europe can continue to meet and work the the Parliaments Members to resolve problems and create policy.

30 The arguments for a legal basis are not that different from the debate on the possible legal basis for a Euroepan Contract Law. On this, see Martijn W. Hesselink, Jacobien W. Rutgers, en Tim Booys, The legal basis for an optional instrument in European contract law, Centre for the Study of European Contract Law Working Paper Series (2007)

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Sjef van Erp

EU Charter of Fundamental Human Rights and Property Rights

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Introduction

Between the European Union and its Member-States, certainly in the area of property law, a legal osmosis exists. Certain areas are governed by national law, whereas other areas by EU law and still others are of a mixed nature. A crucial provision is article 345 (ex article 295 TEC) of the Treaty on the Functioning of the European Union (TFEU), which states: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership." On first reading, this article seems to imply that the European Union has no competence whatsoever in the area of property law. Recent research, however, has shown that this provision only makes clear that decisions to nationalise or privatise enterprises are a matter as to which solely the Member-States have competence. In other words: Article 345 TFEU states a negative competence for the EU, limited to a specific aspect (private or public ownership of enterprises) of a Member-State's economy. All other areas of property law, provided of course that a positive competence exists, are not exempted from EU law making.[31] A very well developed area of European property law is intellectual property law, but I will focus on more general areas of property law, such as home ownership and pension rights.

31 Cf. B. Akkermans and E. Ramaekers, The Treaties Shall in No Way Prejudice the Rules in Member States Governing the System of Property Ownership: Article 345 TFEU (Ex Article 295 EC), its Meanings and Interpretations, European Law Journal 2010, pp. 292 ff., also to be found electronically on the website of the Social Science Research Network (SSRN): http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1594415.

Given the enormous divergence between property law traditions in Europe (common law, civil law in its various forms, mixed legal systems), positive integration (e.g. EU regulations and directives) in this area is relatively limited. Examples are the Insolvency Regulation and the Financial Collateral Directive.[32] The impact of negative integration (a national legal provision is considered to be in violation of EU law, particularly any of the freedoms of persons, services, goods and capital) is therefore, at least potentially, more far reaching. Examples are cases concerning public law limitations on acquisition of (second) homes in Austria.[33] Negative integration also results from the collision between property law and fundamental human rights. The case law developed by the European Court of Fundamental Human Rights (ECHR) in Strasburg, interpreting Article 1 of Protocol 1 of the European Convention on Human Rights is a striking example of this development. Case law by the Court of Justice of the European Union (CJEU) made it clear that the protection of fundamental human rights is part of European law.[34] The EU Charter of Fundamental Rights reaffirms this and it can therefore be no surprise that the Charter is heavily based on the European Convention.

Consequently, it can be concluded that, although it appears that in daily practice most parts of property law are still purely national and that only some areas have become European through positive integration, it could be said that a grey or mixed area exists between, on the one hand, purely national law and, on the other hand, European law. National property law, not yet replaced as a result of the positive EU integration process, can only function within the limits set by the negative EU integration process. It is particularly this grey or mixed area, in which the debate on the impact of the EU Charter takes place.

From this it follows that **1)** the EU has the competence to act in the area of property law, **2)** national property law is affected not only by positive, but also by negative EU integration (the four freedoms and fundamental human rights) and

32 Council Regulation on insolvency proceedings (EC) No 1346/2000 of 29 May 2000, OJ 30.06.2000, L 160/1 and Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements OJ 27.6.2002, L 168, 43 (as later amended).

33 Case C-302/97 (Konle) [1999] ECR I-3099 and joined cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 (Reisch and Others) [2002] ECR I-2157.

34 Case 44/79 (Hauer) 13 December 1979, ECR [1979] 3727.

3) the EU Charter plays a role in this process as being the ultimate EU yardstick for the application of the freedom of persons, services, goods and capital. The right to property is protected by article 17 (1) of the Charter: *"Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest."* Article 17 is clearly inspired by Article 1 of the First Protocol to the European Convention on Human Rights. Case law developed by the European Court of Human Rights will therefore be a benchmark for how the CJEU will interpret article 17.[35]

Focussing on this negative integration process, resulting from the impact of fundamental human rights, I will now make some remarks, first of all, on cross-border acquisition of immovable property and the negative effects which unknown public law limitations may have, which has become a serious problem for home owners in Spain. Secondly, I will make some remarks on the protection of pension rights, a problem which is bound to arise in the wake of the present financial crisis and the resulting austerity measures.

Cross-border acquisition of immovable property

More and more frequently, citizens from Member States use their freedom of establishment, as laid down in article 49 ff. TFEU and their rights as EU citizens laid down in articles 18 ff. TFEU. To make this even more explicit, let me quote article 20 (2): "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States (…)". An essential aspect of establishment is renting or acquiring a home. Following the generally applied rule "lex rei sitae", acquiring home ownership is governed by the law of the country where the home is located. I use the term "ownership" in a broad functional

35 A recent summary of ECHR case law (in Dutch) was given by B. Akkermans, Artikel 1 Eerste Protocol EVRM, in: J.H. Gerards, A.W. Heringa, H.L. Jansen and J. van der Velde (eds.), EVRM Rechtspraak en Commentaar inclusief EHRC, 2011 (Article 1 First Protocol ECHR, in: ECHR Case Law and Comments, including the Commission on Human Rights) (The Hague: SDU Uitgevers, loose leaf edition).

sense, meaning the fullest right a legal system may confer upon a person with regard to immovable property, in civil law terminology "ownership" and in common law terminology "freehold" or "leasehold". Although in all EU legal systems buyers and sellers of homes are guided by legal experts (civil law notaries on the Continent of Europe and solicitors in common law jurisdictions, supported by land registrars), still the complexities of cross-border transfers may be enormous.

Although the private law status of immovable property (who is owner, are there, e.g., any servitudes resting on the property?) may be clear from the land registry – and it should be noted that not all land registries in the EU provide a full and complete overview of these rights – frequently the public law status is not so clear. An example of how things can go wrong is the Ley de Costas in Spain. As a result of this Act, unknowing home owners (also, so it seems, uninformed by the conveyancing experts who bear the final responsibility for the legal documentation of the transaction) are now confronted with unexpected expropriation measures from local authorities, claiming that their homes were built illegally in environmentally protected coastal regions. In my view, the right of establishment of EU citizens may be directly affected by such public law limitations, particularly when they are unknown or difficult to find, and which may even be seen as capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. By the latter I refer to the famous CJEU decision in the Dassonville case.[36] In that case the ECJ expressed its opinion regarding trading rules having an equivalent effect of restricting trade in the sense of article 34 TFEU and which are, therefore, not allowed, because they frustrate the creation of an internal EU market. As a final note it might be interesting to say that the European Land Registry Association (ELRA) is now working on a Common Conveyancing Reference Framework as part of its Cross-Border Electronic Conveyancing Project (CROBECO).[37] This is a remarkable initiative from land registrars, who, using the available Internet technology and the resulting on-line data interchange of information, aim to facilitate cross-border transfers by allowing conveyancing experts who are not from the Member State in which the immovable is located to effect such transfer. It should be noted, however, that national organisations of con-

36 Case 8/74 (Procureur du Roi v. Dassonville) [1974] ECR 834.

37 More information can be found on the ELRA webpages: www.elra.eu.

veyancing experts fear that buyers and sellers may not be adequately informed about, e.g., public law limitations.

Pension rights

As a result of the financial crisis, banks, pension funds and even Member States have come in grave problems. Pension funds (as is now happening in the Netherlands) inform their clients that they no longer can guarantee that rights, which have been built up in the past by paying premiums, will be effective upon reaching the retirement age and that pensions even may have to be cut. In as far as these measures are the outcome of austerity measures agreed upon at an EU level, EU citizens may invoke the EU Charter, referring not only to article 17 (protecting ownership, quoted above), but also article 25, protecting the rights of the elderly: "The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life." From decisions by the European Court of Human Rights it becomes clear that participants in pension schemes may not expect that this system will never change. However, participants in pension funds who paid individual premiums for their own private benefit do have a legitimate and protected expectation. In my view, when their rights are affected by EU imposed austerity measures they are not only protected by the European Convention, but also by the European Charter. This is even more the case, when taking into account article 25 of the Charter. How can elderly people lead a life of dignity and independence when their pensions are cut and how can they still then participate in social and cultural life?

Whether pensions (or social security benefits) are protected "property" or not is rapidly becoming a question that crosses the borderline of law and politics and turns into a purely political question, given the impact on national budgets and decisions of pension funds, affecting large parts of the population. If that happens, protection of the right to property becomes of even greater importance.

Fundamental human rights, as the right to property, do not stop where economic crisis and austerity measures begin. It is precisely in times of crisis that these rights must be effective, respected and protected by all involved, especially, in final instance, courts.

Concluding remarks

After some introductory remarks concerning the competence of the European Union I focussed on the difficulties which cross-border buyers of homes encounter and the fears of pensioners that they may lose pension rights for which they individually paid premiums to pension funds for many years. In all these areas, I argued, rights of home owners and of pensioners are not only protected by Article 1 of Protocol 1 of the European Convention on Human Rights, but also by the European Charter of Fundamental Rights, as we are in a grey or mixed area between the national laws of the Member-States and European law.

Professor Peter Sparkes

Human Rights of Property Buyers

Peter Sparkes, Professor of Property Law, University of Southampton; author of European Land Law (Hart, 2007) considers the development of this area looking at an example from Spain.

Members of the European Parliament have received numerous complaints from people who have bought property in Spain, the planning laws adopted in the Valencian region of south eastern Spain proving particularly contentious. Many complainants are second home owners resident elsewhere in Europe but there are also many native Spaniards affected. Problems boil down into two main categories, first, the imposition of infrastructure charges when rural land is reclassified as urban land suitable for development, and second, the demolition of unauthorised buildings in coastal regions. Generally the matters complained of fall within the margin of appreciation allowed to the public authorities, but human rights principles may provide assistance in a small number of cases, urbanisation charges being easier to attack than demolitions of illegal buildings.

Imposition of infrastructure charges

Development charges do not affect land in Spain that is already urbanised, but they come into play when rural land (rustica) is reclassified as being ripe for development. A decision to reclassify land will increase its value significantly. Individual owners are not allowed to block development and will be required to contribute to the installation of infrastructure, such as roads, water and sewerage. The version of this law introduced in Valencia in 1994 allows developers to seek permission for land they do not own, to buy land compulsorily at discounted prices and to charge for the installation of infrastructure. There is evidence of abuse in the application of these provisions. Urbanisation charges may be subject to human rights challenge in extreme cases.

Ownership of property is never absolute and is everywhere subject to controls imposed in the public interest. Decisions about land are primarily for the state in

which the land is sited, that is for the regional governments in Spain. However, public authorities must observe the human rights of citizens, including the right to property and the right to respect for a home. Human rights are in play when a public authority affects the land of a citizen (a vertical application) but not when one citizen sues another (a horizontal application). In the Spanish cases one apprehends that the state is involved albeit indirectly by enacting the legislation which is being used by developers against owners (indirectly horizontal applications, like James v United Kingdom (application 8793/79, February 21st 1986). So the Valencian legislation might potentially be challenged in the human rights court in Strasbourg, though only after domestic Spanish proceedings based on Spanish and regional constitutions had been unsuccessful.

In order to bring human rights into play it is necessary to establish an interference with a convention right that was unjustified. The first stage is relatively easy, but it is important to classify the potential infringement. The right to property is conferred by article 1 of Protocol 1. Most commonly land use legislation will constitute a control on the use of land, in which case it will be subject to the principle that the state is not (at least usually) required to pay compensation for the imposition of a control on the use of land. So a planning refusal may cost the owner a great deal of money, but no human rights issue arises if the decision is lawful and justified in pursuit of a legitimate public interest and is reached after following a proper procedure. So too with a decision to impose infrastructure costs on an owner or a decision to demolish an illegal construction; it is the same as a British local authority deciding to make up a private road and charging the cost to the frontagers. That is the basic position.

A number of chinks can be seen in this shield. Some decisions in Spain might be classified as deprivations – either as a formal compulsory purchase or a de facto deprivation of property having the same effect. If a case is recategorised as a deprivation the normal requirement is that the public authority should pay the market value of the interest taken. Complaints that inadequate compensation has been offered might fall into this category, and other arguable issues are decisions which effect a de facto deprivation without a proper procedure being followed, procedural impropriety, delay, and the lack of an opportunity to challenge the decision making process. Human rights challenges are often based on a discriminatory interference (article 14) with a right to property (Protocol 1 article 1). This is possible where analogous cases are treated differently or different cases are treated the

same. In Chassagnou v France (application 25088/94 etc, April 29th 1999) local inhabitants were given hunting rights over private land in the commune, but the legislation allowing this fell when it emerged that the legislation in the Dordogne did not apply in many other départements of France. The Valencian authorities may need to explain why their version of the infrastructure law has created so much greater injustice than the less intrusive regimes in place in other regions.

It is relatively easy to find that an activity of a public body is potentially subject to a human rights review, but much more difficult to find an actual breach. This is because it is open to the state to justify an interference with property, and a wide margin of appreciation is allowed in favour of a state. Justification involves two preconditions – lawfulness and the proportionate pursuit of a legitimate aim of public policy. So far as lawfulness is concerned, presumably the actions in behaviour in Valencia have been within the broad remit of legislation passed by the regional authority, but one might wish to consider in detail whether legal procedures have been followed and whether any corruption or improper motive can be proved. The potential difficulty of breaches of EU public procurement rules has receded in the light of the ECJ decision in Commission EU v Spain (C-306/08, May 26th 2011). Even if most cases involve actions that are legal, one might expect a residue of cases in which the legitimacy of what has been done is open to question. Finally, then, most human rights cases boil down to a dispute about the justification of particular legislation. It is relatively easy for a state to show that it has passed enactments in pursuance of a legitimate object. That done the task is to show that the solution adopted is proportionate.

Interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. … [T]here must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. The requisite balance will not be achieved if the person concerned has had to bear an individual and excessive burden (Depalle v France, application 34044/02, March 29th 2010, para 83).

The Valencian legislators need to be able to explain why the same aim has been achieved elsewhere is Spain by less draconian means. Beyond that the solution has to be tested in the particular fact situation, so even if the legislation passes muster in general, it still remains to be seen whether the particular application of it is proportionate. Just two examples from the case-law may suffice to suggest the sort of issues that need to be considered. In Perdigão v Portugal (application 24768/06, Grand Chamber, November 16th 2010) compensation paid to the Perdigãos when some of their land fell in the path of a new motorway was completed absorbed by the court costs involved in challenging the process, and they ended up out of pocket to the tune of €15,000. Their burden was excessive, the fair balance between private and public interests having been upset. In Katikaridis v Greece (application 19385/92, November 15th 1996), compensation for road works was reduced arbitrarily by the value of a fifteen metre strip to take account of the benefit derived by the adjoining owners from road works; this automatic reduction in proper compensation irrespective of the real depreciation caused by the work also upset the appropriate balance. This case has some of the flavour of the complaints from Valencia that owners are being required to pay developers for the installation of infrastructure they do not want.

In the final analysis, each case turns on its facts, and although the Valencia law will probably withstand wholesale challenges it may still give rise to a residue of cases where an intolerable burden has been imposed on individual landowners.

Demolition of buildings infringing coastal planning rules

The approach to properties built illegally in coastal zones was settled by a majority vote (13:4) of the Grand Chamber of the European Court of Human Rights in Depalle v France (application 34044/02, March 29th 2010). This concerned a house on the northern shore of the Golfe du Morbihan built sometime in 1880s partly on the public foreshore. The Depalles bought the house in 1960s, the striking feature of this being that the purchasers bought in good faith – believing reasonably that they acquired a valid title. It was in fact void because French law did not allow the private acquisition of public land. (The court would have given short shrift to the owner of a house recently built illegally along the coast and particularly if it had knowingly been erected a building without a permit, see

para. 85). The Depalles were granted a series of temporary occupation rights, the last agreement expiring in 1992. In total the house had been in situ for over a hundred years, for 35 of which the Depalles had occupied as a family and by the time it came to be demolished was worth €1.2M. Renewal was refused once the Coastal Areas Law 1986 art 25 signalled a tougher approach to coastal ecology and made illegal all private use of coastal land. The house was eventually demolished without any compensation, and on the facts this was held not to be an infringement of the owner's right to their property.

Human rights cases often come down to balancing the public interest and the interests of an individual property owner. The harsh decision in Depalle shows without doubt that coastal conservation and the preservation of public access to the foreshore will be regarded as legitimate objectives of legislation. Demolition pursued the legitimate aim of promoting unrestricted access to the shore. Pre-eminence will be given to the community's general interest in environmental conservation policies, the state being allowed a wide discretion, or in technical language a 'margin of appreciation'. Part of the reasoning of the Strasbourg court was the legitimacy of the corresponding provisions in other European states, including Spain:

> *'In Spain, 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.'* (extract from para 53).

This case negates any prospect of the widespread use of human rights arguments against decisions to order the demolition of illegal coastal property. Nevertheless a few chinks of light emerge where cases may be arguable. **1)** The reasoning of the case relies heavily on the French law principle that public land is inalienable and so title to any encroachment is void. The same would not necessarily apply to other systems where title to public land was handled differently; in Spain land

use law is regionalised and so the specifics in each regional community would need to be considered. **2)** The result might have been different if the civil law had allowed private individuals to obtain title to public land by adverse possession; private beaches exist in England in tightly controlled circumstances. **3)** In the French case the authorities had made very clear throughout that the occupation was by licence of the state, and a different result might have arisen if the public authorities had by negligence (or possibly even by tolerance) had created a legitimate expectation that the home owner would be able to continue in possession, that is the authorities contributed to maintaining uncertainty regarding the legal status of the property. **4)** Public authorities must act in the public interest and if the abuses sometimes alleged in Spain could be made good in court this would invalidate the decision making process. **5)** Public authorities must also act consistently between neighbours and consider circumstances such as the outstanding architectural merit of the building. **6)** The decision to enforce demolition of the Depalles' house was treated as a control on the use of property with the consequences that compensation was not required; there may be exceptional cases where compensation is required when the use of property is controlled and other cases where the facts are properly analysed as a de facto expropriation requiring compensation at the market value (perhaps when a house is bulldozed without legal preliminaries). **7)** Finally, although Depalle is tough, it may be possible to imagine a yet more extreme case in which the burden imposed on the individual owner is even more excessive, upsetting even further the balance between the interests of the community and those of the applicant (para. 92).

So, in general challenges to the demolition of properties infringing coastal zoning rules are unlikely to succeed, but there is scope for a successful challenge in individual cases demonstrating extreme facts. One way and another it does superficially seem surprising that none of the Spanish 'land grab' cases has been arguable on any of these grounds. ●

Linking up national Land Law systems across the EU
– some practical steps

Some Professional networks – successes with European colleagues

Against the background of a disparate and evolving legal picture across member states, there have been examples of good practice being passed on at a practical level amongst professionals. European networks include, lawyers, notaries, barristers, property developers, land information services, estate agents and surveyors, and credit providers. Some, like RICS[38], are developing EU wide standards with professional registration schemes that will establish a professional standard service comparable across borders. A useful source of links to individual organisations and information on current EU legislation affecting the sector can be found at the European Property Federation[38] website.

Likewise the existing work of organisations like the Society of Estates Practitioners (STEP), demonstrates that despite the minefield of conflicts of law regimes it is possible to offer useful and appropriate advice when clients can get access to the right professionals before embarking on cross-border property adventures.

38 RICS www.joinricsineurope.eu

Practical solutions to the challenges of cross-border work are also being provided by organisations such as Eurogeographics[39] who represent the work of Member States organisations, such as cadastre maps across many states, and Ordnance Survey in the UK, in mapping land, boundaries and information relating to it, to achieve harmonisation of working and information sharing. European initiatives such as INSPIRE aim to provide for a single EU-wide source of spatial information so that a conveyancer in Cardiff could search a plot of land in Portugal and find out its boundaries, whether there were zones applying to it, its proximity to a road, etc.

The recent launch of the Europe Union's e-Justice portal[40], which was the subject of a resolution in the European Parliament[41], will ultimately make access to justice much easier for many issues. Its continued development should increase the availability of legal advice for citizens, from the simple find-a-notary scheme, to the specifics of foreign law and legal systems. Likewise, the work of the European Land Registry and the pilot CROBECO project which will do even more to get legal professionals working together cross-border to ensure that the purchaser buys what he would expect to buy in his own system.

The Iberjuris project

Mr Xavier Ibarrondo[42] Vice President of the Belgian network of Eurojuris, a leading European wide legal professional network, introduces their framework and in particular the Iberjuris project aiming to improve transactions for EU citizens in the Iberian Peninsula.

EUROJURIS international was established in 1980 across Europe and is the number one group of European lawyers' chambers today. It has a presence in 610 different towns and in 18 countries.

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39 Eurogeographics www.eurogeographics.org

40 https://e-justice.europa.eu/

41 European Parliament resolution of 18 December 2008 with recommendations to the Commission on e-Justice (2008/2125(INI))

42 Mr Xavier Ibarrondo Vice President of Eurojuris Belgium www.eurojuris.net
Extract from speech given to the ALDE European Parliament Seminar held on June 14 translated from French

Each of these countries has a national Eurojuris association comprising medium sized independent lawyers' chambers. For example my chamber in Nivelle has 23 lawyers. In all these countries, cabinets have to satisfy selection criteria, particularly related to quality. Eurojuris also works with several cabinets throughout the world, but the goal is to give companies, public authorities, and individuals, direct legal counsel and advice and local representation everywhere in Europe.

Members of Eurojuris international meet twice a year to take part in specialist practice groups, particularly with regards to property law, the members from each country meet to discuss the issues going on in each country, and exchange on their daily practices. One of the major current themes is purchasing real property across borders within the EU. I will deal with this issue in four points, the first relates to the difficulties relating to the diversity of legal systems and concepts linked to property rights in Europe, a subject covered elsewhere in this publication. The second difficulty relates to those acting in the field, notaries, lawyers, estate agents; their status and powers can vary from one state to another. Then I'll tell you a few practical examples, and I will conclude by talking about the initiative of our Spanish Iberjuris network, which has established a model system relating to this issue.

Consumers usually face an information deficit, linked to the property regime in its widest sense. Here we are talking about ownership, co-ownership, rent financing, long term leasing, time sharing, usufruct[43] *etc. There is a lack of information focused on the tax regimes and credit arrangements in other member states relating to the purchase of property, this is another major obstacle to the cross-border purchase of property. The Commission have acted in some cases to prevent discriminatory practices in fiscal provision from preventing access to property transactions in other Member States taking direct action against Greece and Germany for example.*

The problem is that there is no clear and reliable information source that would enable us to have an idea of the different legal systems in force. Things are even more complex because in each state there can be civil law rules that vary between

43 Usufruct is a concept of ownership in the Civil Code tradition similar to a life estate in the Common Law tradition giving a right to use and enjoy real property during the lifetime of the owner of the right. It is particularly important in French law on succession where a standardised part of the deceased estate must pass to any surviving children.

regions. For example in Spain, communities can legislate on this issue depending on their degree of independence. It is also the case in Belgium because rules can vary between regions on registration law and inheritance law.

Council Regulation number 44/2001, known as Brussels I[44]*, is the instrument that governs the attribution of international competences between Member States of the European Union, and the conditions and methods of recognition and enforcement of judgements given in Member States as well as relating to deeds to ownership. In most Member States this convention replaces the 1968 Brussels convention.*

Another difficulty relating to this issue relates to the professionals involved, their competences and their powers, because these can vary between Member States. In Belgium the notary is the main figure who authenticates property contracts, in France it would be a lawyer and other states differ again and the roles and expectations of professionals can vary considerably.

Now for consumers, the main issue here relates to access to information. This is the main obstacle, particularly if we add the issue of languages, a point also noted by ELRA. You can imagine this can be very tough, and there is the status of estate agents and the various professionals involved, which can change from country to country.

I can give two practical examples from my files. The first case relates to an Italian company which decided to rent a building in Nivelles, the town I come from, which is near Brussels. They rented it from a Belgian company which owns the building. Now the Italian company's business did not go well, so they decided to leave the Belgian property, and they literally abandoned it, leaving the owner with a pretty heavy bill. The Brussels I Regulation meant that the dispute was taken to the Nivelles Justice of the Peace, as the building is located in Nivelle. The decision was reached, and the decision needed to be enforced in Italy. Now it has been my experience that the Belgian legal system can be slow, but sometimes you find that other systems are even slower. Nevertheless, it took me a year to get the Court of Appeal of Florence to say that the Belgian decree was valid. All that was

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

required was for the Court of Appeal in Florence to hear that a Belgian Judge gave the decision and that the decision was valid and recognised by the Italian Court.

The EUROJURIS network enabled us to take an interesting approach here, rather than handing over the Belgian decision to my client and saying 'well, now you get on with it, you go and deal with this in Italy', rather than doing that, we were able to offer the client some continuity, by sending the file to my counterpart in Florence. Networking enables us to deal with one of the main obstacles faced; we managed to simplify the ways in which information can be accessed and allowed access to justice for the citizen of a Member State when a decision needs to be enforced in another Member State. This communication and this access to information enable us to promote and guarantee exchanges between companies from different Member States. If this wasn't possible, the legal maze that the company in question would have to go through, may well produce a significant block on investment and contracts being signed in various Member States.

The second example relates to a Belgian who had purchased property in Spain. His wife was Belgian as well and they were married under the regime of shared ownership of goods. In this instance he hadn't got his wife to sign the purchase contract. When he got home he found that his wife wasn't particularly happy with this purchase of property in Spain, so the cancellation of the contract became the issue. Under the Brussels I Regulation, the dispute comes under the jurisdiction of the Spanish Courts, particularly the Court of Figueras.

The major difficulty in this kind of issue relates to checking the solutions that apply in Belgian civil law, and checking whether they are compatible with Spanish civil law, and more particularly with Catalan civil law, because there are specific rules relating to the purchase contract in Catalonia. Spanish law is essentially compatible with Belgian law in this, because the agreement of the spouse is essential under both legislations. But you can imagine for example, if the dispute was to do with the value of the property, and it is being overvalued, the solution would not have been so simple, because the rules on annulment on the grounds of misrepresentation are very different in the two countries, in spite of the fact that we have relatively similar legal bases in Spain and Belgium. Practically speaking, the fact that we had a network of professionals working with the same vision, and in accordance with the same quality standards enabled us to anticipate these problems and sometimes enables us to avoid court cases.

Let me give you another example, that of a Belgian family, whose parents married under the regime of shared ownership, and they had purchased a flat in France. The father died, and the family had to deal with issues relating to inheritance and transferring the property. The solution was relatively simple, French and Belgian laws are very similar; the solution was that the widow inherited usufruct from the husband, whereas the two sons inherited the underlying property rights. Obviously we still have to deal with issues relating to inheritance tax, where and to who this should be paid and also issues relating to amending the title deeds. Here once again the EUROJURIS network enabled us to come up with a pretty rapid solution to this, in particular giving us information on the issue rapidly.

I conclude by giving you an example relating to the IBERJURIS network. This is the Spanish branch of EUROJURIS. A few years ago they took the initiative of establishing a specialised group on property law, with the objective of sharing and exchanging knowledge on property law in a professional and practical manner. At the same time, the lawyers who are members of IBERJURIS 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 safely complete the purchase of a property in Spain. 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.

The IBERJURIS example is an excellent one, and all of us should have, in each member state, a local network, and a checklist which would mean that we could predict the main difficulties linked to property purchases. I believe that we 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.

How conflicts of laws can affect immovable property

Mr Richard Frimston of the Society of Estates Practitioners (STEP) considers how conflicts of laws can affect immovable property within the EU:

Conflicts of laws are those rules chosen by a state for the decision of cases which have a foreign complexion. However in the same way that internal law varies from one state to another, the conflict of law rules also vary. There are many circumstances in which states do not agree as to which state's laws apply. This causes uncertainty and the inability to enforce laws across borders.

Amongst many other things, the 1992 Maastricht Treaty created the European Union, the third pillar of which concerned cooperation in the field of justice and home affairs so as to offer European citizens protections in the areas of freedom, security and justice.

Since then, the EU institutions have been working through a number of programmes with a view to harmonising conflicts of laws rules between member states in different areas of law.

EU Legislative Vehicles

To achieve its aim, EU institutions can adopt regulations, directives, recommendations or opinions. Regulations are the most powerful being binding and directly applicable across the EU whereas directives are binding on each member state but leave it up to the national authorities as to how they should be implemented.

In harmonising conflicts of laws rules, the EU has primarily used various Regulations, and because of their power much care has been required in their preparation and those in existence have been subject to review.

Real Property in the EU

Although cross-border real estate transactions are increasingly common, real estate law is one of the branches that has not been directly the subject of any EU Regulations and has remained essentially national. Only Directive No. 47/47 dealing with time share rights directly applies.

Some legislation does already affect real estate, although obliquely:

- *The Brussels I Regulation No.44/2001 deals with the recognition and enforcement of judgements including notarial acts which are common in real estate transactions in many Member States.*
- *The right to free movement of capital protects cross-border mortgages and the right to foreign currency loans.*
- *Various directives affecting contract law, such as unfair terms, doorstep selling and consumer credit all affect real estate transactions.*
- *The progress towards a common frame of reference for European contract law will also have an impact.*

Problems from Conflicts of Laws

Many problems can arise in relation to real property across borders.

- *State A may require a contract to be made in front of a notary. Will a contract validly made in State B not in front of notary be valid in State A?*
- *If all the parties to the contract are in State B, but the property is in State A, is it really necessary for all the parties to travel to State A in order to effect a transfer of the property?*
- *If there is a dispute, must they conduct the court action in State A or State B?*
- *The law applying to the contract may be different to the law applying to the transfer of the title to the real property.*
- *If the buyer is also obtaining a mortgage in State B, this will add further complication and expense. Do any protections given to borrowers in State B also apply in State A or the other way round? If the borrower does not pay, can the lender take legal action in both State A and State B?*

Future Developments to Provide More Certainty

Some work has already been done. The European University Institute project on Real Property Law and Procedure in the EU finalised in 2008, collated reports from 16 member states and considered the issues of real estate transactions, contracts and mortgages.

Difficulties with planning, zoning, environmental law, pre-emption rights for public authorities and other administrative regulations were considered both in the context of warranties by the seller and as to checks made on the buyer's behalf.

The reports set out the issues very thoroughly:

http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/ProjectRealPropertyLaw.aspx

What can STEP do to help develop solutions for the EU citizen?

Although many STEP members focus on estate planning and succession issues for their clients both nationally and internationally, real property is inevitably often a significant proportion of the value of the personal assets of many clients. STEP members are therefore accustomed to being consulted on the cross-border issues arising from real estate acquisition. Advising on the different effects of various ownership options and structures, STEP members understand the cross-border tax and other consequences of the various available local options.

STEP's network of members both inside and outside the EU, enables advice from relevant experienced members in other jurisdictions to be readily obtained. STEP members support the progress towards a common frame of reference for European Contract law and many of the proposals of the draft common frame of reference.

STEP with no vested interests in the title transfer process, supports EU initiatives that would ensure basic checking of planning, zoning, environmental law, pre-emption rights for public authorities and other administrative regulations on the buyer's behalf, were made with a common minimum standard throughout Europe.

Why are Land Registries so important to the process?

Land Registries are one of the cornerstones of a safe process of property transactions. They maintain registers of rights over the property, charges against the property and perhaps maps and plans of the boundaries and zones affecting the area. They may also be known as Cadastre registers or maps and both Land Registries and Cadastre will be made up of various separate registers, maps and indexes. Many foriegn purchasers find themselves in difficulties when boundaries are dis-

puted, perhaps leading to the loss of connection to amenities; zones are applied to the property perhaps leading to the property being built without valid permission; or a property purports to be sold free from encumbrance but is in fact subject to a developer's mortgage. All these examples 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.

How do they work?

However Land Registries are more than just a deposit of information, in some jurisdictions the actual act of registering a right over property in the Register will create that right. So in some jurisdictions the absence of registration of a right would mean the right did not exist, even if the purchaser had handed over money, even moved into the property itself. Most systems fall under either the Register of deeds model where the fact of the transaction is recorded but no right created via registration, or the Register of title model where the right is created via registration and greater precedence is given to registered rights and a greater level of certainty achieved by reference to the register which the state would "insure" by compensation to anyone who loses through an error in the Register or its administration. The second model gives a high degree of certainty but requires a high degree of administration, infrastructure and state financial guarantee. It is the view of the European Land Registry (ELRA) project that this high degree of legal certainty is essential throughout the EU if real property transactions are to be as safe as possible facilitating the wider aims of the EU.

In jurisdictions with administratively advanced Land Registries it is easy to take for granted the peace of mind offered by a State guaranteed source of information, reliable and easy to access. Not all jurisdictions enjoy such an advanced level of administration, however, and legal certainty of information is hard to come by. If the purchaser is local or a citizen of the State they will have some local knowledge about the property or zone or region that might help them steer clear of trouble, but 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. The destabilisation of property markets that results can have a massive negative impact on the economy and reputation of the state.

ELRA

If much of a successful and safe real estate transaction is about having access to the right information and correctly administering a transaction to create a registrable right then the key to successfully managing that process must lie with the Land Registry body. ELRA was created in 2004 by a group of Land Registries who recognised the need for representation and co-operation on an EU wide basis. Their stated aim is the "development and understanding of the role of land registration in real property and capital markets". They have grown to a membership of organisations from 20 Member States and continue to grow; they are now co-funded by DG Justice and involved in many other EU wide initiatives in the field of law and real property matters. ELRA are leading the way for other professional organisations to co-ordinate across borders and find a common way whilst respecting local frameworks.

ELRA outline below the CROBECO project which aims to provide a common framework for purchasing property cross-border throughout the EU Member States via electronic conveyancing and processes, this is an extract from the seminar presentation given by Gabriel Alonso Landeta, President of ELRA.

Modern land registries are the instrument the State utilises to protect real rights on immovable assets and imbue trade with certainty. Land registries are not mere databases. Registration publicity is not mere information, but qualified information, information with legal value and effects.

Land registries (LR) dispense reliable information during the decision process and provide legal protection once the right is acquired. But account must be taken to the fact that not all EU registries have the same organisation and the same effects, and not all registries dispense the same degree of protection. In broad terms we can distinguish two systems in the EU. Deeds system is restricted to filing and publicising contracts, to which the system gives the effect of mere third-party enforcement. Registered contracts prevail over unregistered contracts, but the registry does not guarantee the buyer's right. (Negative effect). In the more developed Title registration systems, only titles and jus in rem (rights to things) are entered in

the land books. These rights are vested by the registry with strong effects, giving the greatest protection to the purchaser's right (positive effect).

Title registration systems avoid the expense of title searches, save time, reduce the information asymmetry between the parties and lower transaction costs, and therefore facilitate the integration of the Single Market.

CROBECO

Known as Cross-Border Electronic Conveyancing (CROBECO), this project aims to establish simpler and more confidence-inspiring process for obtaining immovable property abroad.

The purchasing procedure will largely be conducted electronically and settled in the buyer's home country. Foreign buyers often prefer the applicability of protective rules from the law of their home country. Applicability of home country law could have an important psychological effect on prospective foreign buyers. Also because of the fact that the (bilingual) deed is processed in their own language by a conveyancer from their home country, they get the feeling that they can be more confident of their legal protection

It is, then, important to stress that CROBECO is a project that fully respects the national systems in force. It does not attempt to eliminate requirements, but to meet all the requirements of each State's legislation establishes in order to produce effects in each national system.

The project tests the possibility of using the rules of the Rome I Regulation to enable the parties to exercise their right to choose the applicable law. The contract's effects are therefore split between the effects that produce obligations between the parties and the in-rem effects of the contract. Law choice can only concern obligations of the buyer and seller. Law choice can never concern the acquiring of property rights itself that are governed by the lex rei sitae of the country of the plot. The law choice is established by a specific clause in the contract of sale and assures the buyer of compensation for unknown restrictions and violation of the contract by the seller.

CROBECO is developing a set of rules and protocols. A checklist of protective clauses and guidelines for the cross-border transfer of rights is currently being developed in collaboration with Maastricht University's European Private Law Institute. As not all European conveyancing and land registration systems are the same, specific rules will be developed and adapted for each system.

Because of the fact that timely receipt of information from the land registry by conveyancers and of conveyance documents by registrars is essential for cross-border conveyancing the framework will be based on electronic communication. The deed will be also an electronic document signed by the conveyancer with advanced electronic signature.

European Land Registry Network

ELRA has coordinated action amongst its members for the creation of a cooperation instrument, "the European Land Registry Network" (ELRN). The ELRN is made up of contact points who are land registrars, legal experts on real rights. The ELRA Network will support the CROBECO project, at two different stages of the envisaged process:

At the pre contractual stage, the network will explain the LR information. The widespread introduction of ICTs in registration organisations throughout the Union enables a significant number of registries to have on-line inquiry services. The European e-Justice portal[45] will create a single point of access to the LR information through the LINE project in 2013. But to be effective, this information needs to be understood. Basic reference information is collected by the Network in simple, easy-to-understand language, explaining the contents and the value of registry publicity, the different systems and their main procedures. This information will be posted on the Internet. At the second level, individualized assistance could be provided.

After the contract is signed and sent to the LR, additional requirements must be fulfilled in the Member State where the plot is located before final registration is performed, such as the payment of property transfer taxes. The Network will have to cooperate at this stage, providing advice about the registration procedure and facilitating compliance with collateral procedures involving national administrations.

Public restrictions

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 bal-

45 https://e-justice.europa.eu/home.do?action

ance 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. ELRA is working on a research project in which its members are attempting to identify at least the major public restrictions and limitations in the different Member States.

b) Concentration of all the information concerning public restrictions at a single point. Citizens should not be burdened with having to check with each administration about potential restrictions on the property they want to buy. With the right technology, it is possible to set up 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. This would enable in the mid-term the interaction of public restrictions with property rights, thus reinforcing legal certainty inside the registry, which is where ownership is publicly disclosed by the State. ELRA 2011

The CROBECO project is generating considerable interest in both professional and political circles and pilots may be extended to other member organisations. ●

Diana Wallis MEP concludes

It was a real privilege to host the seminar in June and especially to see the reaction of many participants who perhaps felt that they had been working away in their own corners on these issues without attracting sufficient input or notice from the European Institutions. I hope that this small publication goes some way towards correcting that and will help raise the profile of these matters.

It has to be emphasised that the e-mails from constituents keep coming and we have to respond. Whilst on the one hand the contributions to this publication showcase the many admirable initiatives at professional and administrative level, what is lacking is clear and systematic intervention from the European legislature. Many will argue that such intervention is currently a political impossibility, far too difficult and sensitive, but if highlighting the pitfalls around cross-border property purchases shows that we are currently letting our citizens down - what better motivation (and indeed justification) could exist for more attention and action on this subject? The right to property, a citizen's right to their home, is fundamental and is as much a European value as the many other so called European values which we champion daily. At a time of economic uncertainty, that right needs underpinning more than ever, and should find its place in the program for the proposed 'European Year of Citizens' in 2013. ●

www.alde.eu

www.dianawallismep.org.uk