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Real Property Law and Procedure in the European Union

General Report

Final Version

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Overview

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Introduction

Objectives

The purpose of this study is to describe existing land law.

- We hope that this study can show that there are some **common structures** in the different legal systems.
- However, we also hope to show how the several parts of each of the national systems (land registration, land law and interests in land, sale of land, enforcement procedures) can be understood only jointly as building blocks each of which is necessary for the respective national system.

It is not the purpose of this study to make any recommendations *de lege ferenda*. There are many and valid reasons why there have not yet been any proposals to harmonise land law in Europe:

- ***Lex rei sitae*** is probably the oldest and most universally recognised principle of international private law. Everybody understands that a different set of land law rules might apply for land situated in another state.
- The functioning of land law as law in action can be understood only if seen in its **legal environment**, that is in the context of land registration on the one hand, enforcement procedures on the other hand – and the national law of obligations in between.
- **Land law is static**. It has been harmonised in the different national states mostly in the 19th century. However, in most countries there are still cases in which the previous particular law applies to interests granted under the old regime.
- Finally: In land law, as generally in property law, there is not only a channel, but an ocean between the continental systems on one side and the **common law** systems on the other side. A lot of land law practice in Britain is about equitable interests or trusts[1]. Harmonisation would require also to tackle these issues.

Families of Legal Systems

In comparative law, simplification is not only unavoidable, but generally even desirable. If you want to get the details, go read the national reports. This final report can and will give only the big picture.

Sometimes, for understanding the basic concepts, we distinguish between the different legal families, that is:

- the system of the **Code Napoleon** (France, Belgium, Italy, Luxembourg, Portugal, Spain),
- the **common law** countries (England and Wales, Ireland, in many respects also Scotland),
- the **Nordic** countries (Denmark, Finland and Sweden – whereas Iceland and Norway have not been covered by this study),
- the **Eastern European** transformation states (in this study we have covered Hungary, Poland and Slovenia, with some references also to the Czech republic),
- finally the **German** systems (Austria, Germany and Switzerland).

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1 Just ask a simple question about how an English couple sell their house to another English couple, and our national reporter will tell you, that in practice, two trusts are involved in that situation (part 3.1.).

However, for land law, there are some important differences to this commonly used distinction:

- The Portuguese and Spanish land registration system differs from the French system of mortgage register.
- The Netherlands are somewhere in between the various systems, as happens often in comparative law.
- In Eastern European countries, the rupture with the former communist system has been much more profound than in other areas of civil law. Therefore, one might doubt whether the Eastern European transformation states still are a group linked by some common features in land law – or whether the return to pre-war traditions has not been more important, so that we should rather lump Slovenia in one family together with Austria and, may be, the Czech republic, Hungary and Slovakia - or Poland together with France and the family of the Code Napoleon.

Terminology and Definitions[2]

We should say a word about the legal terms used in this study. Of all major European languages, English is the one least suitable for talking about (civil or continental) land law, because the common law concepts of land law are completely different from the civil law perspective.

So if you are an English lawyer reading this study, please first forget everything you know about English land law terminology. This is a comparative law, not merely English law, exercise. Whenever there is no comparable English term at all, we have even introduced some French-English or German-English terms – which we hope our English readers will not object, considering they have lived for almost a thousand years with Norman-French institutes with such nice names as *profits à prendre* or *appurtenance*.

These are the main terms we use in this final report (and which have been used by most, if not all authors of the national reports) – given in systematic order:

- **land law**: Land law is the heading of what we are talking about. Our English reporter has convinced us not talk about real property or estate[3] (which is of common use in the US, but has a very narrow technical, pre 1925 meaning the UK).
- **land, parcel, building**: In this study, the term „land“ is used in the extensive sense of immovable property, including both the „parcel“ (i.e. the ground) and the „buildings“ built on the parcel.
- **ownership in land, limited rights (interests) in land**: The term „ownership in land“ is rooted in the civilian law concept of exclusive rights (which under English law would encompass not only freeholds, but also leasehold estates). By “limited rights in land” (in the questionnaire: “interests in land”), we define all limited real rights in land created (which otherwise might also be called encumbrances or burdens).
- **land register**: The land register is the competent authority for registering the transfer of ownership and the creation of interests in land. The term includes the mortgage register of the French type (*conservation des hypothèques*) and the “land book” (*Grundbuch*) of the central European type. Generally, it is to be distinguished from the cadaster (which is the

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2 For a translation of the terms, compare also: UINL, Civil Law/Common Law Task Force, Lexicon/Glossaire, IRENE, Luxembourg (www.irene-eu.org.) 2004 (with translation and explanation of the juridical terms also in German, Spanish, Dutch and Italian).

3 The questionnaire and the national reports still use the term „real property“.

term used for a separate authority responsible for land survey). However, if the cadaster is also competent for registering rights in land (e.g. in the Czech republic, Hungary and Slovakia), we include the cadaster in the term “land register” (while referring to that function).

Countries covered by this study

In this study, we have tried to cover most member states of the European Union:

- There are separate national reports on England/Wales (which are covered by one report) and Scotland which has a completely different land law.
- Some of the EU Member States are not covered by a distinct national report, but by some remarks in this general report (in particular the Czech republic, Denmark, Ireland, Slovakia and Switzerland as important non-member state).
- Among the current EU Member States, we have not been able not cover the Baltic states (Estonia, Latvia, Lithuania); neither Cyprus and Malta. We also have not covered other candidate states, either.

1. Principles

1.1. General Features and Short History

Real property law has developed in Europe on the basis of tribal/feudal and Roman law. Its general contemporary sources are spread over continental codifications and the British Common Law whereas specific fields such as the registration system, apartment ownership and building contracts are dealt with in special statutes. Whilst real property law is mostly uniform for a whole country, strong regional divergences may be found in the UK and Spain, and weak ones in other federal States such as Belgium, Germany and Austria. Philosophically, real property law is influenced strongly everywhere in Europe by liberalism which relies on individual land ownership. Whereas this origin is significantly reflected in national constitutional law, the influence of supranational constitutional law has shown to be only limited up until now.

Real property law or, used synonymously here, land law, has developed in Europe as a blend of **tribal/feudal law** on the one hand and **Roman law** on the other. On the continent, the feudal system originated after the great migrations of the 6th-8th century a.C., whereas in Britain it was spread after the Norman conquest in 1066. This system presupposes that all land is owned by a king and/or nobleman and given as a kind of loan for use (**feu**) to an ordinary person who in turn was to deliver fruits of the land and/or personal services (such as most prominently military service). On the continent, the feudal system survived all over the middle ages and ended only at the beginning of the modern age, with the **philosophy of enlightenment** and the **grand revolutions** of the 18th century. The latter abolished privileges of the aristocracy and consecrated the **new social paradigm of free and equal citizens**. On the British Isles, the feudal system continuously diminished in importance as well, but formally persists in England (where all land is still considered as held ultimately by the crown), whereas it was abolished in Scotland in the recent 2004 legislation. Roman law, particularly the Justinian **Corpus Iuris Civilis** (529-535 a.C.), continued to play a role even after the fall of the Roman empire, but had a renaissance with the **reception of Roman law** in Europe from the 12th century onwards, which ultimately lead to the **great codifications of the 19th and 20th century**. The reception had a large influence also in Scotland, but only a limited one in England. Roman law invented most of the important concepts of continental real property law ranging from ownership over possession to limited interest in land such as servitudes, whereas hypothecs/ mortgages have roots in both Roman and tribal law. Also, Roman law enabled the systematisation of private law and the integration of real property law into that system, which culminated again in the great codifications.

Contemporary real property law is still spread over the **continental codifications** and the **English Common Law** which is to a large extent even today case law. Notwithstanding that, legislation, in particular the voluminous **1925 Birkenhead legislation in England** and the recent major reform abolishing feudal rights in Scotland, seems to plays a more important role than in other fields of private law. Everywhere, specific items of real property law which typically include the whole **registration system, apartment ownership and building contracts** are dealt with in **special statutes** outside the codifications respectively the case law. Moreover, contemporary real property law is in most cases uniform for the whole country. **Subnational differences** exist most strongly in the UK where three different systems - England and Wales, Scotland and Northern Ireland - coexist. Beyond this, subnational differences exist also in Spain (where the competence for land law matter lies with the regions) and to a

minor extent in federal states such as Belgium, Austria and Germany (where the public law context of real property such as environmental and zoning law is partly regional) and in France (where the region Alsace Moselle has kept some peculiarities mainly derived from German law, in particular the registration system).

Basically all great codifications are the child of **liberalism** which presupposes the existence of **individual property** and the **principal freedom to use it at one's will**. This seems to be true also for modern English land law whose feudal traits are only symbolical. The land law of Eastern European Countries, too, shares this basic orientation. After the fall of Communism, these countries mostly reverted to their former liberalist traditions, which included massive **re-privatisation** measures. This basic philosophical orientation is reflected also in the relationship between law and positive **constitutional law**. In all European systems, also in the famous unwritten British constitution, constitutional law protects **individual property** and provides that **expropriation** may take place only in the public interest and against an adequate compensation of the landowner. By contrast, the influence of **supranational constitutional law** on land law has been limited up until now. The European Court of Human Rights in Strasbourg has been consulted on land law issues only occasionally and in fairly peculiar cases such as the 1967 English enfranchisement legislation (under which the holders of building leases granted for long periods can claim the transfer of the land to them). As described earlier, the European Court of Justice in Luxembourg, the chief judicial institution of the European Union, has likewise dealt with land law only to a limited extent. The most important land law cases brought to that court are about **limitations** of EU Member States **on the free acquisition and transfer of ownership rights**.

1.2. Concept of Ownership (Property and Estates)

1.2.1. Specific Common Law Types of Ownership (Estate and Trust)

Ownership of land (*dominium*) is the all inclusive real right (property right). In the continental systems, ownership cannot be divided in different ownership rights though there are "precursor rights" such as possession or the German *Anwartschaftsrecht***.** However under common law, there may be estates, being ownership limited in time. In England and Wales and in Ireland (however not in Scotland), the lease is considered an estate – that is time limited ownership in the civil law terms. Another important difference between common law and civil law property law is the existence and the extensive use of the trust in the common law jurisdictions. Under common law, the trust is also characterised as involving divided ownership (however not in Scotland).

a) Estates and other divisions of property

In the **continental systems**, there is but one all encompassing ownership right. Ownership can be held jointly; however it cannot be split into different ownership rights. With some very minor exceptions still to be found in Spain and Italy, feudal rights have been abolished in the 19th century. Under the **common law**, feudal theory still holds on in land law: In **England and Wales** only the Crown can enjoy ownership in the legal sense. Legally, the Crown is the ultimate owner of all land; all other landowners hold from the Crown. This holding right is called an **estate**. However, there are no practical services deriving from the ultimate ownership of the Crown. The only difference lies in the possibility of a limited duration of the estate.

In line with this, the most common type of an estate, the **freehold estate** (or in full: an estate in fee simple absolute in possession) which is not limited in time, is the economic equivalent of civil law ownership and – but for the purely notional feudal holding from the Crown – also its legal equivalent. Thus, if we talk about ownership in this study, this comprises the English

freehold estates, unless expressly mentioned otherwise. **Scotland**, on the other hand, has just abolished feudal rights and the *dominium directum* of the superiors, and consolidated *dominium utile* into ordinary land ownership.[4] Thus, Scotland has rejoined the mainstream of European property law.

In the English Common Law (not in Scottish law), there is the further distinction between **legal and equitable estates** and interests in land. **Law** and **equity** are two different systems of jurisprudence which evolved and still exist alongside each other. Equity was developed by the Lord Chancellors (its contemporary successor being the **Chancery Division of the High Court**) as an informal and discretionary regime to supplement and correct the more rigid Common Law. The original division was however abolished in favour of a single set of courts in 1876. Whilst both legal and equitable estates may be registered, in the absence of registration, a fundamental priority rule in favour of legal estates applies: Legal rights bind the world; equitable rights bind the world except the bona fides purchaser for value of a legal estate without notice of the equitable right. In land law, equitable estates typically arise from **trusts**.

The statement that on the continent there exists no **vertical division of ownership** should however be qualified. Whereas there are indeed no competing full ownership rights, as is the case with the estates under the Common Law, there are real rights amounting to less than, but as it were paving the way to, full ownership. To this category belongs obviously the concept of **possession**, which, according to its Roman law concept recognised basically everywhere, refers first to the factual situation of control over a thing. This concept is however upgraded into a right in rem inter alia by the "defensive remedies" available in case of infringement. Another "vertical pre-state" to full ownership is the German **Anwartschaftsrecht** (expectancy right) which was developed by the courts. It gives its holder a stable opportunity to acquire the full ownership right and is in this respect vaguely similar to an equitable interest under English law. Under an instalment purchase contract, an Anwartschaftsrecht is granted inter alia to a buyer who has not yet paid all instalments when the contract provides that ownership will pass only at that moment.

b) Trusts, settlements and overreaching

Trusts are an all-round tool of the Common Law (without direct equivalents in Civil Law) with many functions in land holding and transactions. Trusts imply three parties: a **trustor** transfers an estate to a **trustee** to the benefit of a **beneficiary.** The trustee becomes owner at law and the beneficiary in equity. Typically, the trustees hold management control whereas the beneficiaries are entitled to enjoyment of the land (be it to occupy it, to receive a rent or, after sale, to receive interests from investment of the proceeds).

Trusts are mainly used (1) as a settlement on successive generations (express trusts), (2) as a (statutory) instrument to manage co-ownership (in particular between husband and wife who frequently are at the same time both trustees and beneficiaries of an estate) or (3) in the form of (usually statutory) management trusts following death, minority or for managing charitable land. Trusts of land (1) have replaced the earlier instruments of **family settlements** to divide ownership of land by time between successive limited owners and of **strict settlements.** The latter instrument however survives, as regards its results, in the doctrine of **overreaching.** According to this doctrine, in the event of sale of the land by trustees (with the law requiring at least two trustees acting jointly for the sale to be valid), the trust of land is being automatically converted into a **trust of money derived from the proceeds of sale**.

For reasons of space and simplicity, we have decided to neglect equitable interests and trusts to a considerable degree in this study. This may be justified to the extent that trusts accom-

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4 Abolition of Feudal Tenure etc. (Scotland) Act 2000.

modate the transfer of ownership on death, whereas this study focuses on sales contracts. Similarly, the limitation to legal mortgages accepted here may be explained by the fact that nowadays equitable mortgages are rarely used.

1.2.2. Superficies solo cedit

The rule of *superficies solo cedit*, that is that the ownership of a piece of land generally comprises also the ownership of all buildings erected on the land, applies in all European legal systems. Exceptions generally recognised are building leases (not recognised in Scotland) and apartment ownership. Further exceptions of separate ownership of buildings exist in the Reform States of Middle and Eastern Europe.

In all European legal system the Roman law maxim ***superficies solo cedit,*** in the French legal family also called the rule of ***accession,*** applies. According to this rule, the ownership of the land extends to the ownership of all building stably erected on the land, as well as to all components/ objects structurally inserted into those buildings. As a general rule with many exceptions, the vertical scope of ownership also extends to the earth below and the sky above the land (insofar it can be used from the ground).[5]

- A first minor exception widely accepted goes back to the Roman law principles that a small part of a building erected unintentionally on foreign land will continue to belong to the owner of the main part of the building (see e.g. § 912 BGB on **Überbau**).
- In most legal systems, major exceptions are **building leases** and **apartment ownership**. The first instrument establishes a separate right in rem to own a building on foreign land (see 1.5.) whereas the second provides for the separate ownership of a flat in a block of flats, the land and common parts of the block normally falling into co-ownership (see 1.4.).
- **Further exceptions** in the form of separate ownership of buildings exist particularly in the Reform States of Middle and Eastern Europe, due to the fact that the previous communist regimes did not care for proper registration of title. Thus in many cases, buildings had been legally built by somebody else than the owner of the land, the ownership being regarded a mere formality. However, with the re-privatisation of land following the fall of Communism there is the general tendency of abolishing such separate ownership rights.

Lastly, figures on the percentage of isolated ownership of buildings, which are available only in some cases, range from 10 – 20%.[6]

1.3. Limited Real Rights in Land (Interests in Land)

1.3.1. Numerus clausus of Real Rights

A formal *numerus clausus* rule - meaning that real rights are defined by law, and parties are not free to create new ones by contract - exists in the majority of European countries. However, even in the remaining countries it is either observed in practice (Spain), or its ratio to render the scope of those rights which are enforceable erga omnes foreseeable is equall ensured by other devices.

The **numerus clausus** of real rights in land applies in most European countries. In a rigid version, it exists in particular in France, Greece, Italy, Portugal and Germany where real rights are exhaustively defined by law, and parties are not free to create any new ones or mod-

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5 Note, as a curiosity, that an English court held that an owner cannot prevent this land from being photographed from an airplane (*Berstein v. Skyviews*, [1978] QB 479, Griffiths J.).

6 See e.g. the English and German reports.

ify existing ones by contract. In a softer version, the rule applies also in Scotland, Finland and the Netherlands where there is still a **statutory cap** on real property rights, but parties may define the detailed content of several of them by contract.

In **England**, there is no general definition of real property rights, and the *numerus clausus* principle is not recognised. Even though a statutory cap was imposed in 1925,[7] is was ignored by the courts. Thus, they have created a new proprietary interest called **proprietary estoppel** (meaning that someone who relied on the expectation about a right created by another person will become entitled to that right) and a **right of rectification of a document** to make it conform to the preceding agreement among the parties.

In theory, the rule of *numerus clausus* does not apply in **Spain,** either, where parties are entitled to create new rights in rem. In practice, however, this hardly ever happens, because the standards for creating new rights in rem are very high. To this extent, Spain also follows the *numerus clausus* system de facto.

The reason for the *numerus clausus* rule is plain: Since the real rights are enforceable *erga omnes*, the rights have to be clearly defined in such a way that third parties can know and understand without difficulty the limitation of the ownership. This ratio is, however, accommodated even in those European countries in which jurisprudence has created new rights. Ultimately, the important distinction is not, probably, whether the *numerus clausus* rule applies or not, but whether the existing real rights are flexible enough to fit different situations and new needs. Generally, in this respect rights to use (servitudes and easements) give more contractual freedom to the parties than mortgages.

1.3.2. System of Real Rights in Land

Real property rights may be divided ratione materiae into full ownership and limited (subordinate) rights. The latter category may be further subdivided into rights to use, security interests and pre-emption rights.

In the questionnaire, we have used the term "interests in land". In this final report, we have chosen to use the term "real rights" or synonymously "rights in rem", because an interest may be less than a right[8].

There is no uniform and generally accepted classification of real property rights in Europe. Ratione materiae, one may however distinguish between the **full ownership rights** and **limited (subordinate) rights** on the land of another person such as **rights to use** (e.g. usufruct, servitudes, habitation rights, trust life rents in England and Scotland, and different kinds of easements or, synonymously, servitudes) **security rights interests** (*i.e.* mortgages, liens, charges and rent charges), and **pre-emption rights** established by contract or statute (such as pre-emption rights in favour of local governments).

In England, the primordial distinction between common law and equity leads to a somewhat different overall situation: not only the direct equivalents to **full ownership, freehold and commonhold estates**, but also limited rights conferring absolute possession such as leaseholds and equitable beneficial interests under trusts are regarded as (time-limited) ownership rights. Finally, there are everywhere subordinate rights which enjoy limited proprietary status only (see 1.3.6.).

1.3.3. Rights of use (usus or prohibitio usus)

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7 LPA 1925 s 4 (1).

8 The English reporter uses the term „property right" or „property interest". The Scottish reporter prefers the term „real right".

Rights to use may be divided into extensive rights of use giving possession (in particular right of superficie, usufruct, usus, right of habitation, emphyteusis, building lease and timesharing rights) and limited rights of use, the most important ones being easements or, synonymously, servitudes.

Rights to use may be divided into **extensive rights of use giving full possession** (1) and **limited rights of use,** also called **proprietary burdens** (2). Most of these rights of use require registration to be opposable *erga omnes* in most systems.

a) Overview

In all countries except England, the first category comprises the **usufruct** right, the right to use a land and to enjoy its fruits, i.e. all kinds of earnings from the land including rent payments. Typically, usufruct is not limited to land but extends to movables and rights according to most systems. Whereas in Western Europe practice, usufruct mainly applies to farming land, under the former Communist system in Poland, a special form of usufruct called **perpetual usufruct** has been, and still is, used to grant land to individuals for long periods while formally keeping it under the ownership and control of the state. Derivatives from usufruct are **usus** (recognised inter alia in Spain and Portugal) which also entitles to the use and to the fruits of the land, but only to the extent necessary for the owner and his family. Another derivative of usufruct is the **right of habitation** recognised in all continental countries. Another related right recognised in the French legal family is the **emphyteusis** or **long lease,** which entitles to the long or perpetual use of land against a fee, combined with the obligation to improve it. In England, due to the lack of any numerus clausus, one may also find **rights of use sui generis** such as an abandoned spouse's occupation right of the matrimonial home. Other more important extensive right of use are **rights of superficie** respectively **building leases,** which consists of the transferable and inheritable right to erect and own a building above or below the surface of a foreign piece of land (see 1.5.).

Of little importance are some remaining feudal and customary rights of use such as the Spanish **censos** (ground rents similar to usufruct but presupposing a direct and a beneficial owner according to the feudal model) or **crofting** rights recognised only in some Northern Scottish counties (a perpetual lease, usually of small farming land, with security of tenure and a buying option).

Another real property right sui generis recognised in several European countries and harmonised in EC directive 94/47/EEC is the **timesharing** right. It typically refers to holiday premises occupied by its holder only some weeks per year. According to the directive, the timesharing right can be framed as an obligational, corporative or real right.[9] In the latter, case it may be understood as a division of property in time.

b) Easements or servitudes

The most important category of limited rights of use are **easements,** on the continent also called **servitudes** (Grunddienstbarkeiten). Easements may entitle to use neighbouring land in different ways, including a right of way for pedestrians and/or vehicles, the construction of water and sewer tubes, of dividing constructions, the provision with light or a certain view (not recognised in England) and the distance between buildings. However, easements do not, with the single exception of the Scottish **real burdens**, extend to duties of positive action of the owner of the neighbouring land.

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9 As abuses are frequent, the directive stipulates various consumer protection instruments, in particular a bundle of information duties and a right to revocate the underlying contract. In practice the significance of timesharing is rather low (as it is normally more costly than other ways to use holiday premises).

As regards their holder, easements may be divided into two types: First, **easements in appurtenance**, i.e. to the benefit of the owner or possessor of neighbouring land; in this sense, one may refer to a **dominant tenement** (piece of land) and a **servient tenement**. Second, **easements in gross**, i.e. to the personal benefit of another person (*beschränkte persönliche - Dienstbarkeiten*, §§ 1091 ss. BGB). To quote a fancy Spanish example, an easement in gross may give a family the right to watch a bull fight from a balcony pertaining to the neighbouring house. Whereas easements in gross are recognised as real rights in most European countries, they have only obligational status in some systems including Portugal, the Netherlands England and Scotland. In the latter two countries, in addition to (positive and negative) easements in appurtenance in the sense just described, one also finds **restrictive covenants** respectively **real burdens** (i.e. formal restrictions of the use of neighbouring land, to be found today mainly in apartment flat schemes and commonholds). Unlike easements which may be created also by division or long **adverse possession (usucapio)**, restrictive covenants may only be created expressly by a deed of covenant. Finally, one should mention some limited rights of use of feudal or customary origin which may still be found in some continental countries and have largely the same effect as servitudes, but are not registered - for which reason they may still cause practical problems. Examples are the Italian **ius civici** and the German **altrechtliche Lasten.**[10]**.**

A final group of limited rights of use similar to easements entitle their holder to take part of the fruits and produce of the land. To this group belong the English **profits à prendre** (examples include the right to extract gravel or the right to have cows graze the grass), the **antichresis** right still existing inter alia in Italy, the German **Reallasten** (which also entitle to receive regular benefits from land) and the **rights of extraction** (e.g. gravel, soil) and **the right to take timber** reported from Finland.

1.3.4. Security Rights, in particular Mortgages and Rent Charges

Security rights consist in the use of land as guarantee in rem for the repayment of a debt, and entitle the creditor to have the land auctioned off by court order in case of payment default. Their most important forms are mortgages created by the parties to a credit contract to secure the debt. The main difference between the various forms of mortgages to be found in Europe lies in the principle of accessoriness, i.e. the linkage of a mortgage to the existence of the secured debt, which applies in the English and French, but not in the German legal family.

Security rights consist in the use of land as guarantee in rem for the repayment of a debt. Generally, they require **creation by deed or notarial act** and **registration in a land register** (see 2). Once a mortgage is created (typically to a bank), the property remains with the owner, but in case of default of the debtor with the payment, the land will be sold in an auction or another type of forced sale, which generally need to be authorised by court order. Only under the traditional English concept of a mortgage (similar to the historical Germanic law concept of *Totpfand*) did the lender become owner of the land or is granted a long lease (nowadays), whereas corresponding clauses are usually forbidden in continental systems.

The most frequent forms of security rights in rem are:

- mortgages (accessory or non-accessory) created by the parties to a credit contract to secure the debt;
- liens imposed by statute as a result of particular factual situations, in particular when the seller of land remains unpaid (e.g. in England or France);

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10 Please note that the similar term "*Baulast*" applies however to limitations on the use of land which the owner has created under public law by a declaration to the agency controlling new constructions. Such burdens are not registered either.

- rent charges securing a periodical payment on land, often used for the maintenance of family members. This type of security exists e.g. in Germany (Rentenschuld) and in Alscace Moselle (prestation foncière).

In some countries, other less important forms of securities in rem may be found: In Belgium one may find, apart from a **pledge on immovables** no longer used, **mortgage promises instead** of full mortgages, which seem to be widely used in order to avoid high registrations duties (1% of the secured sum).

The fundamental difference between mortgages under various European system lies in the feature of **accessoriness** - i.e. the linkage of a mortgage to the existence of the debt to be secured with the consequence that the mortgage diminishes as the debt is gradually repaid and expires completely once the debt no longer exists. The accessory version is dominant in the French and English legal family whereas the non-accessory version (Grundschuld) prevails in the German legal family. Beyond that, its exists also in Sweden and Finland and in some Eastern European reform states, with an equivalent Polish device just making its way through parliament. Whereas the accessory version offers a **maximum of security to the debtor**, the non-accessory type enables the **repeated use of a mortgage and its transferability among borrowers and lenders**, with the latter option facilitating the **refinancing of banks**. It should be stated, however, that even in countries with (only) accessory mortgages, accessoriness may be quite relaxed (e.g. in Sweden) or certain non-accessory exceptions may be recognised. Thus, in Spain, a mortgage may secure the final (not yet known) balance of liquidation of a current account on a specific date. Similarly, in Italy, a future, conditional or merely possible debt is sufficient for a mortgage to be created (Art. 2852 CC). Further features of accessoriness and non-accessoriness are discussed below (see 7.3.).

1.3.5. Rights in Rem to Acquire Real Property, in particular Pre-emption Rights

The European picture of rights in rem to acquire real property, in particular pre-emption rights, is very diverse. Whereas in some countries, such rights do not seem to exist at all (Italy and Holland) or exist only in limited form (Spain, Sweden and Scotland), far-reaching and stable pre-emption rights may be found in others (Germany, Portugal, Hungary and England).

Rights in rem to acquire real property, in particular **pre-emption rights**, are not recognised all over Europe. Thus, in a first group of countries, which encompasses Italy and Holland, such rights do not seem to exist at all, and their function has to be performed by purely contractual arrangements. Where such rights exist, they do not have a uniform shape, but are usually granted by statute in certain situations (e.g. **in favour of municipalities or tenants**) or by contract. A further distinction may be drawn as to their intensity which varies a lot:

- In Spain, a **call option erga omnes** exists, which entitles to the purchase of land at a previously agreed price, albeit limited to 4 years.[11]
- In Sweden, **options to buy and sell** exist only in exceptional circumstances, in particular to the benefit of municipalities and associations of tenants (usually established when their block is about to be sold to a third party).
- In Scotland pre-emption rights in favour of a person exist in the form of **real burdens**, but apply only at the first sale.

Conversely, in another group of countries, **far-reaching and stable real pre-emption rights** exist:

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[11] A similar effect is ascribed to the **defeasance clauses** frequently used in Spain, which confer to the seller the right to recuperate sold property in case of non-payment.

- In Germany pre-emption rights in rem may be granted to an individual person or the owner of other (usually neighbouring) land and for several future sales.
- In England, a largely similar result is reached in the case of sales agreements, including pre-emption rights, on land, for which - as opposed to the famous common law rule which applies to any other sales - the (equitable remedy) of **specific performance** is available. Also, these rights are assigned proprietary status (even though this is somewhat controversial for pre-emption rights) as they apply against any future owner of the land.

1.3.6. Other Real Rights in Land

Whereas the catalogue of rights presented above is virtually exhaustive, there exist rights without full proprietary status but with analogous functions. These encompass (continental) ground leases and corporative ownership schemes to be found in ex-Communist systems and Scandinavia.

The distinction ratione materiae introduced here between **full ownership rights** and **limited (subordinate) rights,** that category being subdivided into **rights of use, security interests** and **pre-emption rights**, is able to accommodate virtually all rights in rem to be found in European systems today.

However, on the margin of real property rights, one finds similar rights which do not enjoy full proprietary status, but have functions analogous to those of property rights. To this group belong firstly (continental) **lease contracts**, in particular agricultural, residential and commercial ground leases. Under the generally recognised principle "**emptio non tollit locatum**", i.e. that the sale of premises does not affect existing lease contracts (see e.g. § 566 BGB = § 571 BGB old version). The position of the lessee (tenant) is particularly strong in Swedish law where leases may be registered and, under that condition, prevail even over mortgages in executionary sales.

Another equivalent instrument to ownership rights are **corporation law constructs** according to which people do not own houses, but shares in companies which are the registered owners. Such constructs play a huge rule ex-Communist systems such as Poland (even though they are gradually replaced by ownership there) and, by tradition, in Scandinavia.

1.4. Apartment Ownership (Condominiums)

Whereas apartment ownership is recognised as a separate and mostly real right in all European states, there are wide differences about its legal construction. Four main types may be distinguished:

– the land and the whole building are jointly owned, with each co-owner being granted an **exclusive right to use** a specific apartment (Netherlands).

– apartment ownership is **completely separated from land ownership**, i.e. an owner of an apartment need not be joint owner of the land (Scotland)

– apartment ownership is construed as a matter of corporate law: a corporation owns the land and the building, and the **apartment owners are shareholders**, each share granting the right to the exclusive use of a specific apartment (Finland and Sweden).

– Apartment ownership is a combination of **separate ownership of the** apartment and joint ownership of the land and the common structures (e.g. walls, roof, staircases etc.) of the building (all other countries).

Apartment ownership is generally created by means of a splitting deed regulates the various property rights and their demarcation among the owners. Together, the owners form an association, which decides on the maintenance and management of the building and possesses the

power to enact bylaws on the rights and duties of the inhabitants of the building.

In this study, we just touch briefly on the subject of apartment ownership. Basically, we just want to make the reader aware that when we talk about the sale or the mortgaging of an "apartment", the legal object might be completely different in the various legal systems. Apartment ownership is an area of great diversity in land law, and the differences do not necessarily follow the classical legal families.[12] The law of apartment ownership always needs to regulate questions of classical property law on the one hand and questions concerning the association of apartment owners which are close to corporate law on the other. Some legal systems even refer the whole issue of apartment ownership to corporate law (Finland, Sweden).[13]

a) Basic legal models of apartment ownership

As regards the legal structure of **apartment ownership**, also called **vertical property**, one may distinguish **four basic models**:

- According to a first model to be found in the Netherlands, the land and the whole building are jointly owned, whereas each co-owner being is granted an **exclusive right to use** a specific apartment (which is regarded as a right in rem).
- Under a second model which exists in Scotland (and is laid down in the default rules of the Tenements Act 2004), apartment ownership is **legally separated from land ownership**. Each person owns his own apartment, and has in addition a right of common property to shared parts of the building, notably the hallway and stairs. Often, the owner of the highest flat owns the roof, and the owner of the lowest flat; but the land may also be owned jointly by all owners. Nevertheless, if the land gets vacant (e.g. the house burns down) and is, the default rules prescribe that the price shall be divided on an equal basis.
- According to a third model existing in Scandinavia, apartment ownership is dealt with under corporate law: A **housing company** set up as an ordinary limited liability company (Finland) or as a **co-operative** composed of "tenant-owners" (Sweden) holds the land including the building. The **apartment owners** are **shareholders**, with each share granting the right (which is not a right in rem) to exclusive use of a certain apartment. Shares are transferable according to the rules on movables unless this is excluded by the company's charter of association (Finland).
- The fourth and most widespread model, to be found inter alia in Belgium, France, Germany and in England after the 2002 Commonhold and Leasehold Reform Act, combines **separate ownership of an apartment with joint ownership "in forced indivision" of the land and the main structure of the building** (such as walls and roof).

Apart from these main models, there exist in various States alternative models for certain kinds of condominiums. Thus, in England, alongside **commonhold schemes** established by 2002 legislation, one may find **leasehold schemes**. These may be less advantageous for the lessees, as the ground owner may charge high ground rents, and a problem of wastage of value may occur towards the end of the lease (a problem however counteracted by **enfranchisement legislation** entitling the tenant to purchase the apartment at the privileged conditions). In Germany, on the territory of the German Democratic Republic, there is another spe-

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12 Compare also Timmermans, Le droit de la copropriété en France, en Belgique et aux Pay-Bas et les perspectives de l'unification du droit d'appartements en Europe, Notarius International 2003, 300.

13 Another special rule worth mentioning, might be that in **Austria** no more than 2 persons may own an apartment and each of them may own only 50% (neither a bigger nor a smaller share is possible, which causes problems if there are more heirs).

cial type of apartment ownership called **Gebäudeeigentum**.

Irrespective of their precise legal nature, all apartment ownership rights are transferable, mortgagable without the consent of the other apartment owners, and normally capable of registration. Besides, to the extent that all owners agree, also the land itself may be charged with burdens, e.g. a right of way in favour of another building or even a (common) mortgage.

b) Common features of the various models

Further commonalities among different national systems regimes follow from the very nature of apartment ownership. The first one attaches to the creation of apartment ownership which requires everywhere something like a **splitting deed**, to take up the Dutch expression similar to the German **Teilungserklärung**. This regulates the various property rights and their demarcation among the owners, but often also other fundamental matters such as the allocation of costs for utilities. The management of the building including its maintenance is assigned to the **association of apartment owners** which often delegate the daily business to administrators. The association has its statutes, which are in some countries prescribed by the law, in others widely left to the owners themselves, but normally always registered (e.g. as restrictive covenants or real burdens in England respectively Scotland) and thus binding on third party purchasers. Furthermore, the association of owners is authorised to enact further **bylaws of the condominium**, in which rights and duties of the owners are stipulated. Though such bylaws are only exceptionally registered in the land register, they are usually made binding also on purchasers. Whereas fundamental issues such as the use of the apartment, e.g. as a dwelling or restaurant, are regulated in the splitting deed itself or the rules of the association (with changes requiring the consent of all owners), less important questions such as the keeping of pets are typically left to the bylaws of the association to be enacted by majority vote. These bylaws generally depend only on the freedom of the parties but statutory provisions, in particular fundamental rights or principles may entail limitations. Thus, whilst keeping pets may generally be prohibited by a majority of the owners, the keeping of a guide dog by a blind resident must not be forbidden.[14] Finally, when the building is destroyed and the vacant land remains, the condominium is normally dissolved, unless reconstruction is foreseen or agreed upon. If the land is sold, the proceeds of the sale, just as compensation payments from an insurance company, are distributed among the owners according to their shares.

1.5. Building Leases

All European countries possess special regimes for buildings on foreign ground, whose main purpose is to facilitate the construction of cheaper housing by private individuals, municipalities or non-profit organisation. Whilst a minority of countries relies on long leases under which the ground owner becomes the owner of the building, too, the majority has introduced special forms of building leases (rights of superficie, bail à construction, Erbbaurecht) which enable separate ownership of buildings on foreign ground for long periods.

In order to facilitate the construction of housing at cheaper costs and to offer landowners a secure way of letting their ground against rent for longer periods, all European countries have created special regimes for building houses on foreign ground.

In a minority of countries, these regimes allow for **long leases** or **emphyteusis** with proprietary status. Generally, these are transferable, mortgagable, capable of registration and endowed with a high degree of security of tenure, but the building erected continues to belong to the ground owner according to the superficies solo cedit principle. Examples are provided by the Polish perpetual usufruct, Scottish leasehold schemes or the long leases (erfpacht) to be

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14 Case decided by the Bavarian Supreme Court, BayObLGZ 2001, 306.

found in the Netherlands.

In all other countries, one finds separate statutory rights in rem called **rights of superficie, bail à construction, building leases,** or **Erbbaurecht**, which entitle to full ownership of buildings erected on (including above or below) foreign ground. In many countries, such rights are granted by public or non-profit landowners engaged in social housing at low prices. Just as long leases, they are transferable, hereditary, mortgagable, capable of registration in the land register, and last for long periods, typically among 20-99 years. However, this limitation still entails the problem that at the end of the period the land owner might receive the building for free. This **danger of wastage**, already mentioned above, is counteracted by a couple of devices: automatic prorogation mechanisms, enfranchisement legislation (allowing the owner of the building to buy the land) and finally obligations of compensation (according to which the ground owner must compensate the owner of the building at its market value), though the latter may be weak, such as the Portuguese solution qua the rules on unjust enrichment. Similarly, there are often mechanisms to counteract the **danger of repossession** in the event in which the building owner going into default with the ground rent, e.g. the Swedish solution to impose a statutory lien on the building. Furthermore, the **level and increases** of the ground rent are usually controlled, typically more strictly than with ordinary leases. This is true e.g. under the German regulation tying the ground rent (Erbpacht) to the official annual index of living costs. Taken together, these devices render building leases a stable and significant alternative to full ownership of land in most countries.

1.6. The Public Law and Policy Context of Real Property Transactions

The public law context of real property transactions is extremely wide and diverse. Though the constitutional principle of freedom of contract is the rule in all European countries, real property transactions are considerably affected by (1) consumer protection instruments, (2) public law restrictions on certain transactions, (3) taxes and (4) subsidies granted to the building of homes.

a) Consumer Protection

Freedom of contract is first limited by a series of **consumer protection instruments**. These formally belong to private law, but are a part of **public policy** with high relevance for real property transactions on account of their **mandatory nature**. Firstly, special consumer protection instruments may affect ordinary land sales. Specifically in France, there is a compulsory *condition précédente* for the sales contract depending on the buyer's ability to obtain the financing of the house in question, the seller is legally bound to assume a guarantee to the precise surface and is under the obligation to disclose certain defects (specifically termites, asbestos and lead). In part even further-reaching information and disclosing obligations are reported inter alia by Spain and Portugal. These initiatives have been well received at European level where the European Mortgage Federation and consumer associations have elaborated a **Code of Conduct for Pre-Contractual Information on Home Loans** under the aegis of the European Commission, which transposed that code into recommendation 2001/193/CE.[15] Further-reaching consumer protection rights, in particular a right to withdraw from the contact within a certain period ("cooling off period") are usually granted for loan contracts by national law, loans for the purchase of real property being excluded from the European consumer credit directive. Similar measures may be found in the case of special transactions, too. Thus, there exist almost everywhere in Europe special protective regimes for the sale of a house yet to be built by a building company, as the buyer who usually bears hefty financial burdens needs protection against the danger of the house not being finished in

[15] OJEC L 69/25 of 10.3.2001.

whole or part, or of its having defects (see for details below 5). Finally, European consumer contract directives and their national implementation legislation may apply to certain features of land law, especially the directives on abusive clauses and timesharing.

b) Public law restrictions

Genuine **public law restrictions on real property transactions** may take many forms. Firstly, municipal or regional pre-emption rights exist all over Europe. In some countries, they exist for all kinds of land sales (e.g. Poland) whereas in others they are reserved to special land (e.g. certain harbour areas in Belgium, or all land affected by urban planning measures in Germany). Generally, these give the competent authority a 2-3 months option of purchasing the land at the conditions agreed upon in the (preliminary) sales contract; however, this option may be, and frequently is, renounced in anticipatory notices. Secondly, everywhere in Europe, buildings, including substantial changes or subdivision of existing buildings, require permits by the competent authorities who may deny them due to non-compliance with all kind of public law, in particular zoning law (including masterplans).

Beyond that, there are frequent **limitations on special kinds of transactions**. Thus, in Poland, the sale of public land is reported to usually require a tender procedure. Moreover, in several States, a special authorisation is required for the purchase of farming land, forests (e.g. Germany and Sweden) or land and buildings with cultural, historical interest (Italy) or high ecological value (Spain). These provisions aims at ensuring that the buyer is in fact able and willing to take adequate care of the land. In Sweden, a similar authorisation is even required from a buyer wishing to acquire tenancy properties, so as to ensure proper management capacities and to counteract speculation. In Holland and Germany, municipal law may limit the purchase or use of houses by non-locals. The most extreme and controversial example along these lines stems from Greece, where all purchases of land in borderland areas (which amount to a huge percentage of the national territory) need a special authorisation by the Ministry of Internal Affairs which is frequently denied to foreigners. This limitation has been attacked on European law grounds. Conversely, prohibitions on the acquisition of land by foreigners have generally been abolished for nationals of EU Member States following EU law provisos to this effect.

Further-reaching limitations generally attach to buildings which have been publicly subsidised in order to create homes for people in need ("**social housing**"). To quote the Spanish example, the buyer may use the house only as his habitual residence, there is an upper price limited for later sales, a prohibition of sale in the first five years as well as pre-emption and redemption rights of the public administration for any sales taking place within the first 10-15 years. If these limitation are not respected, all subsidies received must as a rule be paid back, but the Spanish authorities are said to control compliance with little rigor. That notwithstanding, these obligations not entered in the land register may give rise to insecurity. Similar limitations are reported to be "smuggled into" municipal building lease schemes in the Netherlands.

c) Taxes

Taxes play another important role in real property transactions. Firstly, a specific tax on **transfers** exists generally exists which may reach peak levels of 3,5% of the purchase price in Germany, 4% in Finland (with the important exception for the first purchase of a home by people aged 19-38) or even 6% in the Netherlands. Interestingly, in Finland, the transfer tax rises if registration is not carried out within a certain delay. Whereas in most countries, tax debts do not affect the validity of the purchase contract under private law, in Greece the non-payment of the transfer tax entails its nullity. Also, the ownership of immovables is taxed in many countries, though generally at much lower levels than transfer. Conversely, the purchase of homes, specifically first homes, is in many countries exempt from VAT. Finally,

gains from the sale of houses may be subject to income tax, which is almost always the case when they occur in short periods of time (anti-speculation legislation). However, frequent exemptions apply to the sale of family homes here, too.

d) Subsidies

Subsidies related to the construction or purchase of houses may take many forms, too. In most countries, indirect subsidies such as tax privileges and/or loans below market conditions provided by the State are available for people below certain income levels, young families and/or couples and handicapped persons. Other subsidies are granted in some States for ecological reasons (e.g. for the up-grading of the isolation or the heating system of a house or the use of green building materials). Conversely, direct subsidies have become rare following the financial crisis of public households in most European countries in the 1990s. An example still existing is the German *Eigenheimzulage* which is however expected to be abolished soon. The reason for this tendency lies in the fact that direct subsidies to people in need such as rent subsidies to tenants are generally less expensive and socially better targeted than subsidies for building homes.

1.7. Brief Summary on "Real Property Law in Action"

Important features of real property law in action include the current market situation both for real property and mortgage markets, and the status, functions and practical performance of actors and institutions involved in real property transactions (notaries, land registry, the court system, estate agents and others).

a) Real Property Markets

From the 1990s onwards, there has been a **boom of real property markets** all over Europe, including the Eastern European accession states after the fall of Communism. Whereas prices are still slightly rising in a number of countries due to a limited offer especially in the larger cities, other markets have passed their peaks (England and France), are saturated (Poland and Hungary) or are even in slight decline due to economic crisis (Germany). However, the latter trend is to a certain extent compensated by the **historically low level of interests** on mortgage loans everywhere in Europe. On account of price increases and rises in real property transactions in most countries, the **role and volume of mortgages has increased massively** everywhere in Europe over the last 15 years, and the overall amount of mortgage credits is said to come close to 50-70% of the national GDP in Denmark and Sweden. In Great Britain, where people are said to be more ready borrowers than most Europeans with a higher per capita level of debt both on credit cards and in mortgage lending, it is estimated that 37% of all households are subject to some mortgage liability. Competition on the mortgage markets is reported to be considerable everywhere and very high in those countries like the UK or the Netherlands were re-mortgaging (changing the lender) is not restrictive by penalising contractual arrangements. By contrast, the economic importance of other subordinate rights in land is limited, even though notably easements play a significant role in the supply with public utilities.

These general trends of the property and mortgage markets notwithstanding, the **situation of housing throughout Europe continues to display strong national and local divergences**. Thus, the percentage of owner occupiers and tenants varies considerably.[16] Whereas in Germany around 60% of all households are accommodated in rented (mostly private) dwellings,

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[16] For overall Europe see the study by *BIPE* (ed.), European public policy concerning access to housing, 2000, 19, 29, available at: http://www.bipe.fr, which indicates the following figures: In the EU-15, the total housing stock has been estimated at 171,4 million units in 2000, of which 22% is the private rental and 11% in the social rental sector, the rest being owner-occupied (60%) or vacant (7%).

this figure is between 30 and 40% in most other countries and falls to only 20% in England, to 18% in Ireland and to about 10% in Eastern European Countries, where owner-occupancy reaches nearly 100% in rural areas. That notwithstanding, only some States (such as Germany, Italy and Poland) report that building and renting of housing is perceived as a lucrative activity for landlord investors.[17] Most other countries refer to high tax burdens, the protection of tenants including rent control and the availability of more profitable alternative types of investments as disincentives against building and renting houses. The situation seems to be worst in Greece where bureaucracy is described as particularly burdensome and where the statutorily required prove of the lawful source of all funds used for the purchase of houses poses considerable practical problems.

b) Actors and Institutions

On the continent except from Scandinavia, the eminent actor in land law is the **notary public**, an institution going back to Roman law. His or her essential tasks consist in drawing up the contractual documents, checking burdens of the property and ensuring land registration. Notaries are liberal professionals or civil servants, and their activity is characterised by the principles of autonomy, impartiality and freedom of choice (meaning that the client is free to chose the notary he or she prefers). Insurance for professional liability is mandatory everywhere. In most countries, notaries form a professional corporative regulated and supervised only by the Ministry of Justice, with internal rules and institutions ("chamber of notaries") including disciplinary courts. By contrast, the principle of exclusivity according to which notaries must not exercise other professional functions is not respected everywhere; thus, in France, notaries are allowed to act as estate agents, and in several German *Länder*, they may be practising solicitors, too. Finally, there are in several States and the EU tendencies towards deregulation of notaries' activities. A noteworthy example the liberalisation of fees in the Netherlands which gears at enabling stronger competition, but obviously also entails the risk of diminished quality of services.

In the UK, the role of continental notaries is essentially performed by **solicitors or licensed conveyancers**. In Sweden, conveyancing is carried out by licensed estate agents who have to pass a two years special education. In Finland, the same role is taken over by agents also called notaries who do not however form a separate profession but may be public officials, estate agents, or bank clerks appointed by the district court. A meaningful comparison among the different systems cannot be carried out here. However, it should be noted that almost all countries with notaries report relatively little litigation in real property matters (Poland being the only exception studied here), whereas real property law seems to belong to the most litigated legal fields on the British Isles and in Scandinavia.

Alongside notaries, the **land registry** are the most important institution in Europe, and it functions reasonably well in most countries examined here. The performance of the land register is the reason why title insurance which is current in the US has not developed in Europe as is not necessary. Status and role of **land registrars** and the various functions of the land register are dealt with in detail below (see 2).

Mortgage banks are important in all European countries due to the indispensable function of mortgages as financing tools. Generally, mortgage banks are sections of ordinary banks, and they do not form professional associations similar to those of notaries. **Real estate agents** are said to be involved in 50-90% of all sales, their main task being that of bringing contractual parties together. As regards the degree of organisation and public supervision of that profes-

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[17] However, in Germany, this assessment is limited to middle and upper class dwellings in attractive West German cities and their surroundings, whereas the East suffers from internal migration to the West and an artificial supply boom due to massive tax incentives provided in the wake of reunification.

sion, there are huge differences, the scale ranging from strict regulation, licensing and control in Scandinavia to a more or less open business in most other States which frequently gives rise to abuses such as excessive commission claims. Finally, in Scandinavia, an **inspection and valuation by independent specialists** of any residential premises to be sold is reported to be usual.

The role of **courts** is obviously dependant on the quantity of litigation already mentioned. The competence of the ordinary court system, including appellate and high courts, is the rule, but there is also a series of specialised courts or court-like institutions including the Scottish land tribunals (which have jurisdiction inter alia in the discharging of real burdens and servitudes), rent tribunals existing in England, the Netherlands, Denmark and Sweden (competent for litigation between landlord and tenant) and the Finnish consumer complaint board (which often gives recommendations on land law matters).

Fair and effective access to courts depends on the general situation of the court system in each country. In this respect, huge differences may be found, in particular as regards the length and cost of procedures needed to obtain executable judgements. Figures range from half a year for two instances in Sweden up to 10-15 years in Italy (should an appeal on legal grounds be lodged with the National High Court, the Corte di Cassazione). Legal counsel is mandatory in no European first instance court dealing with tenancy matters, be it a general or a special court, but of course possible and widely used. Legal aid is generally available everywhere, but reserved to the very poor in most countries so that it does not play an important role in land law. Alongside free legal advice by associations of homeowners and tenants, legal insurance may bear the costs of litigation, but it is affordable and widely used only in a few countries such as Germany and Denmark. Alternative dispute-resolution is virtually non-existent in land law though several reporters would recommend it to overcome often long and costly procedures in the court system.

Legal certainty seems to exist at an acceptable level in most countries. This is mainly due to the relative stability of the field documented also by the existence of consolidated case law in most countries. The same cannot, however, be said for “satellite” matters such as lease and building contracts which are frequently reported to be more opaque and attract higher rates of litigation. Similarly, public, in particular urban planning law interventions are accused of being unforeseeable and unjust in several countries including Spain. In Italy, the unsatisfactory and incomplete state of the law is reported to have necessitated collaborative agreements including codes of conduct among notary and banking associations.

The **availability of specialised legal information** is generally satisfactory. Basic treatises, law reviews, often even specialised reviews on housing law, and (sometimes expensive) electronic databases exist not only in western Europe, but also in the first wave of eastern European accession states. A certain problem lies in the fact that the decisions of lower courts are not regularly reported in a majority of countries. Therefore, **local practice** and **local divergences** in jurisprudence play a certain role in most countries.

2. Land Registration[18]

Basic assumption: 5 basic types of land registers in Europe

In comparative law, we are used to talk about legal families. In Europe, normally **five legal families** are distinguished:

- common law,
- civil law of the Code Napoleon countries,
- civil law of the German/Central European countries,
- civil law of the former communist countries,
- law of the Nordic countries.

So if we encounter similarities of the land register within one legal family, which we cannot find in the register system of another legal families, we may talk short hand of a characteristic of the "Central European" or the "Nordic" land register.

2.1. Organisation of the land register

2.1.1. Official terms for the national land register

All European States have some competent national authority for registering ownership of and charges on land. In this report, we use the term "**land register**". (The report by the Forum Group on Mortgage Credit has used the term "*public register*" in order to show that necessarily it is a public authority).

In the various legal systems covered by this report, this authority is called:

- in Austria "Grundbuch",
- in Belgium "conservation des hypothèques",
- in the Czech republic "katastru nemovitostí",
- in Denmark "tinglysningskontoret",
- in England and Wales the "Land Registry",
- in Finland "lainhuutorekisteri" (title register) and "kiinnitysrekisteri" (mortgage register),
- in France "conservation des hypothèques" (in Alsace-Moselle "bureau foncier"),
- in Germany "Grundbuchamt",
- in Greece "Ypothicofilakia",
- in Hungary "földhivatala",
- in Ireland the "Registry of Deeds" (as the old type) and the "Land Registry" (as the modern type),
- in Italy "registri immobilari",

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18 Besides the national reports for this study, you may consult in internet the material of a seminar on land registration and the real estate industry, organised by EULIS on 1./2.4.2004; it may be found on the EULIS homepage (www.eulis.org).
Compare also *Böhringer*, Comparison of the Land Registry System in Central Europe with Other Forms of Property Law: Introduction to the Basic Features of Central European Land Registry Law and Apartment Ownership, Notarius International 1997, 166.

- in Luxembourg "conservation des hypothèques",
- in the Netherlands "kadaster",
- in Poland "księga wieczysta",
- in Portugal "Conservatória do Registro Predial",
- in Scotland "Land Register" (besides the older type of "Register of Sasins", which is being replaced gradually),
- in Slovakia "katastru nemovitostí",
- in Slovenia "zemljiške knjige",
- in Spain "Registro de la Propriedad",
- in Sweden "inskrivningsmyndigheter",
- in Switzerland "Grundbuch".

Comparing just the names with the traditional distinction of legal families, we encounter an identical name in three legal families:

- In the German (Central European) family we encounter the **"***Grundbuch***"** (**land book**) (Austria, Germany, Switzerland),
- at least in some Code Napoleon countries we encounter the "*conservation des hypothèques"* (**mortgage register**).
- the **Nordic system**,
- On the British Isles, however, in Ireland and Scotland we encounter even two different registers – the "land register" and the "register of deeds" (in the Irish terminology).

The **statutory basis** for land registration are listed in the annexed in the national reports and in the table 2 (land register).

Different types of land registers within one legal system exist either in newly acquired territories (France, Greece, Italy) or while a system is being changed (Ireland, Scotland):

- **France** and **Italy** have a **different register** in the territories which they acquired after World War I from Germany or Austria (departments of Haut-Rhin, Bas-Rhin and Moselle; former Austrian provinces in north-eastern Italy): They kept the system of "**land book**" (*livre foncier, Grundbuch*) already existing in the new territories, while in the old territories the system of "mortgage register" still applies.
- The same applies to **Greece**, where in some islands of the Dodecanese under the Italian government a system of "Land book" German/Austrian style had been introduced – this system was kept in place after sovereignty had been transferred to Greece.
- In **Ireland** and **Scotland** an old system of deeds' registration ("Registry of Deeds" in Ireland, "Register of Sasins" in Scotland) coexists with a new system of registration of titles ("Land Registry" in Ireland, "Land Register" in Scotland). In England, in one register there are two different methods of registering (the old registration of deeds and the new registration of titles).

Later (2.2.2. and 2.3.) we will describe in detail the differences between the various of land registration systems, namely the registration of rights in a realfolium (e.g. in Austria, Germany) and the registration of titles normally in the form of personalfolium (e.g. France and Italy in the "old" territories).

2.1.2. Relation to cadaster (land survey)

Mostly, two different authorities are charged with ownership in land: Technical mapping and land survey usually is done by the **cadaster**, while the land **register** is competent for registering ownership and charges on the land. Even if there is only one agency handling both functions, the functions usually are still clearly distinguished by the law.

- A **separate cadaster authority** exists in most countries of the Code Napoleon and the German legal family (e.g. in Austria, Belgium, Denmark, France, Germany, Luxembourg, Poland, Slovenia and Spain). Greece has started to build up a separate cadaster (up to now, there has been no general land survey).
- In a second group, cadaster and land register are separate branches with different staff, but together they form **part of the same agency** called "Land Agency" (Italy) or "Land Information System" (Finland, Sweden) (two different authorities within one institution). In Italy, this seems to be really one agency, whereas in Finland and Sweden it is more like just a single database linking two different agencies.
- In the Netherlands, the functions of cadaster and land register are distinct; however the **same official combines both functions** (personal union, provided by statute).
- Similarly, some Eastern European countries have given to the **cadaster also the functions of the land register**, since the communist regimes had left the land registration in shambles (e.g. Czech republic, Hungary[19], Slovakia).
- The common law systems are the only ones where the functions of land survey and registering of title also seem to be more or less merged, one agency handling both functions in a **single register** (England, Ireland, Scotland).

Land survey and registration of rights are two different functions in reality, which require a different training (technical or legal respectively). So it makes sense to divide responsibility between the keepers of two different registers, one for the technical, the other for the legal issues.

- In some states the cadaster also serves for **tax purposes** (in particular in the Code Napoleon countries, e.g. Spain).
- If both functions (or even both registers) have been merged, it seems that normally the legally trained officials are responsible for the actual registration in both registers. In other words: The **land register takes the lead** (even if the authority is called "cadaster").
- For the Netherlands, an interesting study has been made on how the registrar, although his powers concerning the land register are quite limited, can and does use his powers concerning the cadaster to keep also the land register correct and updated[20].

In this report, we cover only on the functions of registering rights in land, i.e. the land register in a functional sense. So we are talking about the "land register", even if – in an organisational sense - the cadaster is the competent national authority also for registering rights in land (as shown in part 2.1.1.).

Land registration requires a working cadaster system[21] – and an easy and permanent exchange of data with the cadaster. **Countries without a working cadaster system** are the exception in

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19 E.g. Hungary merged the two registers in 1972.

20 *Zevenbergen*, Registration of Property Rights: a Systems Approach – Similar tasks, but different Roles, Notarius International 2003, 125; *Zevenbergen*, Systems of Land Registration – Aspects and Effects, dissertation, Delft 2002.

21 Only a system of mere registration of deeds (such as the system of most states of the U.S.A.) might work without a cadaster, leaving the task of describing the land boundaries to the parties involved.

the member states and the applicant states of the European Union.

- Greece is just about to install a land survey.
- Former communist regimes have neglected the cadaster. Now the reform states have to grapple with the consequences. Some have not yet achieved to update their cadaster.(E.g. Croatia plans to update its cadaster until 2010.)

2.1.3. Integration in the court system or administrative authority

We can distinguish three different types of organisation of the land register:

- In the largest group, the land register is part of the **court system**. This applies namely to the Central European type of land register (provided that the land register has not been taken over by the cadaster) (e.g. Austria, Croatia, Germany, Greece, Slovenia, Switzerland), but also to the Nordic systems (Denmark, Finland, Sweden) and to some of the Code Napoleon countries (Poland, Portugal, Spain).
- In the second (and intermediate) group, the land register is an **independent administrative body** (e.g. in Ireland, England, Netherlands and Scotland).
- In the third (but second largest group), the land register is a **subordinate administrative authority**. This applies for the Code Napoleon countries with "mortgage registers" (Belgium, France, Italy – all under the supervision of the Finance Ministry) and in those Eastern European reform states, where the cadaster performs also the functions of the land register (Czech republic, Hungary, Slovakia).

It goes without saying that land registration is a task to be provided by the state. There cannot be two or more competing private registers.

Also, in all European states the organisation of both the land register and the cadaster seems to be either a part of the court system, or an administrative body or an organisation under public law. As to the different **types of organisation**:

- In the **Central European states**, registration (land register and companies' register) and the courts' authority to grant authorisations in case of conflicting private interests (e.g. authorisation for the parents to sell land belonging to their minor child) traditionally has been regarded as the core of **non-contentious jurisdiction** (*iurisdictio voluntaria*, *freiwillige Gerichtsbarkeit*).
- As an exemption to this rule, three Central European states (**Czech republic, Hungary, Slovakia**) have a "land book" with the traditional functions of the Central European type (constitutive effect and protection of bona fides), but which is kept by the cadaster. The different organisation structure is due to the decay of the land register under the communist regime.
- On first glance, the common law land registry and the French type of mortgage register might both be grouped as **administrative authorities** (as opposed to a judicial structure). However, the common law land registry (and the Dutch cadaster) are an independent governmental body. In this respect, they can be considered an intermediate group between the court system and the subordinate administrative authorities.

2.1.4. Educational requirements for the land registrars

The educational requirements for the registrars (i.e. the officials responsible for the land register) vary greatly. Registration is always done under the **supervision of lawyers, often however not by lawyers**, but by court clerks:

- The **highest standard** is set in some states of the Code Napoleon where the registrar must

basically fulfil the same requirements which are also required for a **civil law notary** in the respective country (e.g. Portugal, Spain).

– In some states, fully fledged **lawyers** are responsible for the registration.

– A majority of states employs mainly **court clerks** or other non-lawyer officials for keeping the register. Often these officials have a highly specialised legal training (e.g. the *Rechtspfleger* in Germany graduate from a three year program at a undergraduate university, *Fachhochschule*). As a rule, these officials work under the supervision of a judge (in a court system) or a lawyer (in an administrative authority).

The registration system will achieve a very high standard of reliability, if both the filing (see 2.6.1.) and the registration are done by specialised lawyers.

2.2. Contents of Registration

2.2.1. Percentage of land registered (questionnaire 2.1.4.)

Nowadays, registration is mandatory in a majority of countries – at least, if there is a transfer of ownership. Therefor, at least in Western European countries, registration of land covers most of the land, mostly more than 95% of all land.

- In the Central European "**land book**" system, all land has to be registered – generally with the only exemption of land owned by the state or local governments. Here, non registered land is less than 5% of all land (e.g. Austria, Germany, Hungary). However, the communist neglect of the land register may still be felt. Even in Germany, the registers for non valuable land (such as forest land) in the East might have been updated the last time in 1920's or 1930's[22].

- The **Nordic countries** also demand mandatory registration. Here, too, the non registered land is less than 5% (e.g. Finland, Sweden).

- Even if registration has no constitutive effect, but is required only for third parties' effect (opposability – see 2.3.1.), as in the "**mortgage register**" system, still registration might be mandatory by statute at least for all sales of real property. Thus in some states some 95% of land has been registered (e.g. Belgium, France, Greece). In other states, e.g. in **Spain**, by value more than 95% of the land is registered, however only between 75 and 90% by area. In Eastern Europe, **Poland** still lags behind with registration levels somewhat between 50-75%, due to the burden of the communist past.

- In **England**, under the old system, registration was not mandatory, but required only for third parties effect. The new law however requires registration. But in England it has come into force only in 2002 and it needs a trigger (such as a sale or another transfer of ownership) for mandatory registration. So there are still many unregistered land titles (some 15% in England). In **Ireland**, both systems still coexist. Only in **Scotland**, where registration has been mandatory for each transfer of ownership since 1617, almost all land has been registered.

In England, technically, it is not a registration of the land itself, but of the estate in the land (because the only absolute owner is the Crown, as we have seen – 1.2.). However, for practical purposes, this does not make any difference.

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[22] Therefore, in the German state of Thuringia, the statute granting "neighbouring forest owners" a right of preemption on the sale of forest land, explicitely states, that in order to trigger the deadline for using the right is preemption it suffices to inform the persons registered as neighbouring owners under the adresses stated in the land register or the cadaster – even if in reality these people might have died 50 years ago (§ 17 ThürWaldG – Thuringia Forest Act, GVBl. 2004, 282).

2.2.2. Registration of rights or of titles

In Europe, there are two basic types of land registers: Either real rights in land are registered or documents are registered. Within Europe, the registration of titles enjoys a slight majority by states and by population.

- The **registration of rights** is being used in the Central European "land book", the new British Isles "land register", the Nordic system and in the Hispanic subgroup of the mortgage register (e.g. in Austria, Denmark, England, Finland, Germany, the Netherlands, Poland, Portugal, Scotland, Spain, Sweden and Switzerland).
- The **mere registration of documents** is being used in the "mortgage register" of the French type and in the old common law "register of deeds (e.g. in Belgium, France, Greece, Italy and Luxembourg. The registering authority is called „mortgage register". (The Polish, Portuguese and Spanish "mortgage register", however, registers rights, not only documents.)

2.2.3. Format of registration

There are two basic formats for registration:

- The **registration of rights** is always done in the form of a **realfolium**, i.e. ordered by the land registered).
- The **registration of documents** is normally done in the form of a **personalfolium**, i.e. ordered by the name of the respective owner.

Samples of the registration in different countries are contained in the national reports[23].

The format of registration is **regulated in detail** in each system. Only such detailed regulation can ensure uniformity in the registration which is a precondition for a fast and easy search in the land register.

There is no common European format of registration. Therefore, the EULIS system can only provide a link to the participating national systems, but a uniform search function.

However, in most countries the **realfolium** has a similar structure with **three or four separate parts**, containing:

- description of the land,
- ownership,
- charges, sometimes divided in rights to use and security rights (mortgages).

Normally, each registration gets a **consecutive number**. So it is easy to refer to a specific registration.

Often changes in the registration are annotated in a special **annotation column** (e.g. Germany, Spain).

2.3. Constitutive or declaratory effect (questionnaire 2.5.)

2.3.1. Substantive effects of the registration in general

Three main substantive effects of the registration can be distinguished:

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[23] In internet, samples of registrations can also be found on the EULIS website (www.eulis.org) which provides samples and links to the participating agencies.

- Registration may be either **constitutive** (i.e. that the transfer of ownership or the contractual creation of a real right in land will be completed only with registration) or merely declaratory. In a system with **declaratory** registration, usually a transfer or a real right is **opposable** to third parties (third party effect) only after registration.
- Registration may determine the **rank** among different rights.
- Another effect of registration may be the assumption that registered rights really exist (and that non registered rights do not exist) and – even further - the **protection of good faith**, i.e. that a *bona fide* acquirer may rely on the content of the register (positive as opposed to a negative system).

As for the substantive effects of registration, one might ask two basic questions:

- First, is it necessary to register?
- Second, is it sufficient to register?

The first question distinguishes between **constitutive** registration systems on the one hand, where registration is necessary for the acquisition of ownership and for the creation of rights in land, and merely **declaratory** registration, where the creation or the transfer of the right is independent of the registration – the latter also called negative registration, because here registration primarily serves to block other rights[24].

The second question is basically whether **good faith** in the register is protected – and to which extent it is protected.

2.3.2. Constitutive or declaratory effect of the registration

The doctrine of **opposability** based on registration might be demonstrated by the French statute:

> "Les actes et décisions judiciaires soumis à publicité ... sont, s'ils n'ont par été publiés, **inopposables aux tiers** qui, sur le même immeuble, ont acquis, du même auteur, des droits concurrents en vertu d'actes ou de décisions soumis à la même obligation de publicité et publiés, ou ont fait inscrire des privilèges ou des hypothèques. Ils sont également inopposoble, s'ils ont été publieés, lorsque les actes, décisions, privilèges ou hypothèques, invoqués par ces tiers, ont été antérieurement publiés." (article 30, par. 1 décret 4 january 1955)[25].

The **constitutive effect** might be demonstrated by the German statute:

> "Zur Übertragung des Eigentums an einem Grundstück, zur Belastung des Grundstücks mit einem Recht sowie zur Übertragung oder Belastung eines solchen Rechts ist die Einigung des Berechtigen und des anderen Teils über den Eintritt der Rechtsänderung und die **Eintragung der Rechtsänderung in das Grundbuch erforderlich**, soweit nicht das Gesetz ein anderes vorschreibt." (§ 873 par. 1 BGB)[26]

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[24] *Böhringer*, Comparison of the Land Registry System in Central Europe with other forms of Property Law, Notarius International 1997, 166.

[25] "Acts and judicial decisions requiring registration ... , which have not been registered, are **inopposable to third parties** who have acquired competing rights in the same land by acts or decisions, which are submitted to same requirement of registration and which have been registered, or who have registered charges and mortgages. Even if they have been registered, they are inopposable, if the acts, decisions, charges or mortgages invoked by the third party, have been registered earlier."

[26] "The transfer of ownership in land, the creation of a limited right in land or the transfer or encumberment of such a limited right require an agreement of the owner (holder of the right) and the other party on the transfer of title (or the creation of the encumberment) and the **registration** of the legal change in the land register, unless provided otherwise by statute."

Finally, the English system starts just like any constitutive system. The second quote, however, shows, that here – like in so called **Torrens system** – registration in itself grants the right of disposition – irrespective of bona fides of the other party of the transaction. Thus one might say, that registration in itself is sufficient to create or transfer the right or – short hand: **Registration is the right**.

> "If the requirement of registration is not complied with, the transfer, grant or creation becomes void as regards the transfer, grant or creation of a legal estate." (art. 7 par. 1 LRA 2002).
>
> Art. 23, par. 1 LRA 2002: "Owner's powers in relation to a registered estate consist of -
> (a) power to make a disposition of any kind permitted by the general law in relation to an interest of that description, other than a mortgage by demise or sub-demise, and
> (b) power to charge the estate at law with the payment of money."

2.3.3. Constitutive effect for limited rights

To complicate matters, in some countries registration is merely declaratory for the transfer of ownership, but **registration is constitutive for the creation of limited rights** in land such as for a mortgage (Italy, Poland and Spain – in Spain only for mortgages).

For mortgages, the effect of registration is covered in greater detail in part 7.2.3.

2.4. Bona fides

2.4.1. Transfer of ownership

In part 4.2.2. we discuss the example of a sale, if the seller is not the owner, but is registered in the land register – and if the buyer does not know about the defect of seller's title (bona fides).

- As it turns out, in almost all of the countries, where registration has a **constitutive** effect, the **good faith** in the register is also protected (e.g. Austria, Croatia, Czech republic, England, Estonia, Germany, Hungary, Scotland, Slovakia, Slovenia, Switzerland). Greece is an exception, where registration has a constitutive effect, but bona fides is not protected.
- On the other hand, in some other countries, where registration is merely **declaratory**, still the **good faith** in the register is protected (e.g. Denmark, Finland, Poland, Portugal, Spain, Sweden).
- The third group are the registration systems with a merely **declaratory** registration and **without protection of good faith** in the register (e.g. Belgium, France, Italy, Luxembourg).

British system:

- More precisely, in the first group, in England, Ireland (land register) and Scotland (land register), the result is the same: Ownership is acquired even though the seller was not the owner. The reasoning however is different. It is not protection of the acquirer's bona fides. But art. 23 par. 1 LRA 2002 (as it has been quoted just before) grants the power to dispose of the land to whoever has been registered.
- However, an equitable proprietor in possession may be protected against alteration of the register (sec. 65, sched 4 LRA 2002). So here applies some limitation to the absolute effect of the registration.

The differences have been shown in a table delivered by the Scottish reporter, Prof. Kenneth Reid:

	Scotland (and England)	**Other EU Countries**
Effect of registration	Positive: *any* defect cured	Either (i) no defects cured or (ii) only defects already on the Register ("Register error")
Duration of cure	Potentially temporary. Title remains challengeable in the future – even after the land is transferred again. If an acquirer loses possession he may lose the property.	Permanent. If the necessary conditions are met (e.g. good faith), the acquirer receives an unchallengeable title.
Role of possession	In the event of a title defect, possession determines the form of the guarantee (mud or money), and therefore whether property is returned to the "true" owner.	No role.[27]
State indemnity/ insurance for acquirer	If the acquirer loses the property, he is paid state indemnity – even in respect of errors in his own transaction ("transactional error").[28]	No indemnity.
State indemnity/insurance for "true" owner who loses property	If the acquirer is in possession, and so keeps the property, the "true" owner is paid its value by the state.	No indemnity, although there may be a delictual claim against the registrar.
Good faith	No role for good faith as such, but the guarantee does not extent to errors caused by the fraud or carelessness of the acquirer.	In systems where title defects are cured, good faith is usually required.

2.4.2. Creation of limited rights

The same rules would apply for the creation of a limited right by somebody, who is registered as owner, but who is not the actual owner (although we did not ask for an example in the national reports).

2.5. Correlation between the different classification factors

Now let us check whether there are interrelations between the main distinguishing factors which we have found so far, namely

- the different organisation (court, independent administrative unit, subordinated administrative unit),

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27 For the purposes of land registration. But possession is important for prescription.

28 This is one of the points at which the Scottish/English model parts company with the Torrens system. In most countries which operate Torrens systems, indemnity is only payable to the "true" owner (ie the person who is deprived of ownership as a result of the registration of the acquirer.)

- the format of registration (registration of rights or of documents),
- the constitutive or declaratory effect of registration
- and the protection of bona fides.

The rank (as the third effect of registration) will be treated later, because it does not help to find a system of types of land registers.

2.5.1. Correlation between constitutive or declaratory effect and bona fides protection

Taking the constitutive (or declaratory) effect and the bona fides protection together, three main systems can be distinguished – as has been mentioned already:

- If registration has a **constitutive** effect, normally also **good faith** in the register is protected (with the exception of Greece).
- **Declaratory** systems, on the other hand, split in those which protect **good faith** in the register and those which do not protect it.

Thus taking a closer look on the constitutive or declaratory effect of registration on the one hand and on the protection of a *bona fide* acquisition on the other hand, one would rather describe the effects of registration on a continous spectrum or as a matrix. In Europe, on the end with the least effects of registration would be the French system, on the other end would be the new English system, in which only the registration matters.

- Let us start with the (new) **English system**. Here only the registration matters: The owner is, whoever is registered as the owner. Rights in land are whatever rights are registered. The registration matters even if the buyer knows that the contract upon which the registration is based, is invalid.
- The **Austrian, German or Swiss system** is quite close, the difference being, that if the transfer was invalid, the registration is incorrect. However, the transfer does not depend on the existence or the validity of the sales contract. And the good faith of the buyer in the registration is protected.
- **Greece** has a system with constitutive registration, but without the protection of good faith. Thus, it is an isolated case.
- On a scale, we would move on to the systems with merely declaratory registration. Some of these systems, however, protect the buyer's good faith in the registration (e.g. **Poland, Portugal or Spain**). So here the registration also matters. The **Nordic systems** are similar.
- Finally **Belgium, France, Italy, Luxembourg** have a declaratory system which does not protect the good faith (Italy with the exception that for limited rights such as mortgages, registration is constitutive).

2.5.2. Correlation between registration of rights and protection of bona fides

If we put it not a scale from left to right, but on a matrix, it might look like this:

	protection of good faith	**no fides**	**no protection of good faith**
constitutive registration	*systems close to Torrens*: England Ireland (land registry) Scotland (land register) *Central European systems*: Austria, Croatia, Czech republic, Hungary, Slovakia, Slovenia Germany, Estonia Switzerland Netherlands (some protection)		Greece
declaratory registration (opposability)	Poland (constitutive for mortgages) Portugal, Spain *Nordic countries*: Denmark, Finland, Sweden	Alsace-Moselle	*most Code Napoleon systems*: Italy (constitutive for mortgages) France, Belgium, Luxembourg *previous English system/USA* Ireland (registry of deeds) Scotland (register of sasins)
	registration of rights	**rights**	**registration of documents**

On this matrix, to the correlation of constitutive effect and bona fides protection we also added the distinction whether rights or documents are registered (in the lower part). The matrix shows nicely the **coincidence of the registration of rights with the protection of bona fides** on the one side (left column) and the coincidence of the registration of documents with the lack of bona fides protection. Both questions are basically the formal and the substantive side of the same question. One might doubt, whether it is possible to distinguish.

- Only for the hybrid system of the land book in **Alsace-Moselle** we need a middle column (grey) for an registration of rights, but without bona fides protection (whereas the land book in the "new provinces" of north-eastern Italy and on Rhodes etc. in Greece still follow the classical Central European type also in its substantive effects). In Alsace-Moselle, the outer shelf of the land book has been maintained, while most of its content has been emptied.
- Arguably one might also put the **Netherlands** in the middle column, which are generally still counted in the middle (or even the right) column, because often they are still considered a "negative" system (see above 2.5.).

2.5.3. Correlation between constitutive effect and registration of rights

The matrix shows another correlations:

- The constitutive effect is generally linked to a system of registration of rights – with the only exception of Greece. This might be demonstrated by the recent changes in the land registration systems on the British Isles. Here, both the form of registration (registration of rights instead of registration of documents) and the effects of registration (constitutive instead of mere opposability) were changed at the same time.
- Thus registration of rights seems to be almost a precondition for constitutive effect. However, not every registration of rights has a constitutive effect: Opposability may be found both in a system registering rights (e.g. Poland, Portugal, Spain, the Nordic countries) as in a system registering documents (e.g. Belgium, France, Italy and Luxembourg).

2.6. Summary: Types of land registers

2.6.1. Table of different systems

Taking also organisation of the land register into account and thus combining the various aspects of land registration into one single matrix, one might distinguish the following groups among the existing registration systems in Europe:

	registration of rights + protection of good faith	**rights/ no fides**	**registration of documents - no protection of good faith**
constitutive effect	***British Isles (Torrens-like) system*** *(registration is the right)*: England, Ireland (land registry = new), Scotland (land register = new),		
	Central European "land book" (Grundbuch) *– classical type = part of (non-contentious) court system:* Austria, Croatia, Slovenia, (new provinces of Italy; Rhodes/Greece) Germany, Switzerland		*hybrid system of land book and mortgage register:* Greece
	- subgroup with land book kept by the cadaster: Czech republic, Hungary, Slovakia		
	Netherlands (*some bona fides protection*)		
mixed systems (constitutive for charges only, e.g. mortgages)	*hybrid system of mortgage register and land book:* Poland (constitutive for mortgages)		***mortgage register*** *- under some influence of Central Europe:* Italy (constitutive for mortgages, but no bona fides)
declaratory effect (opposability)	*mortgage register – Hispanic type:* Portugal, Spain	*hybrid* Alsace Moselle	*mortgage register of Code Napoleon (conservation des hypothèques) – French type*: Belgium, France, Luxembourg
	Nordic countries: Denmark, Finland, Sweden		
			classical common law system*:* *previous English system/USA* Ireland (registry of deeds = old) Scotland (register of saisines = old)
grey area = register kept by court			

Some **general explanations**:

- Also in this matrix, we prefer to stick to the substantive effects as the decisive criterion for distinguishing the different systems, putting the differences in organisation only in the second place.
- It would take a multi-dimensional matrix to show the precise relative distance of all systems. In the above two-dimensional system, the order within one subgroup does not necessarily mean a difference in grade: In the new British Islands systems, the registration is more important than in the Central European "land book".

2.6.2. Basic types of land register in Europe

Now let us describe first the **five basic types** of land register in Europe – from top to bottom – from left to right:

- The **British Isles** have a fairly uniform system: Originally the common law system was a mere registration of deeds. That has been replaced (or in Ireland added) by a new system, which resembles strongly the **Torrens system**[29], where registration creates or transfers the right disregarding of whether there has been a valid causa or a valid conveyance. The register is kept by the "land registry", an independent governmental body.
- The classical **Central European land register** – *Grundbuch* in the Austrian, German and Swiss terminology, which we translate with "**land book**" – is a constitutive system with registration of rights and protection of good faith, kept by the local court (as a part of the non-contentious jurisdiction). This has been the historic basis of the Torrens system; only that Torrens took away the requirement of a transfer of ownership and put the registration absolute.
- In the middle between the Central European land book and the French mortgage register we find the **Nordic register**: Registration has but a declaratory effect, but good faith in the registration is protected. It is also a registration of rights.
- The **French "mortgage register"** (*conservation des hypothèques*) is the next main type: In its classical form (as existing in Belgium, France and Luxembourg) it is a register of documents required merely for third party effect (opposability or negative effect) without bona fides protection. The register is kept by a public official under supervision of the Finance Minister.
- The British Isles are to be found on both sides of the spectre: Their new systems emphasise registration more than any other system. The **old common law system of registration of deeds** (as it still coexists in Ireland) put less weight to registration than the other systems.

Comparing with out basic assumption, that the different types of land register might correlate with the different legal families, indeed we found five main types. Two of these, however belong to the common law countries (old and new) – and none to the former communist countries, which only form subgroups or hybrid versions between the land book and the mortgage register.

2.6.3. Subgroups and hybrid forms

There are several **sub-groups or hybrid forms**:

- In an atypical sub-group of the Central European land register, we find three countries

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29 The Torrens system has been introduced in many Commonwealth countries (first in Australia), in some previous Belgian and Portugese colonies and – optionally – in some U.S. states – compare part 2.6.6.

(Czech republic, Hungary, Slovakia), where the "**land book**" has all the same effects as in the classical Central European system, but the organisation is different: It is **kept by the cadaster**.

- **Greece** is a hybrid of the Central European land book with the mortgage register: Central European is the organisation (kept by the courts) and the constitutive effect. Derived from the mortgage register is the form of registration (registration of documents) and the lack of good faith protection.
- **Poland** is another form of hybrid of both systems: Central European is the organisation (kept by the courts) and the form of registration (registration of rights) – as well as the bona fides protection. Derived from the mortgage register is (not only the name, but also) the effect of mere opposability of the registrations – except for mortgages and other contractual encumbrances, for which registration is constitutive (as in the Central European – model).
- **Italy** also is not a precise copy of the French mortgage system, but shares the constitutive effect of the registration of mortgages and other contractual encumbrances with the Central European model (and with Poland).
- Portugal and Spain, we have listed as a separate **"Hispanic" sub-group of the mortgage register**: With the mortgage register French type they share the same effect of registration (mere opposability, also for mortgages). With the land register, however, they share the organisation (kept by the courts) and the form of registration (registration of rights) as well as the bona fides protection. (One might question, whether the Hispanic group is not rather a group in its own right rather than a mere subgroup; however, because otherwise these countries belong to the Code Napoleon family and have developed from the mortgage register, we have chosen to rate it as a subgroup only).

2.6.4. Dual systems in France, Greece and Italy

The dual registration systems of France, Greece and Italy are worth of special interest, because they indicate what difference the registration system makes, if all other legal factors are the same.

- The examples of **Italy** demonstrates, that the legal system of the Code Napoleon can function not only with a mortgage register system, but also with a land book system. In its north-eastern provinces, Italy has kept also the substantive effects of the previous Austrian system.
- The **French** system is not as good an argument, because in Alsace-Moselle from the previous German land book basically only the registration system (registration of rights) has been kept, while the constitutive effect and also the bona fides protection have been abolished.
- It is not quite clear, why Italy and France kept the land book system (at least partially) in place – whether more for reasons of convenience or because of advantages of the land book system. However, a clear policy statement may be drawn from the fact, that Italy introduced a land book in its **Greek** Dodecanese colony (1912-1946) - considering that this was not the national law in the Italian mainland (but only in some provinces newly acquired in 1918).

2.6.5. Central European system chosen by most Eastern European reform states

The **Central European "land book"** system has also been the choice for most of formerly communist Middle and Eastern European states, when, in the 1990's, they had to make a choice on how to organise their land registration systems. Their choices varied as to the or-

ganisation land register or part of cadaster), however they mostly opted back to their pre-war system of substantive effects of land registration – that is to the constitutive effect of the land book system (e.g. Croatia, Czech republic, Estonia, Hungary, Slovakia, Slovenia).

- Due to common legal heritage, the **Austrian model** was reintroduced e.g. in Croatia, the Czech republic, Hungary, Slovakia and Slovenia.
- Estonia after regaining independence was inspired mainly by the **German** land law.
- The most important exception is **Poland**, which (of its variety of pre-WW II traditions in land law) chose the Napoleonic model of "mortgage register" with its effect of mere opposability – however in hybrid system combined with court organisation, registration of rights and bona fides protection.

2.6.6. Changes in the registration systems in England, Ireland and Scotland

The British Isles, reforming their centuries old land registration law, opted for an even further reaching impact of the registration – similar to the Torrens system.

- Originally, the British Isles used to have a **registration of deeds** (documents) system – a system still in use e.g. in the United States.
- Some Commonwealth countries, starting with Australia, introduced the **Torrens system**, where, basically, registration is the right. (The Torrens system is also being used in former Belgian and Portuguese colonies and in some U.S. states.)
- Ireland followed suit in 1964, Scotland in 1979 (still decided by the British parliament) and England just recently with the Land Registration Act 2002 (LRA 2002). Their new systems are similar to the Torrens system.

The later the change has taken place, the more radical has it been:

- In **Ireland**, the **two systems coexist peacefully**. A transfer of land registered in the (old system of) Registry of Deeds may still be registered in the Registry of Deeds.
- In **England and Scotland**, the old system is **gradually being replaced by the new system**: In Scotland, since 2004, every sale triggers a change form the old to the new register: If a title held on the Register of Saisines is sold, the title of the buyer is registered in the Land Register (created in 1979). (Also land registered in the Land Register can only be transferred or charged by registration in that register.)
- In England, there is only one register. All new registrations since 2002 follow the new model. A trigger clause applies similar to Scotland: Land has to be registered if it is transferred (not only by sale, but also by a gift or a devolution on death) and if it is charged with a first (legal) mortgage.

This has been a **complete shift** from one end of the spectre of existing land registration systems to the other end (as can be seen from the table under 2.6.1.).

- Under the previous system of deeds' registration, registration was required only for third party effect (opposability). It was neither necessary for the creation or the transfer of rights nor was good faith in the registration protected.
- Now, registration is everything. Without registration, the right does not come into existence or is not transferred. If the right has been registered, it does not matter whether there has a valid causa or even a valid deed: Anyway, the right exists. This is even more than mere bona fide protection.

2.7. Priority and rank of rights (questionnaire 2.6.)

2.7.1. Rank of limited rights

The rank of a limited right generally is determined either by the **time of registration** or by the **time of filing** for registration. Under normal conditions both dates should be the same, because registration has to be made in the order of filing.

- In a **constitutive** system, registration is a precondition for the existence of the mortgage. As a consequence, registration also determines the rank (e.g. Austria, England, Germany, Greece, Hungary, Ireland, Netherlands, Poland, Portugal, Scotland). The main exception seems to be Sweden, where rank is determined by the application date.
- In a system with **declaratory registration** rank may depend either on the time of registration (article 30, par. 1, decree 22/1955 France) or on the time of application.
- Both, in the declaratory and in the constitutive system, procedural rules for the land register universally require that the **order of registration has to follow the order of filing** (e.g. art. 2200 CC France).

Case (questionnaire 2.6.1.): Owner grants first a mortgage to A, afterwards another mortgage to B. After that, creditor C has a third mortgage registered on the same property in an execution procedure. The time of registration is as follows: First B, then C, then A. What is the respective rank of the mortgages?

In all national systems – except Finland – the order follows the time of registration: First B, then C, then A. (Admittedly, we had made the answer easier by giving the same order both for filing and for registration, which however correlates to the general practice.)

It is important to notice, that also in the accessory systems (where the mortgage does not come into existence unless the secured claim also has come into existence) the rank does not depend on whether the secured claim already existed at the time of registration.

This finding correlates to recommendations 30, paragraph 3, and 31 of the **Forum Group** on Mortgage Credit[30]:

- Recommendation 30, paragraph 3, reads: "The Commission should ensure that: ... registered charges on real property in relation to the same estate shall rank in the order of priority disclosed in the Public Register."
- Recommendation 31: "For filings of applications for registration/notification, the Commission should allow Member States to decide that priority be determined according to the time at which the application was received (not actual registration). In this scenario, the Member State should ensure that filings of applications must be registered or rejected by the Public Register in the order of receipts."

2.7.2. Transfer of ownership

Priority may be different if there are two concurring transfers of ownership. Here, the solution also depends on whether the sales contract already transfers ownership. So we will discuss this issue later (3.3.1.).

2.7.3. Priority Notice

There is a practical need to give the parties some time to conclude and register the contract after checking the actual state of the land register. This may be achieved in different ways:

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30 Internet: http://www.europa.eu.int/comm/internal_market/finservices-retail/docs/home-loans/exsum_en.pdf

- The most commonly used technique is to block new registrations in the land register for a certain period after a check has been made ("**freeze**") (e.g. England, Scotland, Sweden). Not a legal, but a factual freeze is used in Spain by a permanent exchange of information between the notary and the registrar, after the notary has checked the land register.
- Another solution is a **provisional registration** of a contract that does not yet fulfil the required formats (e.g. France). The provisional registration reserves rank, if the ordinary application is made within a certain timeframe afterwards (e.g. within 3 years in France, 1 year in Austria, 6 months in the Netherlands - art. 7:3 BW, 60-180 days in Spain).
- Similar, but not subject to any temporal limitation is the priority notice under German law (*Vormerkung*, § 883 BGB). It requires a valid contractual obligation.

Another method, which might coexist with the above mentioned methods, is the **reservation of rank** (e.g. Germany, Hungary, Poland). In other countries, such an abstract reservation of rank is not possible (e.g. Greece, Spain).

2.8. Registration Procedure (questionnaire 2.3.)

2.8.1. Form of filing (application)

Almost universally, formal requirements have to be met for the filing (application for registration). If a lawyer (in particular a notary) is charged with drafting the application, this leads to a higher quality and legal certainty of the filing.

- In the **mortgage register** of the Code Napoleon countries, only **authentic acts** (= notarial documents) can be registered (Belgium, France, Luxembourg, Netherlands, Portugal, Spain – on this list, only the Dutch register is not called mortgage register; the same applies in Germany for the transfer of ownership).
- The **Central European land register** typically requires a **certificate of signature** for registration (Austria, Czech republic, Germany, Hungary, Slovakia, Slovenia).
- The **British Isles** systems (both old and new) require a **signed and witnessed deed**.
- Only the **Nordic systems** have **no formal requirements**.

The most basic effect of every formal requirement – be it the certification of signature or the witnesses – is to **prevent fraud** by proving the identity of the parties and the authenticity of the signatures.

- Indeed, in the **Nordic systems**, there have been reports on fraudulent registrations achieved by fake documents[31].
- A certification of signatures seems to be safer proof than witnessed (whose signatures might be faked as well).

Considering the effects, formal requirements nowadays have for land registration, the most obvious is the **additional control** given to the content of the register, **if a lawyer has to be consulted** for drafting the document which is to be registered.

- If an **authentic act** is required, obviously the parties need to consult a notary (Latin type). Regularly, the civil law notary has a professional duty to counsel the parties on the legal effects of the transaction undertaken. Thus, legal counselling would be the effect of the formal requirement. (Therefore, it makes sense, if the German law requires an authentic

[31] *Vogel*. Gutglaubenserwerb, Fälschung, Staatshaftung und Identitätsfeststellung im schwedischen Grundstücksrecht, in: Festschrift (mélange) Max-Planck-Institut für Privatrecht, 2001, p. 1065 = republished notar (= newsletter of Deutscher Notarverein) 2002, 42.

act for the transfer of ownership, even though for the creation of limited real rights in land, a certification of signature suffices for registration.)

- For a **certification of signature**, normally there is no professional duty for the official (usually the notary) to counsel on the legal effects. However, quite regularly, the civil law notary drafts also the document, before he certifies the signatures. Thus the document is prepared with legal counsel – and there is also an additional legal check before the document or the right is registered by the land register[32].
- The common law **deed** does not require consultation of a lawyer. In practice, however, it seems quite common to consult a conveyancing lawyer for land transactions. The consultation of a lawyer might also be caused by the need to fulfil the formal requirements.

2.9. Access to information (questionnaire 2.4.)

2.9.1. Legal Restrictions on the Access to Data

In most states, access to the information in the land register is available for everybody who wants to get information (**public access**: e.g. Austria, Czech republic, Croatia, Denmark, England, Finland, Hungary, Ireland, Lithuania, Italy, Netherlands, Portugal, Scotland, Sweden).

- In some states, for privacy reasons, access is restricted to persons having a **legitimate interest** (Belgium, § 12 GBO Germany, art. 607 CC, 221 s. LH Spain).
- In other states, the **files of the mortgage register** of the French type (*conservation des hypothèques*), which contain the more relevant information in a system registering documents (not rights), are only accessible with a legitimate interest (e.g. France, Poland).

2.9.2. Electronic Registration

Today, **electronic registration is the norm**. Most states have already completed electronic registration (or almost completed the data transfer).

- In some Southern and Eastern European states electronisation has just started (e.g. Croatia, Greece, Hungary, Portugal, Slovenia). The delay is most probably due to budgetary constraints, in some cases also to the lack of reliable cadaster data (Greece) or to the bad shape of land registration during the communist regimes (e.g. Croatia).
- France is just starting electronisation of the *livre foncier* ("land book") in Alsace-Lorrain, but plans to complete it by the year 2007.

In recent years, most states have been changing to a electronic registration. Some states are still in the process of changing to an electronic version.

- In the middle and eastern European reform states, electronisation sometimes is slowed down by the lack of funding. Therefore, electronisation here has been **sponsored by the European Union** (e.g. in Hungary by the PHARE program).

Consulting the land register by **internet** is possible in those countries that have both completed electronic registration and also allow public access to the registered data (e.g. Austria[33], Czech republic[34], England[35], Hungary, Lithuania[36], Netherlands[37], Norway[38], Poland, Scot-

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32 *Baumann*, Das Amt des Notars – Seine öffentlichen und sozialen Funktionen, MittRhNotK (Mitteilungen der Rheinischen Notarkammer) 1996, 1, 6, 19; *Staudinger/Hertel*, BGB, 2004, Vorbemerkung §§ 127a/128 BGB note 25; *Woschnak*, Notar und Grundbuch, Notarius International 1999, 8.

33 www.justiz.gv.at/grundbuch

34 www.nahlizenidokatastru.cz

35 www.landreg.gov.uk

land[39], Slovakia, Slovenia, Sweden[40]). Usually fees are payable for consulting the electronic register.

- Countries limiting access to persons having a **legitimate interest** necessarily limit electronic access to professionals who are controlled by special professional duties not to violate the privacy rights of the registered persons (e.g. Germany; in Spain electronic consulting of the register so far has encountered technical problems).
- Online consultation of the land register is less meaningful in countries with a **register of documents** in a personalfolium, unless you can consult also the documents (which so far is not possible).
- **Political decentralisation** might also restrict the access: In Germany, land registers are maintained by the various states (*Länder*). Each state had to decide individually when and how to switch to electronic registration. As a result, each state has an individual system, although most (however not all) work on the same technical standard.

2.9.3. EULIS

The EU sponsored EULIS project (**European Land Information Service**)[41] has set its goal to provide the possibility of reaching on-line and up-dated information about land across European borders.

- EULIS enables to consult all participating land registers online. EULIS does not maintain any register by its own, but **merely connects to the existing registers**. The information contained is shown in the respective language of the register.
- Also, EULIS connects to some information about the legal content of the registered rights or the translation of legal terms.

The preparatory project was successfully finished on schedule in June 2004. A live operational service was started in early 2005.

So far, Austria England and Wales, Finland, Lithuania, the Netherlands, Norway, Scotland and Sweden are **project partners**. Others such as Poland and Spain are expected to join soon. There are different reasons why the other countries do not (yet) cooperate:

- In some Eastern European states, the main obstacle are **budgetary problems**, more precisely the costs of the changes which would be necessary in the national electronic registration systems.
- More fundamental is the problem of the countries which limit access to persons having a **legitimate interest** (e.g. Belgium, Germany, Spain). It these countries do not want to change their national rules on privacy, they will have to ensure, that also the access in other states is limited in the same way. At present, privacy protection relies on professional duties and their control by the state. Professionals in other states, however, are neither bound by the same professional duties nor are subject to control and possible sanctions by the registering state.

It is important to understand that EULIS is **not a European land register**, but a platform for the various existing national registers. However, the participating agencies have agreed to

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36 www.kada.lt
37 www.kadaster.nl
38 www.eiendomsinfo.no
39 www.ros.gov.uk
40 www.lantmateriet.se
41 www.eulis.org

work together on transnational access to their respective registers despite differences in the existing principles for collecting and storing information, the legal and regulatory framework and the principles for access to information.

- A uniform **format of presentation** cannot be achieved, because the form of registration and publication depends on the applicable substantive law (unless the substantive law is also harmonised).
- Another obstacle is the **language**: Naturally registration is done in the respective national language. It would be to costly to translate all information in foreign languages. Also, land registration contains more individual information than for example the companies' register; so it would not be sufficient just to translate the headings of each part of the registration. EULIS tries to give some assistance by providing translations of the relevant legal terms. This is helpful, but only if you already have at least a basic understanding of the respective language of the registration.
- EULIS has taken an interesting approach and will help overcome national boarders. However, it will never become as important as cross boarder access to national company registers will soon become: For a company, often it is fully sufficient, if you can check out its legal situation and the power of representation by internet. But you will need information on real estate abroad much less frequent than on foreign companies. And if you need information, normally you will also want to see the land in reality.

3. Sale of Real Estate[42]

3.1. Procedure in general

3.1.1. Main steps of a real estate sale (matrix)

Constitutive systems		Declaratory systems	
Germany	**England/Scotland** (new system)	**Code Napoleon** (Belgium, France, Italy)	**Sweden**
sales contract (notarial act)	sales contract (lexchange between solicitors for seller and buyer) often 10% down payment	preliminary contract (promesse/compromis de vente) 5-10% down payment	draft of sales contract 10% down payment
priority notice (Vormerkung § 883 BGB)	priority period after search		
payment	payment in escrow account before or at completion	sales contract (authentic act) = transfer of ownership	sales contract = transfer of ownership
agreement on transfer of ownership (*Auflassung* § 925)	completion = sales deed may be used for registation	payment during signing of sales contract	payment during signing of sales contract
registration = transfer of ownership completed	registration = transfer of ownership	registration = opposability	registration = opposability

3.1.2. Examples of different countries

Let us first just describe the main steps of a land sales contract in some countries, before we try to understand why it is structured that way in the various legal systems.

a) Germany

- In Germany, the parties first conclude the **sales contract** by notarial act.
- Afterwards, the notary registers a **priority notice** for this contract (*Vormerkung*, § 883 BGB). As a consequence of the priority notice, all posterior dispositions of the property are invalid against the holder of the priority notice. Thus, the buyer can **pay** now without running any risk.
- The next step is a **separate agreement on the transfer of ownership** (*Auflassung*, § 925 BGB) (also by authentic act). To be more precise, this agreement is already contained in the same document as the sales contract. However, the notary does not register it, until after payment has been effected.
- The final step is **registration** of the transfer in the land register. Under the German constitutive system, registration is required for the transfer of ownership.

b) England

- In England, the **sales contract** documents are exchanged between the seller's and the buyer's solicitors (who keep them in escrow). Usually, then a down payment of 10% is made (into an escrow account of the conveyancer acting for the seller).

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42 In addition to the national reports for this study, national Reports of a EULIS seminar of 15./16.5.2003 on conveyancing in various European countries may be found in internet on the EULIS homepage (www.eulis.org).

- At the date set for **completion**, the **payment** is made into an escrow account of the conveyancer acting for the seller. (Also the keys are handed over and the purchaser takes possession.)
- Only after receiving payment in the escrow account, **registration** is effected. Only after registration, the money is paid out from the escrow account.

c) France (and other Code Napoleon countries)

- In France (and in other Code Napoleon countries, e.g. in Belgium, Italy, Luxembourg, Portugal and Spain), first a **preliminary contract** is signed. Usually also a down payment of between 5% and 10% is made.
- After the buyer has obtained financing, the **sales contract** is concluded in a notarial act. At the same time, **payment** must be made, since the sales contract already transfers ownership.
- **Registration** is made afterwards, but it has merely declaratory effect.

d) Sweden

In Sweden, most steps are basically the same as in the Code Napoleon countries – except that there is no preliminary contract, but only a draft contract:

- In Sweden, the first step is a **draft contract**. At that time, usually a down payment of 10% is made.
- At the set date, the **sales contract** is signed. At the same time, **payment** must be made, since the sales contract already transfers ownership.
- **Registration** is made afterwards, but it has merely declaratory effect.

3.2. Real Estate Sales Contract

3.2.1. Form

As we have seen, in most countries, registration of a land sales contract requires a certain form (compare part 2.8.1.). Usually, the formal requirement is also necessary – either for the validity of the sales contract and/or the transfer of ownership:

- An **authentic act** is required for every sale of real estate in **Germany** (§ 311b par. 1 BGB). In **France**, only for the sale of a **newly built properties**, an authentic act is required. (An indirect requirement is given in Alsace-Moselle by the necessity to conclude a notarial act within 6 months; otherwise the sales contract lapses, art. 42 L of 1924).
- The **British Isles** systems (both old and new) require a **signed and witnessed deed** for the sales contract to be binding (England, Ireland, Scotland).

More often, the formal requirement comes in for the transfer of ownership:

- In the **Code Napoleon** countries, only **authentic acts** (= notarial documents) can be registered (Belgium, France, Italy, Luxembourg, Portugal, Spain). Generally, the sales contract is binding upon the parties even without this form. However, the **transfer of ownership** requires the form of an authentic act.
- In **Germany** and the **Netherlands**, an authentic act is required for the (separate) agreement for the transfer of ownership (and in Germany, also for the sales contract).

In the other systems, there is **no formal requirement** for the validity of the sales contract or the transfer:

- The **Central European land register** (except Germany) have **only procedural require-**

ments for the registration (certification of signature), which, however, do not affect the substantive validity of the obligations or of the transfer of ownership (Austria, Czech republic, Hungary, Slovakia, Slovenia).

– Only the **Nordic systems** have **no formal requirements** at all, neither for the substantive validity nor for the registration.

- In the **Code Napoleon** countries, the requirement of an authentic act for registration, at first glance, seems to be merely a procedural requirement. As an obligation, a sales contract is perfectly valid, even if it is not concluded by authentic act. However, the transfer of property (or at least its opposability) depends on an authentic act. (In Spain, the *escritura* is the modus of transferring ownership. In the other Code Napoleon countries, the practice of preliminary contracts is based on this distinction.)
- If an authentic act is required (only) for the transfer of ownership and/or the registration, clearly the main effect is **legal security** for the people consulting the land register. If however, (also) the sales contract requires an authentic act, this is for the benefit of the parties, who receive independent **legal advise**. This might be demonstrated by the French law, which recently has introduced formal requirements for the sale of newly built premises, because this was considered more risky than an ordinary real estate sale.

3.2.2. Contracting (Who normally drafts the real estate sales contract?)

In almost all European states, the real estate sales contract is drafted and the contract execution is managed by lawyers (even if this is not required by formal requirements):

– in the **continental states** usually by **civil law notaries**,

– in the **British Isles** by **solicitors**.

– Only in **Nordic countries**, contracting is advised by **licensed real estate agents** "Nordic type".

If contracting is handled by solicitors, always **two solicitors** are involved, one for the seller and another one for the buyer. The civil law notary or the licensed agent Nordic style usually handle contracting for both parties acting as an **independent intermediator**, who has to take care of the interests of both parties. Only in Belgium and France, seller and buyer both retain one notary each.

a) Professional Assistance

Land and houses are big ticket items. The parties run high economic risks if anything goes wrong with the transaction. So usually the parties rely on **professional advise**, even if it is not required by law.

- In most countries with a Latin notarial system, authentication by the notary is required at least for the registration of the transfer of ownership. Normally, this formal requirement also ensures that the parties receive professional advice by the notary.
- However, even if the formal requirements do not necessarily require the assistance of a legal professional, normally the parties consult a specialist: The national reports on England, Finland, Scotland and Sweden all estimate that at least in two thirds of transactions of residential property between private owners, professional advice is sought for the conclusion of the contract.

Interestingly, professional advice is being sought, **even if normally a standard contract** is being used, such as in England the "Standard Conditions of Sale" (SCS) published by the British Law Society.

- One might think, that the parties would try to save money by just buying a contract form and fill it out by themselves. However, obviously they consider legal counselling worth its money for two reasons: First, they do not know, whether the standard form really fits their specific situation or whether and how some clauses have to be changed.
- Second, the parties need professional assistance for the **execution of the contract**. E.g. in the English system, the solicitors act as intermediaries who hold the sales deed and the money in escrow. Otherwise one of the parties would have to deliver first – and without being assured that the other party would also deliver[43].
- Also, as the English reporter points out, lenders (**banks**) will insist on professional representation.

In the countries requiring authentication of the transfer or of the sales contract, the legislator forces the parties to seek professional advice – comparable to **compulsory safety standards** or mandatory insurance. The advise might benefit both the parties (if the advise is given before the sales contract has been concluded) and/or enhance legal security on behalf of third parties (insofar legal advise and control applies to the registered documents or the application for registration).

b) (Latin) Civil law notaries, British solicitors and licensed real estate agents Nordic style

Depending on the legal system, **three different professions** are involved in counselling on real estate sales:

- In the majority of European States, counselling and contract drafting for real estate sales is the responsibility of **civil law notaries** (e.g. Belgium, Czech Republic, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal and Spain). Of the countries with a civil law notarial system, only in Austria and Hungary, besides the notaries also attorneys are involved in contracting for real estate sales to a larger extent.
- In the British Isles, a system without civil law notaries, **solicitors** (attorneys) are normally retained for drafting and execution of the sales contract. As mentioned before, attorneys also play a role in Austria and Hungary.
- In the Nordic countries, the **licensed real estate agent Nordic style** is the professional responsible for contract drafting and execution. That is a huge difference to the much more limited role of real estate agents in continental Europe and on the British Isles. Not surprisingly, the duties of the real estate agents and the requirements how to become real estate agent are heavily regulated by specific statutes in the Nordic countries. In this study, we use the term "licensed agent (Nordic style)" in order to make the reader aware of the difference to the "ordinary" (continental or British Isles) real estate agent.

In almost all countries, it is **but one profession** responsible for contract drafting – either because there is no civil law notary (British Isles) or because of statutory competence (formal requirements for authentication by a civil law notary). Only in Austria and Hungary, two different legal professions are almost equally involved in contract drafting.

c) Neutral or double counsel

In a majority of countries, contracting is counselled by **one professional only**, who acts as a neutral intermediary responsible for advising both parties (and also liable to both parties in case he neglects his duties).

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[43] In England, contract execution is further complicated by the necessity for chain management, i.e. that several sales contracts in a chain have to be completed together on the same day.

- The **civil law notary** (Latin type notary) under his statutory professional duties typically has to act as an neutral intermediary. Thus in most countries, only one civil law notary suffices for counselling on the contract (e.g. in Germany, Greece, Italy and Spain; also in Austria and Hungary, if a notary drafts the contract).
- However, there are some countries (**Belgium and France**), where it is usual – though not required by law – for both parties to retain one notary each, that is two notaries in total.
- The licensed **real estate agent Nordic type** is also bound by a professional duty to act as a neutral intermediary. This further distinguishes him from the real estate agent continental or British type who typically has a contractual relationship with one party only.
- If contracting is handled by **solicitors** (attorneys), always two solicitors are involved, one for the seller and another one for the buyer (e.g. England, Ireland or Scotland). Usually the vendor's solicitor drafts the contract, the buyer's solicitor reviews it.
- Thus in Austria and Hungary, where some contracts are prepared by attorneys, others by notaries, if the drafting is done by a notary, the notary has a neutral role towards both parties, whereas if drafting is done by an attorney, typically the other side also is represented by another attorney.

3.2.3. Two consecutive transactions (preliminary contract)

As it turns out, in almost all countries, in practice there are two consecutive transactions: The first contract brings contractual obligation. Afterwards, everything is being prepared for performance. Then, in a second transaction, ownership is transferred. Payment is effected is in between the two transactions or at the same time as ownership is transferred.

Thus, the two steps are not required by law, but are required by practice.

- Some legal systems distinguish between the **obligation contract** and the contract for the **transfer of ownership**. The transfer might be abstract (e.g. Germany) or causal (e.g. Netherlands).
- If the sales contract in itself also transfers ownership, in practice the parties normally first sign a **preliminary contract** and in the second step the contract in the required form (e.g. Belgium, France, Italy, Poland, Portugal, Spain). Similarly, in other countries a **draft contract** is used instead of a preliminary contract (if the contract does not require a specific form) (e.g. Sweden).
- In England, Ireland and Scotland, where (under the new system) ownership is transferred only upon registration, usually the **contract** is signed at an early stage, however kept in escrow, until at the second stage of **completion or conveyancing** payment is made and therefor the documents may be used for registration (and the keys are handed over). (In the old system, there were also two transactions, first the sales contract, second completion with signing of the deed and transfer of the title document – similar to the preliminary contract in the Code Napoleon countries.)

3.2.4. Typical Real Estate Sales Contract

A standard form of contract may be found in a country, where the content of a land sales contract has not yet been standardised by statute, namely in England (edited by the British Law Society). Arguably, the standard contract substitutes the non-existing statute on land sales.

In most countries, there seems to be no official standard form. However, you might mention the manuals most frequently used.

3.3. Transfer of Ownership and Payment

3.3.1. Requirements for Transfer of Ownership

The European systems combine the possible requirements for the transfer of ownership in very different ways:

- In the **Code Napoleon** countries (Belgium, France, Italy, Luxembourg, Portugal, Spain), the **sales contract** already transfers ownership. There is no other requirement. Also the registration is merely declaratory. The same applies for the **Nordic countries** (e.g. Sweden).
- In the new **British Isles** system, ownership is transferred by **registration** in the land register. Only registration matters. Neither the sales contract nor an agreement for the transfer of ownership are requirements for a valid transfer.
- The **Austrian** system combines the **sales contract** and the **registration** as the two requirements.
- In **Germany**, the two requirements are an **agreement on the transfer of ownership** (*Auflassung*) and the **registration** – irrespective of the validity of the sales contract.
- Only in the **Netherlands**, there are **three requirements**: first the sales contract, second a separate agreement on the transfer of ownership, third the registration.

	causal systems				abstract systems	
	France, Belgium/Lux. Sweden	Spain	Austria	Netherlands	Germany	England, Ireland, Scotland
titulus	sales contract	sales contract	sales contract	sales contract	agreement on transfer of ownership	
modus		form of sales contract (*escritura*)	registration	agreement on transfer of ownership + registration	registration	registration
	declaratory systems		constitutive systems			

a) Steps for transfer of ownership

As possible requirements for the transfer of ownership one might imagine:

- sales contract (as a valid obligation contract - *causa*),
- payment of the purchase price,
- agreement on the transfer of ownership (which is separate from the sales contract) or "*traditio*" of the land,
- registration with the land register.

The requirements might be found in different combinations.

- "**Causal**" systems are the ones, that require a valid causa for the transfer of ownership (while abstract systems do not).
- "**Constitutive**" systems are the ones, that require registration in the land register for the transfer of ownership (while declaratory systems do not).
- A distinction between the sales contract (or any other causa) and a **separate agreement on the transfer of ownership** can be found only in Germany and the Netherlands.

Payment is never a statutory requirement for the transfer of ownership.

b) Causal and abstract systems

- The majority of European systems are **"causal" systems** requiring a valid causa for the transfer of ownership.
- Only on the British Isles (new system) and in Germany, an **"abstract" system** exists, where the transfer of ownership is valid irrespective of the validity of the sales contract.
- Within the abstract systems, in the British system, basically only registration matters (similar to the **Torrens system**), while the German law still requires an agreement on the transfer of ownership. Thus, on the British Isles, even an erroneous registration would transfer ownership.

c) Constitutive and declaratory systems

The difference between constitutive and declaratory (opposability) systems has already been shown in the part on the land registers (2.3.).

- Declaratory and constitutive systems are about equally represented in Europe.
- **Abstract systems are constitutive, declaratory systems are causal** (at least all existing abstract systems are; otherwise the abstraction or the declaratory effect does not make much sense). However, a system might be causal and constitutive, as the Austrian and the Dutch example show.
- Never forget, that registration is mandatory also in most of the declaratory systems – and that it is required for opposability.

d) Roman law: titulus and modus

The grey area in the matrix shows the systems still influenced by Roman law. Under **Roman law**, transfer of ownership required both "*titulus*" (title) and "*modus*" (mode) of transfer. For movables, the modus usually is "*traditio*" (transfer of possession). The old Roman doctrine still applies in various countries. However, the modus is no longer the transfer of possession. Traditio has been replaced differently in the various systems:

- In **Austria**, **registration** now is the modus (even though originally registration was the opposite principle to traditio).
- In **Spain**, traditio of the land has been replaced by **traditio of the formal sales contract** (the *escritura* or authentic act of the sales contract). So basically, a formally valid sales contract is the only requirement (as in the French law), but dogmatically, it is considered both title and modus.
- In the **Netherlands**, modus is twofold: It comprises both a separate agreement on the transfer of ownership and the registration.
- One might argue, whether **Germany** still follows the Roman approach, because here title is not the sales contract, but a separate agreement on the transfer of property (plus registration as modus).

Thus, with the sole exception of the British Torrens system, you may combine Roman theory with all existing systems. So for our task of distinguishing the various systems, it does not help researching possible Roman law origins.

3.3.2. Payment due

In a land sale the main obligation of the seller is to transfer ownership and possession of the land, whereas the buyer has to pay the purchase price. One of the main functions of drafting a land sale is to prevent any of the parties to fulfil his own obligations before he is sure that the other party will also fulfil his obligations. Thus the procedure for a standard land sales contract depends on whether the registration of the transfer in the land register has constitutive or merely declaratory effect (see part 2.3.1.):

a) Systems by country

In legal systems, in which ownership is transferred upon mere consent even without registration (**declaratory registration**) (e.g. Belgium, Finland, France, Italy, Poland, Portugal, Spain and Sweden), payment has to be made at the same time as the contract is concluded.

- In these systems, either a **preliminary contract or a draft contract** is made. A preliminary contract is used mainly, if the legal system requires a specific form for the sales contract (authentic act); so it is easy to distinguish the preliminary from the final contract just by the form. The preliminary contract might bind the parties (e.g. in the Code Napoleon systems), but does not yet transfer ownership.
- In the declaratory systems, the purchase price is **paid directly when signing the contract**.
- Usually, after a preliminary notice, registrations in the land register are either blocked for a certain time frame or the notary who obtained an excerpt of the register will we informed of any changes (e.g. Spain).

In legal systems, in which the **registration is constitutive**, payment has to be made before the transfer is registered:

- In the **English** system, at completion payment is effected into an **escrow account** of the seller's solicitor. Only then, registration moves forward. (Also after an official search of the land register has been made, the register is blocked for a certain time).
- In **Austria**, the main protection is also by way of a (notarial) escrow account. It may be combined with some protection similar to the German priority notice.
- In the German system, the buyer is secured, because the seller grants registration of a **priority notice** (*Vormerkung*), before the buyer effects payment. (In Germany, the parties may also use an escrow account, but still a priority notice would be registered for the buyer's safety.)

b) Systematic overview

In a **systematic order**, we can identify several methods to synchronise payment and the transfer of ownership:

- The parties might try to do "**all at once**", that is effecting payment while the contract (transferring ownership) is concluded (e.g. in the Code Napoleon countries).
- The opposite approach would be complete the contract "**step by step**" – so that a party cannot retreat unilaterally, but the other also cannot obtain delivery without also fulfilling its own obligations (e.g. the German **priority notice**, *Vormerkung*).

– One or both parties might pay or deliver the title documents to an intermediator in **escrow**.
– In some declaratory systems, the transfer might be **conditioned upon payment**.
– Finally, the seller might transfer ownership, but retain a **seller's mortgage** on the property.

To co-ordinate payment and the transfer of ownership "**all at once**" is possible only in **declaratory system**.

- Today, payment usually is effected with a **bank drawn check** (because cash payments are too risky and also cause problems with money laundering)[44].
- Another option is to use an escrow account to separate contracting and payment (e.g. used in Poland).
- Sometimes the parties also sign the contract **at the buyer's bank** in order to co-ordinate the transfer of money with the signing of the contract (e.g. used as an option in Poland, Sweden).

One way of delivery step by step is the **priority notice** which guarantees delivery on the side of the seller. After the priority notice has been registered, if the seller disposes of the property, the disposition is invalid against the buyer.

- The classical example for a priority notice is the **German** law (*Vormerkung*, § 883 BGB).
- In **Austria**, a similar function is fulfilled by the "*Veräußerungsrangordnung*" (§ 53 GBG), which's protectory effects however are limited to one year after registration.
- Recently also **Italy** introduced a priority notice for a sales contract (art. 2645-*bis*). The protection is limited to one year after the sales contract, but not more than three years after the registration of the priority notice.

An **escrow** is another way of partitioning delivery. An escrow may be used either for the payment (escrow account) or also for the transfer of documents (in particular, if the documents transfer title).

- In the new British systems, the buyer pays in an **escrow account**, before the parties apply for registration of the transfer. Thus, the seller is sure to get the money after the registration has been effected. And the buyer rests assured, that the money would not be handed over to the seller until after the buyer has been registered in the land register.
- An escrow account may be combined with other systems (as regularly in Austria).
- **Documents** also may be held in escrow – as under the old British system, where title was transferred in the sales deed, but also under the new British system for the sales deed which is necessary for registering the transfer. An escrow of documents is usual in Austria (for the *Aufsandung*-document, which is necessary for the registration of the transfer of ownership) and in Germany (for the *Auflassung*-document, which again is necessary for registration of the transfer). An escrow of documents makes more sense in a constitutive system, where the withholding of the documents blocks the transfer of ownership.
- Of course, there have to be professional indemnity policies for escrow agent (e.g. of the conveyancers in England).

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44 If the money is paid in cash at the notary's office, this might attract robbers, as has been the case e.g. in Argentinia (which has a Code Napoleon system very close to the Spanish one). The notarial practice has reacted by now concluding many sales in the offices of the buyer's bank – similar to the Swedish approach mentioned.

Payment is never a statutory requirement for the transfer of ownership. Only in some declaratory systems, the transfer might be **conditioned upon payment**.

- Such contractual clauses are used quite commonly e.g. in Finland or in Spain (*condición resolutoria explícita*, art. 34 LH, which has to be registered). In Poland, the sales contract may be conditional; then an additional, unconditioned contract is required for the transfer of ownership.
- In other countries, a conditional transfer of ownership is prohibited by statute and invalid (e.g. § 925 par. 2 BGB Germany, an abstract system). Also in the (new) British system, where only registration matters, a conditional registration is not possible. (The only option is to apply for registration only after payment.)

Finally, a **seller's mortgage** might give the seller a chance to get the purchase price.

- Basically in all systems, a seller's mortgage may be created by contract. In some systems, a **statutory mortgage** automatically springs up for the seller, if the purchase price has not yet been paid (e.g. Spain).
- However, there are better securities for the seller than a seller's mortgage. With a mortgage, he has to go the cumbersome and protracted procedure of enforcement. And he will suffer additional damages and expenses besides the purchase price.

3.3.3. Ways of the seller to enforce the payment

As we have seen, normally ownership is transferred only after – or at the same time – that the seller has received payment of the purchase price. However, if the buyer for some reason does not want to pay (e.g. because he does not want to buy that property any longer), the seller may want to enforce his claim for payment.

- If the sales contract has been made by authentic act (= notarial instrument), in most countries with **Latin notaries**, any obligation for money payment in the notarial instrument will be enforceable under statutory provisions (e.g. Belgium, France, Hungary, art. 472 Code of Civil Procedure Italy, Luxembourg, Poland, Portugal, Spain).
- In other countries, direct enforcement of the notarial contract applies only if in the notarial act, the debtor has declared an explicit submission to direct enforcement (Austria; *Zwangsvollstreckungsunterwerfung,* § 794 par. 1 n° 5 ZPO Germany). In **Germany**, in a real estate sale, the buyer typically submits to direct enforcement. (In Austria, it is possible, however seldom used.)
- If the money has already been paid in an **escrow account**, the escrow holder (civil law notary or solicitor) is under a professional duty to pay the money under the conditions agreed upon.

There are also other ways to secure the seller:

- If a **down payment** has been made upon the preliminary contract, the buyer may liquidate his damages from the down payment (either by keeping the whole amount or by withholding his damages).

3.3.4. Transfer of possession to the buyer

Possession (the keys) is usually transferred to the buyer upon payment. Besides this general rule, there seem to be no particular clauses in the different systems. Also, according to the national reports, the transfer of possession of residential property used by the seller himself normally does not seem to pose practical problems.

3.3.5. Chain management

A unique feature of **English** conveyancing is **chain management**:

- A wants to sell his house. B wants to buy it, but only if he can find somebody to buy his own house. C in turn wants to buy B's house, but only if he can find somebody to buy his own house. The chain is closed, when finally D can be found who is willing to buy C's house without any conditional sale of his own. Then A-B and B-C may sign a preliminary contract first, but completion will be only for all three sales together. Thus, C can use the proceeds from his sale to D in order to pay B. B in turn, will use the proceeds to pay A. Thus, on completion day, the money will run through the whole chain.
- Chain management requires to pay out the money before registration. (Otherwise, the other parties in the chain are not secured.) Thus, chain management helps avoiding bridge financing. However, it involves a certain risk for the parties.
- Something like chain management has also been mentioned in the Hungarian report. However, in other countries may be the payment dates of two sales might be co-ordinated – but very rarely a whole chain of sales like in England.

3.4. Seller's Title

3.4.1. Title Search: Ascertaining the seller's title

The extent to which the buyer has to ascertain the seller's title (and the absence of encumbrances), depends on the effects of seller's registration:

- If ownership or the creation of limited rights depends only on the registration (as in the new British system – **Torrens like system**) or if the **good faith** in the registration is protected, it is sufficient for the buyer to check the land register.
- If however the good faith in the register is not protected (or if the conditions for proving the good faith are high), the buyer will have to check the **title chain**, that is all prior transfers up to the period of prescription/adverse possession.
- A search of the title chain might also be necessary in a **causal system**, even if there is a certain degree of bona fides protection (such as in the Netherlands).

If **good faith in the land register is protected**, "title search" is done very easily by merely consulting the land register:

- This applies to a **Torrens like system** (as the new systems in England, Ireland or Scotland).
- It applies to the **Central European "land book"** system (Austria, Czech republic, Germany, Slovakia, Slovenia, Switzerland – also in the newly acquired provinces of north-eastern Italy).
- As we have seen, also in some Code Napoleon countries, good faith acquisitions are protected. Here, besides the land register, no title search is necessary (e.g. **Poland, Portugal, Spain**).
- In the **Nordic systems**, even though certain limitations apply to bona fides protection, state indemnity applies if somebody looses his property due to incorrect registrations. Thus, it should also be sufficient to check just the register, not the title chain.

If however **bona fides is not protected**, the buyer (or the notary) will have to check the whole chain of titles all the way down until possible period of prescription or adverse possession would have expired - regularly for 30 years.

- This applies to the Code Napoleon countries with a **French type mortgage register** (Bel-

gium, France, Italy, Luxembourg).

- It applies also to **Greece**, where the land register has constitutive effect, but no good faith protection.
- Finally, title search is also done in the **Netherlands**. Traditionally, the Netherlands used to have a "negative" system without good faith protection. Nowadays, there is quite some protection of good faith. So it is not so clear, whether title search is really necessary for the protection of the buyer – or whether it is more done because people have got used to it.

In the systems, where title search is necessary for the buyer's protection, title search may be the most important service of the notary for the parties.

3.4.2. Title Search: Absence of Encumbrances

The scrutiny necessary for the absence of encumbrances depends from the protection of good faith in the register as well.

Creditors of existing mortgages usually are paid off in a land sale, regardless of whether the mortgage is accessory or not.

- In an accessory system, anyway the buyer could take over the mortgage, only if he also took over the secured loan.
- In the non-accessory systems, it is possible for a mortgage to be taken over by the buyer without taking over the underlying debt. However, that rarely happens in practice. If the mortgage still secures a debt of the seller, it is a complicated procedure. Normally, reusing the old mortgage makes sense only if the buyer needs a mortgage from the same bank for the same amount. If there are any changes in the amount of the mortgage or the mortgagee, changing the old mortgage is not cheaper than extinguishing the old mortgage and setting up a new mortgage.

If the purchase price is paid in an escrow account, the civil law notary or solicitor responsible for the account will also pay out the compensation asked for by the mortgagees. If the purchase price is paid directly, often the mortgagees (banks) inform the notary how much compensation they ask for (which then is paid directly to them by the buyer, reducing the part paid to the seller). Often, the mortgagees also send the documents necessary for the cancellation of the mortgage directly to the notary (in escrow until after the compensation has been paid to the bank).

3.4.3. Title Insurance or Liability

In Europe, title insurance is almost inexistent (other than in the United States).

- Title insurance is unnecessary in all those countries which have an efficient registration system (enabling **bona fide acquisitions**)
- and/or sufficient **professional liability of the civil law notary** (or solicitor) who researches the seller's title.

Title insurance makes sense only in a system with mere registration of documents. It is unnecessary in a system which protects the good faith in the registration.

- The buyer does not need title insurance if he may rely on the land register. E.g. in England, the **buyer's good faith** is protected, if he takes possession of the house. (Only those who are in possession are protected against rectification of the register.) And the seller will be paid from an indemnity found for any losses occurred to errors in the registration. Economically, this is a sort of state insurance.
- In countries with a system of registration of documents and without bona fides protection

(e.g. Belgium, France, Italy), title search is always done by **civil law notaries** who are bound to a professional duty of care and who carry professional indemnity insurance. So the buyer is safe without needing title insurance. The same applied for the title search of the **buyer's solicitor** under the old British system.

3.4.4. Leases

In almost all European systems, the buyer is bound to a lease, if the tenant has occupied the premises before possession is transferred by the seller to the buyer.

- Under English law, the tenant has a right in rem.
- Under most continental systems, it is a merely obligatory right. However, the buyer is also bound by the lease (*emptio non tollit locatum - Kauf bricht nicht Miete*).

Also, in many systems the tenant has a pre-emptive right to buy.

Unless a lease contract is registered (which is compulsory in some countries and facultative, though not usual, in others), there seems to be no other way for the buyer but to ask the seller whether there are leases and to check the situation personally when visiting the premises.

3.5. Defects and Warranties

3.5.1. Statutory rules

For **defects in title**, the seller is liable under the statutory rules of all European countries as well as in the contractual practice. The absence of encumbrances normally is also checked by the professional drafting the contract (notary, solicitor), who would be liable for any negligence in the title check.

For **physical defects**, however, in practice, *caveat emptor* applies in all European countries: The seller is liable only for hidden material defects, which he knows.

- In some systems, *caveat emptor* is the legal rule (e.g. England).
- In other systems, as a legal rule, the seller is not liable for the proper use and functioning of the property sold, but only for hidden defects in the property which prevent normal use (e.g. France, art. 1484 ss. CC Spain).
- Or the law might state, that the seller is responsible for all material defects of the property sold (unless the buyer knows the defect or should have known it) (e.g. §§ 434 ss., 442 BGB Germany, art. 1490 ss. CC Italy, art. 911 ss. CC Portugal, Sweden).
- In practice, however, in the last two groups liability is excluded or limited (at least in the sale of a used house by one consumer to another consumer).

Statutory rules on seller's liability are usually drafted for the sale of newly produced movable products, not for the sale of an old house. Thus, a limitation of the buyer's statutory rights is common practice.

As a general rule, however, the seller has to **inform the buyer about hidden defects** if he is aware of the defects.

- In some countries, a statutory obligation has been introduced under which the seller (also the non-professional seller) has to inform about the size of the house, the existence of certain pollutants (chemicals such as asbestos, lead, but also biological, e.g. xylophageous insects) or information about the environment (e.g. France).
- In other countries, it is contractual practice to have the seller answer a uniform questionnaire on the state of the property sold (e.g. in England the "Seller's Property Information

Form").

- or to have the seller state that the land is free from specifically mentioned defects (e.g. Germany).

Only in some countries, it is usual for the prospective buyer to have the house checked by a **professional surveyor** before signing the sales contract (e.g. England, Finland, Ireland).

3.5.2. Typical contractual clauses: the scope of *caveat emptor*

If under the statutory rules, the seller is liable for physical defects, it is common practice in all of Europe (if seller is a consumer) to exclude seller's liability for physical defects of an old house – except for hidden defects which seller knew.

3.5.3. Liability of the Buyer for Debts of the Seller

The buyer might liable for arrears of the seller, regarding in particular

- real estate taxes or other taxes, e.g. related to buildings on the property or the business of the seller conducted on the property,
- charges for garbage collection, water and gas delivery,
- charges for the administration of condominium apartments.

Usually, specific contract clauses have been introduced, if this liability has proven to be a practical problem:

- In some countries, the **notary checks** with local authorities, whether there are any arrears. Then the amount is paid out of the purchase price (e.g. Spain). Similarly, the notary might check if there are arrears for the administration of condominium apartments (e.g. Netherlands).
- In other countries, the buyer is simply advised, that there might be charges on the land, but there is no usual procedure for checking the arrears. E.g. in Germany there is only a clause for the charges for the land development (*Erschließungsbeiträge*, § 436 BGB), because other charges on the land are theoretically possible, but have not caused any real problems.

3.6. Administrative Permits and Restrictions

Building permit:

- In France, the notary's responsibility is high: He has to check at the local authorities that the house sold has been built with the required building permit.
- In England, building approvals are often kept with the titles and therefore at hand if a sale occurs. However, for breaches of building regulations, short periods of limitation apply (no longer than 4 years), so that the buyer has only to check for recent changes.
- In Sweden, a lack of building permission is cured by prescription after 10 years.

Statutory pre-emption rights:

- Statutory pre-emption rights play an important role in the German practice. The notary is responsible for informing the parties which pre-emption rights might apply. Usually the notary also addresses the authorities whether they exercise their pre-emption rights.

3.7. Transfer Costs

The costs for contracting and registration usually range between 1-2%.

Transfer tax rates range between 1-6%, most frequently around 3%.

The real estate agents usually charge around 3% of the purchase prize. However, they not always employed in the various countries.

The following table lists the approximate transfer costs for the sale of residential property between two consumers in the various states as they are stated in the national reports. The first figure in each sure applies to a purchase price of 100.000.- €, the second to a purchase price of 300.000.- €[45].

country	real estate agent	contract	land register	transfer tax/ stamp duty	total transfer cost
England			90.- € 300.- €	1.000.- € 3.000.- €	
Finland	4.880.- € 14.640.- € (always agent)	80.- € 80.- € (see also agent)	145.- € 145.- €	4.000.- € 12.000.- € (4%)	
France					7.000.- € 19.000.- €
Germany	3.500.- € 10.500.- €	600.- € 1.500.- €	360.- € 890.- €	3.500.- € 10.500.- €	
Ireland[46]		1.500.- € 4.500.- € (ca. 1,5%)		stamp duty applies	
Italy	3.000.- € 9.000.- € (3%)	1.960.- € 2.500.- €	70.- € 70.- €	3.400.- € 9.400.- €	
Netherlands	2.500.- € 7.500.- € (2-3%)	680.- € 880.- €	100.- € 100.- €	6.000.- € 18.000.- €	
Poland	3.200.- € 9.600.- € (2,9-3,5%)	660.- € 1.480.- €	1.070.- € 3.070.- €	2.000.- € 6.000.- €	
Portugal	4.000.- € 12.000.- € (3-5%)	190.- € 190.- €	125.- € 125.- €	800.- € 23.400.- €	
Scotland	1.500.- € 4.500.- €	1.800.- € 4.000.- €	220.- € 700.- €	1.000.- € 3.000.- €	4.520.- € 12.200.- €

[45] If the national report indicates only a range of cost, the medium of that range has been shown in the table. However, if the national report indicates also the most common cost, this has been shown.
Costs are shown excluding VAT.

[46] source: Oasis website of the Irish government - http://www.oasis.gov.ie/housing/buying_a_house_or_flat/costs_of_buying_a_home.html

Spain		350.- € 450.- €	210.- € 270.- €	2.100.- € 7.000.-€	2.660.- € 7.720.- €
Sweden	3.000.- € 9.000.- € (3-5%) (always agent)	*500.- €* *500.- €* (see also agent)	80.- € 80.- €	1.500.- € 4.500.- € (1,5-3%) + capital gains tax	

Reading the table, one has to consider the different functions of the various steps in each state, especially the role of the real estate agents in contracting in Finland and Sweden.

- The costs for an assessment of the construction have not been included in the list. In some states it is quite common, such as in England, Finland and Ireland. In other states, however, the structure of the building.
- Regrettably, the figures are not fully comparable: Some reports include VAT, some do not. Some reports list only the lawyers' costs for the sales contract itself, some include the costs for managing the whole transaction. If prices are not fixed by statute, they may vary greatly; here the figures can give only a rough estimation.

3.7.1. Contracting and Registration

Although the costs for contracting and registration vary greatly, the total ads up in most cases to not more than 1% of the purchase price, only in Poland and Scotland 2% of the purchase price.

- Registration costs for the transfer of a house of 100.000.- € range in most states in between 70.- € and 220.- €. Higher registration costs apply only in Poland (1.070.- €) and to a minor extent in Germany (360.- € - probably due to the registration of the priority notice – *Auflassungsvormerkung*).
- For a house of 300.000.- €, registration costs vary between 70.- € (Italy) and 3.070.- € (Poland). The main difference is, that some states charge the same fee for every transfer regardless of the purchase price, whereas others charge higher fees for higher values (reflecting the higher risk in case of a mistake of the register giving rise to liability).
- Contracting is most expensive in Scotland, Italy and Poland, cheapest in Spain, the Netherlands and Germany.
- One cannot say, where Finland and Sweden stand exactly in this comparison. Here, almost always a real estate agent is involved. Usually his task is also to draft the contract. Thus in Finland and Sweden, one cannot distinguish the costs for drafting the contract from the costs of finding a buyer.

3.7.2. Transfer Taxes

a) Tax rates

All European states levy a special tax on the sale of real estate. The most common tax rates are around 3%.

- Transfer taxes (and/or stamp duty) are lowest in Scotland and Sweden (1% or 1,5% for residential property).
- In some southern European states the tax rate actually paid by the parties is lower than the one stated in the table, because it is common practice, that the parties state less than the actual purchase price in the notarial act. (The tax is not based on the market value of the

land sold, but on the price stated in the notarial sales document. Thus only the preliminary contract shows the true purchase price.) E.g. in Spain, the legislator has reacted by basing the tax on the market value, if the difference between the price stated and the market value exceeds a certain limit. (However, there seem to be no penal or administrative procedures against this tax evasion.)

- In some states also **capital gains** from the sale of residential property will be taxed (although usually with a tax brake, if the seller acquires another house for his living instead). E.g. in Sweden, the transfer tax rate is only 1,5% for residential property; however the seller may have to pay capital gains tax.

b) Levying methods

The states apply two methods to ensure that the transfer tax is being paid:

- Either the **notary** who authenticates the sales contract has to **collect the tax** (and is personally liable for the tax) (e.g. Belgium, France, Italy).
- Or the **registration in the land register** cannot be done, unless due payment of the taxes has been proven to the land register (e.g. England, Germany, Scotland).

3.7.3. Real Estate Agents

For the real estate agent, something like a 3 % fee seems to be the most common prize in Europe.

- Scottish real estate agents are considerably cheaper – may be because, the two lawyers (one acting on behalf of the buyer, one on behalf of the seller) take a part of their task.
- Usually, buyer ends up paying the agent's fee – whether he has hired the agent or whether seller asks him to pay the fee as a part of the purchase price. (However in England, the seller pays the agent out of the sale price).

3.8. Buyer's Mortgage

It is general practice in all European states, that the buyer finances by mortgaging the property he buys. There are no specific statutory regulations. In practice, however, there are different methods:

- Either the property is charged with the seller's consent. Then the **bank promises** to the seller to use the mortgage only for the payment of the purchase price (e.g. in Germany). Here the seller has a very limited risk (because even if the bank would not keep its promises, normally the bank would be capable to pay damages).
- Or the mortgage comes into existence **only after the buyer becomes owner** (e.g. Finland). Here the bank's risks is higher. The bank may be secured by a loan repayment insurance (e.g. in Poland). Or the bank may be protected indirectly by the block against further registrations on behalf of the buyer (if the sales contract and the mortgage are signed at the same time and if the same civil law notary handles the registration of both documents) (e.g. Spain).
- In a third method, the seller is paid only after ownership has been transferred and after the mortgage has come into existence. To secure the **seller**, he gets a **mortgage for the purchase price** (in some systems a legal mortgage, e.g. in Italy, where, however, the other two ways of mortgaging previously described, are also to be found).
- A fourth method is to have the title transferred and the mortgage registered almost at the **same time**. In theory, there are still risks of somebody not fulfilling or becoming insol-

vent. However, the risk is minimised, if the whole transaction takes only about an hour: E.g. in Sweden, the conveyance is usually concluded at the buyer's bank. This bank sends the purchase money to the seller's bank. Then the mortgage is transferred to the buyer's bank. When the seller's bank notifies the seller about the payment, the parties sign the contract for the transfer of ownership.

– Another method is to employ a trusted third party which hands out the money and also takes care of registering the mortgage documents, e.g. as the civil law notary, if there is an **escrow account** (e.g. in the Netherlands), or the buyer's conveyancer in England or the buyer's solicitor in Scotland.

Granting a mortgage to the buyer requires the reconciliation of contradicting interests: The bank wants to have the mortgage registered before it pays out the loan for the purchase price. The seller, however, wants to receive the purchase price before he transfers ownership and (thereby) enables the buyer to set up a mortgage. In addition, other banks may have financed the seller and want their loan repaid before agreeing to delete the old mortgage (or assign it to the new bank, if it is a non-accessory mortgage), so as to enable the buyers' mortgage to occupy the first rank.

4. Special Problems concerning the Sale of Real Estate (Cases)

4.1. The Conclusion of the Contract

Case: After inspection, the buyer tells the seller that he wants to buy the house. Thereafter, both of them sign a written contract, which states that the seller will sell and the buyer will buy the house under usual conditions. The purchase price is also indicated in the written document. What, if any, legal effect does this document have?

- The contract is invalid, if a legal form applies also to the sales contract (e.g. in Germany; also in France, if a newly build house is sold).
- In many countries, both parties would be bound by this contract, even though it could not be registered with land register (e.g. in the Code Napoleon countries and the Austrian system).
- In the British Isles and in the Nordic systems, the contract might even be registered with the land register. (In the British Isles, however, the contract has to state that it is a deed, and it would have to be witnessed.) However, as the English reporter states it: People are always **warned not to sign anything without legal advice** (and this warning is repeated when they apply for financing).

4.2. Seller's title

4.2.1. Consequences of an invalid Sales Contract

Case: A has sold real property to B. Now, B wants to sell it to C. However, before entering into the contract, C finds out that the sales contract concluded between A and B was invalid,

a) because it lacked the required form;

b) because A did not possess legal capacity;

c) because an administrative permit required for the contract has never been applied for.

May C go ahead with the contract and acquire the property validly?

This question discusses in further detail the consequences of **causal and abstract systems**:

- As one might expect, in a **causal systems**, the invalidity of the sales contract A to B prevents B from acquiring ownership. Thus, B cannot transfer ownership to C. This is the answer for France, Italy.
- In an **abstract systems**, the transfer of ownership may be valid, even if the causa, the sales contract, is not valid. Thus, the decisive question is whether the fault invalidates also the transfer of ownership.
- In most states, invalidity of the sales contract for formal reasons does not affect the transfer of ownership (e.g. Finland, Germany), whereas lack of capacity will invalidate also the transfer of ownership.
- As for the administrative permit, it depends whether the permit is required only for sales contract (then the transfer of ownership is still valid) or whether the permit is required also for the transfer of ownership itself.
- In England, C is protected, if (1) acting in good faith, unless (2) A is in possession of the house.

4.2.2. The Seller is not the owner

Case: A sells his property to B, who pays the purchase price and has the transfer registered with the land register. Only afterwards, it turns out that A was not the owner, with B having however relied in good faith on A's title. (This may happen e.g. when the seller was believed to have inherited the property from his uncle by a will, but a subsequent will is found in which the uncle leaves his entire assets to a charity. To make it a case, let us suppose further that the seller has become insolvent and cannot repay the money.)

This question discusses in further detail the problems of reliance in good faith on the land register.

- Here, B would acquire in **good faith**, if A had been registered properly under the law of Germany, Poland, Portugal, Spain.
- In England, the bona fides acquirer is protected unless the true owner is on occupation of the land.
- The good faith in the registration is not protected in Belgium, France, Italy, the Netherlands, In these systems, ownership may be acquired by **usucaption** (*usucapacio*), usually within terms of ten years (Italy) to thirty years (France).
- All systems agree, that the **sales contract** A to B is valid, even if A was not the owner.

4.2.1. Execution against the Seller

Case: After the parties have signed the sales contract, but before its registration, a creditor of the seller distrains upon the property in order to enforce a judgement against the latter.

Of course, in the contract practice of all European countries buyer is protected in this situation. However, if we have to guess whether buyer's interest in acquiring the property or merely his interest to get back (or withhold) his money is protected, we would be misled, if we just try to deduct the answers from whether a system is constitutive or declaratory. The decisive point here is whether there is some form of priority notice or block of the land register (see part. 2.6.):

- In the **declaratory systems**, the buyer has already acquired ownership. However, as he is not yet registered, he cannot oppose to the execution. So buyer is protected only if the money is in the notary's **escrow account** until after registration (or application for registration) (e.g. France).
- In the (abstract) **German** or the (causal, but constitutive) **Dutch** system, buyer could still acquire ownership, if **priority notice** has already been registered in his favour. (Usually, the priority notice is registered within days after the sales contract.) Similarly, in **Austria** the notary would apply for a priority notice (*Anmerkung der Rangordnung*) either before the sales contract or directly afterwards.
- Similar is the answer for **England**: The buyer will be protected, if he effects a land registry search before the charging order reaches the land register – provided that he registers within the **priority period of the search**. (Otherwise, the money is still in the escrow account.)

4.3. Delay in payment

If the buyer pays late, the seller generally has two remedies:

- Generally, the seller may **rescind the contract** (at least after setting the buyer an additional time limit for the payment, usually between 10-14 days) (e.g. England, Germany, Scotland). However, in a few countries, it seems not possible to rescind the contract, unless otherwise agreed upon (e.g. Poland, Portugal).

- Also, the buyer is liable **damages**. Down payments may be considered as a limit for damages (unless otherwise stated) (e.g. Sweden).
- In some countries, a **penalty clause** usually will be stipulated in the sales contract (e.g. 10% of the purchase price in the Netherlands).

4.4. Defects and Warranties

4.4.1. Misrepresentation

Case: For which of the following defects is the owner liable if the contract contains a clause which excludes the seller's liability, i.e. by stating that the buyer accepts the property in the state in which it is at the date of the conclusion of the contract?

- Half a year after the buyer has moved in, a water pipe breaks and floods parts of the house. The water pipe was put in when the house was built some decades ago.
- In spring, the basement is flooded. Neighbours tell the buyer that the seller complained to them that the flooding happened every other year in spring.
- An extension of the house has been built without the necessary permit of the building authority. Now, the authority asks the buyer to tear down the extension. The seller claims that he did not know that the permit was missing, since the extension had been built years ago by the previous owner.

- In many countries, contracting practice would include an **express clause** covering the missing building permit (e.g. England, Germany).
- If the **seller knew of the hidden defect** (in our example the repeated spring flooding), he is under obligation to inform the buyer in all legal systems. Contractual clauses limiting liability are to no avail, it the seller did not disclose the defect (e.g. Austria, England, France, Germany, Sweden).
- The example with the broken old water pipe was construed to give a hidden defect of which the seller knew nothing. If the statutory rule of *caveat emptor* applies, anyway the seller is not liable (e.g. England, Scotland). In other jurisdictions, under the statutory rule, the seller would be liable. However it is usual practice to exclude such liability by contractually (e.g. France, Italy, Germany, Portugal, Sweden).

4.4.2. Destruction of the house

Case: After the parties have signed the sales contract, the house burns down. What are the consequences for the contract?

In most countries, in this case there would be some **insurance** – not mandatory insurance by law, but usually at least demanded by the mortgagee bank. Thus the questions becomes important only there is no or insufficient insurance.

The question is, when does the risk pass to the buyer:

- In the declaratory system of the **Code Napoleon**, ownership is transferred with the sales contract. Therefor, if the house is destroyed after the contract has been signed, the buyer has to bear the loss. However, under statutory provisions, the seller may be obliged to **maintain his house insurance** for one month after the sale has been concluded (e.g. France, art. 1465 CC Italy, art. 796 CC Portugal).
- The statutory rule is the same under **English and Scottish** law: Risk passes to the buyer on conclusion of the sales contract. But in practice this rule is almost always altered by provision in the contract to the effect that risk remains with the seller until the **date of reg-**

istration (Scotland).

- In the **German** and the Nordic legal family, generally risk passes to the buyer upon the **transfer of possession** (e.g. § 446 BGB Germany, Poland, Sweden). Thus, the buyer may rescind the contract (Germany, art. 4:11 JB Sweden).

5. Sale of a house or apartment by the building company (vente d'immeuble à construire/Bauträgervertrag)

If in addition to selling plots of land or flat property units the seller also undertakes to construct a building, a number of **special legal issues** arise. These refer mainly to the mode and date of payments, the warranties for material defects, the risk of completion of the construction works or repayment of the money in case of the builder's insolvency.

It appears that the solutions offered by the different legal systems to the specified legal problems vary from one another to a considerable extent and the situation seems to be **far away from a uniform European standard**.[47]

Specific **problems** for the combination of sales and building contract are:

- Typically the seller has an economic interest to receive **payments** before the completion of the works, at any rate according to the progress of the construction. This advance financing in turn involves higher risks for the buyer, normally a private consumer, who is dependent upon the completion of the works by the promoter and needs some security in respect of the costs for the removal of defects, which can be exceedingly high.
- Special contractual arrangements may be required in respect of the **description of the building**, which does not yet exist.
- Special arrangement are also necessary with regard to **credit collaterals**, since the land may be used to set up a mortgage by the buyer, as well as by the seller.
- At last, part of the dealings is a contract in respect of the **transfer of ownership of land** or apartment ownership, with all the usual (and intricate) arrangements involved.

The list of **solutions** offered is long and reflects a great diversity of possible approaches.

- In some countries the risks have been identified at a fairly early stage and there is a long tradition of detailed legislation providing for security in all possible respects.
- Other systems do not recognise special rules in addition to the normal contract of sale and contract for services and leave the settlement largely to the market. Nevertheless, it appears that sometimes mechanisms have developed on a non-legal level, such as the National House-Building Council in the United Kingdom or the *Garantie Instituut Woningbouw* in the Netherlands who offer standard term contracts or might even undertake a warranty to complete the construction works in the case of the seller's insolvency, if the parties decided to submit to such system.
- In other countries the development is still ongoing and bills have been launched only very recently. This does not only apply to new member states such as Poland, but also to old EU member states such as Italy.
- There is some conformity due to EU-legislation and the Unfair Terms Directive in particular. However, even though in most of the countries that Directive applies to immovable property and to the construction of buildings as well, this is not necessarily the case, since according to its wording the Directive seems to be constrained to the sale of goods and the rendering of services.

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47 Cf. also the conclusion by *Frank*, MittBayNot 2001, 113, 135.

5.1. Statutory Basis

5.1.1. National Law

A slight majority of the countries compared in this study have special statues or decrees dealing with some or most of the risks of the sale of private houses during the course of the construction.

- Special rules apply in Austria, Belgium, France, Germany and Spain. Usually, the Civil Code remains applicable to legal questions not covered by those acts. Sometimes special mandatory provisions are (also) integrated into the Civil Code (as recently in the Netherlands). There are similarities between the French, Belgium and Spanish approach on the one hand and the Austrian and German approach on the other hand.
- In other legal systems newly constructed properties are governed by the same laws as ordinary conveyancing and the general provisions regarding the contract of sale and the contract for services are applicable (England, Greece, Italy or Scotland).
- However, sometimes special techniques for the protection of the buyer have developed on a **non-legal level**, as the National House-Building Council (England and Scotland) or the Garantie Instituut Woningbouw (Netherlands). In a few countries standard form contracts are common (England, Scotland, Sweden).

Countries with specific rules:

- In **France** there is a specific system for the sale of future real proper. The relevant provisions are to be found in the Civil Code (Art. 1601 et seq.) and in the building and housing code, the "*Code de la construction et de l'habitation*" (Art. L 261 et. seq.).
- In **Belgium** the Law « Breyne » dated 9 July 1971 and The Royal Decree dated October 1971 apply to the sale to non professionals of private houses and/or apartments before or during the course of their erection.
- In **Spain**, there are the statute no. 57/68 of 27 July 1968, on collection of the amounts paid in advance for the construction and purchase of dwellings, decree no. 515/89 of 21 April 1989 on Protection of Consumers regarding the information that has to be provided at a Purchase or a Lease of dwellings and statute no. 38/99 of 5 November 1999, which regulates, among others, the developer's responsibilities regarding defects of the building during the years following completion. Furthermore, Law 26/1984, dated July 19th, called General Law protecting Consumers and Users, and its later modifications, especially by Law 7/1998, dated April 13th and by Law 23/2003, dated July 10th is important as well as the Order of May 5th, 1994, modified by the order dated October 27th 1995, on Transparency of the Financial Clauses in Mortgage Loans.
- In **Portugal**, according to the Decree Law 267/94, of 25.10.1994, the seller is responsible to the same extent as a developer, if he also constructs the house. According to Art. 1225 of the Civil Code, the seller is liable for damages in respect of certain defects during five years, if he has also constructed, repaired or modified the building. According to Art. 29 Decree Law 12/2004 of 9.01 the conclusion of a contract in respect of construction activity must be in writing and contain certain mandatory regulations.
- In **Austria**, the Building Promotion Act („*Bauträgervertragsgesetz*", *Bundesgesetzblattnummer durch 7 idF Bundesgesetzblatt 1 Nummer 1999 durch 72*) governs the sale of housing, apartments and business premises yet to be constructed.
- In **Germany**, the "*Makler und Bauträgerverordnung*", a special Ordinance dealing with risks from contracts with brokers and property developers applies, if a property developer

("*Bauträger*") not only constructs, but also sells houses and apartments.

Countries without specific rules:

- In **England** and **Scotland** newly constructed properties are governed by the same laws as ordinary conveyancing. Each building company uses its own standard-form contract. However, most builders are members of the National House-Building Council (NHBC) which provides a Buildmark warranty. In **Scotland**, a governmental task force recently expressed disquiet about the provisions of some builders' contracts and recommended the introduction of a voluntary code, to be reinforced, if necessary, by legislation.
- In the **Netherlands**, the contract is a mix of the contract of sale for the ground (Title 1 of Book 7 BW) and the building contract (aaneming van werk, Title 12 of Book 7 BW). According to Art. 7:8 BW in case the buyer is a consumer Art. 7:767 and 7:768 BW, referring to payments are imperative law. These specific rules on consumer protection have only entered into force on 9th of January 2003.[48] In the absence of special provisions before that time, the *Garantie Instituut Woningbouw* (GIW) had been established in 1969 following the example of the British National House-Building Council.
- In **Italy**, there have not been special rules in the past and legislation under the influence of French law is being enacted at present. With Law No. 210 of 2 August 2004, within 28 February 2005, the government must introduce regulations protecting purchasers' property rights where premises are awaiting construction by businesses.
- In **Greece**, there are no special rules, if a promoter agrees to construct a house on the sold land. The general provisions regarding the contract of sale and the contract for services are applicable.
- In **Sweden**, the rules on construction are treated separately from the conveyancing of the land and there is no collected agreement. Sale of land follows the normal rules in the Land Code. The main legislative source for construction of single family houses on behalf of private persons is the Consumer Services Act – *konsumenttjänstlagen* (1985:716); sec. 51-61, as amended 1/1/2005, deal directly with the construction of single-family houses. The Construction Defect Insurance Act – *lagen om byggfelsförsäkring m.m.* (1993:320) is mainly aimed at protecting the consumer from losses due to the insolvency or other economical inability of the contractor. Standard contracts are of particular importance.
- In **Finland**, when a house is sold together with land or a land lease, the 1997 Code applies to the transaction. Most new-apartment sales consist of sales of housing-company shares. The first statute to regulate these transfers is the Housing Transactions Act from 1994, which entered into force in 1995 and was already amended in 1997 with more changes forthcoming in 2005.
- In **Poland**, Art. 9 of the Law on the Ownership of Premises regulates the sale of future premises from a developer. The sale of future houses by private developers is not regulated by law. The law dated 15 December 2000 on Housing Co-operatives regulates the sale of future premises and houses by co-operatives. The main objective of a draft law on the protection of buyers in development contracts, which is being elaborated by the Ministry of Infrastructure, is to secure the funds paid by future owners before the delivery of the premises.

5.1.2. Influences of EU law

In the majority of countries there has been some influence by existing EU-legislation and the

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48 Cf. *Eule*, in: Frank/Wachter, Handbuch Immobilienrecht in Europa, 2004, p. 720.

unfair terms directive in particular (Austria England, Germany, Greece, Italy, Poland Scotland, Spain), whilst in other countries there has been no such influence (Belgium, Finland, Netherlands, Sweden).

5.2. Procedure in general

The procedure is determined by the general provisions of the law of conveyancing on the one hand and the particular provisions in protection of the buyer on the other hand. Even though there are parallels between the approaches of some countries, there seem to be many differences in detail. In principle the same rules apply for the sale of an apartment in a condominium and in cases of renovation (at least if the renovation has a relevant economic value).

- In **France**, there is a distinction drawn between a contract of a future sale (*vente à terme*) and a sale of the future state of completion (*vente en l'état futur d'achèvement*). The former instance is hardly ever used in practice.[49] According to the sale of the future state of completion the seller immediately transfers his rights as to the land and the property of existing constructions to the buyer, future parts of the building become automatically the property of the buyer. The rules applying to the contract are mandatory, if it (also) refers to housing, irrespective of whether the seller is acting as a professional. The payments are made in instalments in proportion to the progress of the building, whereas the exact rates are laid down in Art. L 261-11 of the building and housing code. In principle the rules in French law are identical for the sale of single houses and under the co-ownership system whilst some adjustments are necessary in respect of the relation of the instalments to be paid. The sale of property undergoing renovation can be qualified as sale for future property, if the works to be carried out on the existing property can be likened to building. The contract must also include for the protection of the buyer a guarantee of completion of the construction works or for the reimbursement of payments made in the event of dissolution of the contract or in case the building remains unfinished. In respect of latent defects, for which there is a liability during a period of two or ten years depending on the nature of the defect, the seller must have an insurance policy for damages.
- The **Belgium** "Breyne Law" from 1971 applies to the sale of private houses and/or apartments to non-professionals before or during the course of erection, as well as agreements by which a constructor undertakes to erect, to make erect or to provide a house or an apartment. Similar to the sale of the future state of completion in French law, the title to the land and the existing constructions is transferred to the buyer with the conclusion of the contract.[50] When the notarial deed is executed, a payment may be demanded to the amount of the value of the plot of land and the works already done. Further payments may be demanded according to the progress of the construction. The value of the state of the house is approved by an architect. The Breyne Law applies to the construction of single houses, condominiums, as well as in case of renovations. There is liability for latent defects for a period of up to 10 years covered by insurance.
- In **Spain** the general procedure of a sale contract of dwellings by a developer does not differ from an ordinary sales contract. Normally the purchaser pays an initial amount, which for the seller serves as guarantee that the flat is irrevocably being purchased. A private contract is signed in that moment and is usually drawn by the developer, although he is under obligation to comply with all the requirements as to consumer protection. The rest of the price is usually paid at the moment when the notarial act is signed. The legal regime regarding consumer protection is the same, if the sold property forms part of a condomin-

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49 On the following cf. also *Frank*, in: Frank/Wachter (see above fn. 48), p. 317 ss.

50 *Frank*, MittBayNot 2001, 113, 124; *Kocks*, in: Frank/Wachter (see above fn. 2), p. 48.

ium association and in case of the building's renovation, if it has a relevant economic value. There are guarantees against defects of the building, which have been introduced by the Law on Construction, dated November 5th 1999.

- In **Portugal**, the parties may conclude a contract of sale of future property. As the title of transfer can only be concluded when the property is completed, the promise of sale and purchase contract is of greater importance than for finished properties. With the signature of this contract, a down payment is made (10-15 %). The buyer can also buy the land and conclude a contract with the construction company to build the house. In this situation, the protection of the buyer is better, as he gets ownership of the land immediately and the price might be paid in the moment of acceptance of the building. In case of the sale of an apartment in a condominium, the builder would ask for a provisory registration of the deed constitutive of the condominium, which keeps in force for three years.
- In **Italy**, there are currently no specific rules. The general rules on sales and preliminary agreements and the general provisions of Art. 1469 et seq. of the Civil Code on consumer contracts and illegal clauses would apply. In practice, there will either be an agreement for the sale of a future item (with the transfer of title taking place when the item comes into existence, Art. 1472 of the Civil Code) or a preliminary agreement. There are no differences in respect of the sale of an apartment or in case of renovations.
- In **Austria**, the Building Promotion Act provides for a number of different approaches to secure the buyer's interests in case of advance payments. The buyer may transfer the purchase price to an escrow agent, who makes payments to the seller according to a payment schedule. Alternatively, the buyer's interests and rights may be secured by recording of title, in which case payments are also made in accordance with the progress of the building. Furthermore, there is the possibility to deposit a bank guarantee with the escrow agent (in respect of repayments or the completion of the building) or to enter a mortgage on a different real estate in order to secure the buyer's rights. In principle, the same rules apply for the sale of an apartment in a condominium and in cases of renovation.
- In **Germany** the MaBV demands certain requirements to be met, before the payments may become due. Accordingly, the contract must be valid, all necessary permits must be given, a priority notice on behalf of the buyer must be entered in the land register, a necessary building permit must be granted, furthermore, it must be ensured that the buyer acquires the property free from existing encumbrances. Alternatively, the seller may grant a guarantee covering the risks of repayment and liability for defects (§ 7 MaBV). The payments may only be demanded according to a payment schedule fixed in the MaBV. In principle, the same rules apply, if the seller constructs apartments within a condominium. The provisions of the MaBV are also applicable, if the seller renovates the house or apartments, unless the construction works are insignificant.
- In **England** builders invariably adopt their own conditions which need approval by the Land Registry in relation to lotting and mapping. Reference is made to a LR approved plan and there is a procedure for searching by plot number. The buyer needs to check the specification of works, planning permissions, building regulations certification, the buildmark (or equivalent guarantee), that the standard terms comply with lender's requirements. It is most common to pay a deposit and the balance on completion. In case of a condominium the developer will have to consider whether to set up a leasehold scheme or a commonhold. The same applies, if a builder has bought an old house, which he wants to renovate and split up into several apartments.
- In **Scotland**, building companies always contract on their own standard terms. Sometimes the buyer signs without legal advice, but even if legal advice is taken, builders are reluc-

tant to alter their standard terms. The contract is not subject to any special regulation. Nor are there warranties for material defects, although case law requires builders to do their work competently. A deposit is usual and is paid at or shortly after conclusion of the contract. The remainder of the price is due –as is standard with sales contracts- on the date of entry. There are no differences in cases of sale of an apartment or renovation.

- In the **Netherlands**, the contract must be in writing, if it is a consumer contract. Usually the builder makes use of a standard form, like the one provided by the GIW. After the buyer received a copy of the contract he has three days to withdraw, the GIW standard form even allows him a week to think it over. The seller may demand payments according to the progress of the construction works, the contract cannot stipulate that the buyer will pay more than 10 % of the purchase price in advance. The buyer has the right to keep 5 % of the last instalment in deposit with the notary as guaranty for good repair of defects by the builder. The same rules apply for condominiums. In case of renovations, the general rules of Art. 7:750-764 BW are applicable.
- **Swedish** law treats the construction agreement as two separate contracts. The Land Code governs the sale of the undeveloped land and the subsequent construction is seen as a consumer service. Standard contracts have always been unusually important in the construction business. Construction work on single-family houses is covered by ABS 95, which has been written after negotiations between the Consumer Agency and the building business. Rules in ABS 95 that are of disadvantage for the consumer compared with the statutory regulation cannot be set aside. The consumer only has to pay for work already done. A mandatory insurance covers costs of defects in the construction of a building, in material used and the repair costs. Condominiums do not exist. The closest things are co-operative apartments.
- In **Finland**, there are some differences between the provisions on defects in the Code and those in the Housing Transactions Act. New apartments in a housing company are usually sold during the construction stage. In one typical arrangement, the construction company sets up a housing company, with which it enters into a construction contract. The housing company pays the construction company by, for example, taking a bank loan and then repays the bank with payments from homebuyers, who purchase the company's shares. The founding shareholder of the housing company retains ownership to the shares until their price is fully paid. The founding shareholder together with the housing company and the lender bank cooperate in a contractual arrangement known as the "RS-system". At the core of the RS-system are the so-called "safekeeping documents", which the founding shareholder must deposit. By looking over the safekeeping documents a potential homebuyer can calculate the viability of the investment. The second core part of the RS-system concerns securities to be put up by the founding shareholder. In renovation cases the Housing Transaction Act applies as usual, if the construction company carries out the project by acquiring all or a substantial part of the housing company's shares.
- In **Greece**, the contract of sale as to land requires a notarial act. The construction contract is signed by the contracting parties together with the contract of sales, in which it is mentioned and of which it forms a part. No special rules apply in case of the sale of an apartment (except that horizontal property needs to be established), nor in case of renovations.
- In **Poland**, for the sales contract to be valid, the developer must be the owner of the land, he must have a building permit, the contract should be executed in the form of a notarial deed, it should be registered in the mortgage register. In case of housing co-operatives the contract for the building of the apartment should be executed in simple written form and must contain certain clauses, as the description of the premises, the terms of calculating construction costs, payment schedule etc. No different rules apply in cases of renovation.

5.3. Conclusion of the Contract

In some countries the contract requires a **notarial act** (France, Germany, Greece, Poland), in other countries the contract must be in **writing** (Austria, Finland, Italy, Netherlands, Portugal) whilst in the remaining countries the written form is common. Very often the contract must specify the description of the building, plans of the construction and also other important information.

Sometimes a preliminary contract is concluded in accordance with the general law of conveyancing combined with a **down payment** between 5 % (Belgium, France) and 10-15 % (Spain).

Normally, there is neither a waiting period, nor a general right to withdraw.

- In **France**, a seven-day let-out clause is granted to non-professional buyers either after the conclusion of the preliminary contract or before signing the notarised deed.
- The **German** provision of § 17 par. 2a BeurkG stipulates that the buyer must receive a draft of the contract two weeks before concluding the notarial act.
- In the **Netherlands**, a consumer can dissolve the contract within a period of 3 days.

- In **France**, special mandatory provisions apply to the conclusion of the contract. If the parties conclude a preliminary contract, the building and housing code provides for mandatory rules. The preliminary contract obliges the seller to reserve a dwelling unit and the buyer to pay a deposit of no more than 5 % of the price. The actual contract must be certified by a notary, who sees that all legal requirements are met, and it must specify inter alia the description of the property sold, the amount of consideration, the method of payment, the delivery date, as well as the guarantee of completion and the financing of the buyer. To non-professional buyers a seven-day let-out clause is granted either after the conclusion of the preliminary contract or before signing the notarised deed.
- In **Belgium**, unlike in French law a sale of private houses before or during the course of erection does not require a notarial act. Nevertheless, the Breyne Law seems to assign important functions to the notary in addition to the registration of the conveyance. If a preliminary contract is concluded the down payment may not exceed 5 % of the total price. The contract must specify inter alia the identity of the owner of the sold land, the building permission, the mode of payment and in an appendix the plans of the building.[51]
- In **Spain,** there are no differences with the general assumptions for the sale of real properties, except for the provisions of the regulations on consumer protection. However, the contract must specify the offeror, the object of sale and an exact description of the building and also in an appendix plans of the location and the construction (according to the Royal Decree 515/1989).[52]
- In **Italy**, according to the general rules for the conclusion of a real property agreement a written document is required both for the preliminary agreement and for the final agreement.
- In **Portugal**, according to Art. 29 Decree-Law 12/2004, of 9.01., the conclusion of the contract must be in writing. The contract must mention inter alia, the identification of the parties, the identification of the property (including a copy of the plan of the specific property) and due dates for completion of the building.

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51 *Kocks*, in: Frank/Wachter (see above fn. 48), p. 49.

52 *Frank*, MittBayNot 2001, 113, 121 ss.

- In **Austria**, the contract has to be written. The contract must determine inter alia the object of sale, the purchase price and the person of the escrow agent. Furthermore, a description and plans of the construction have to be included in the contract (§ 4 BTVG). The buyer has the right to withdraw from the contract in case he has not received before signing the essential information regarding the contract, or in case essential provisions of the Building Promotion Act have not been fulfilled.
- In **Germany**, the contract requires a notarial act. The contract must include a description of the construction and normally plans of the building. The buyer has no right to withdraw from the contract. However, § 17 par. 2a BeurkG stipulates that the buyer must receive a draft of the contract two weeks before concluding the notarial act.
- In the **Netherlands**, the contract must be in writing. A consumer can dissolve the contract within a period of 3 days.
- In **Sweden**, written form is not necessary, but common, as there is a burden of proof-rule in favour of what the consumer claims to have been agreed upon. Down payments are not possible in a consumer contract.
- In **Finland**, according to the Housing Transactions Act the contract of sale must be made in writing, if it is concluded during the construction stage. Otherwise, the contract is not binding on the buyer. Starting from 2005, the Housing Transactions Act lays down minimum contents of the contract, including the object (information about the housing company, shares, and apartment), the parties, the price and terms of payment, securities and selected statutory rights of the buyer.

5.4. Payment

5.4.1. Payment date

Time of payment:

- In a number of countries **down payments** are common (Belgium, England, France, Italy, Portugal, Spain).
- Often, the balance is paid at once on **completion**, on entry or on the execution of the necessary notarial act (England, Portugal, Spain, Scotland).
- However, in the majority of countries payments are made in **instalments according to the progress of the building** (Austria, Belgium, Finland, France, Germany, Greece, Netherlands, Poland, Sweden). Normally, there are mandatory regulations providing for a detailed payment schedule or general limits in respect of the single instalments, which may not exceed the value of the existing construction (Austria, Belgium, Finland, France, Germany, Netherlands).

The payment is usually made **directly to the seller** or, if the construction is financed by loan, to the seller's bank.

- In Austria, payment is usually made to an **escrow agent** upon signing of the contract or fourteen days after, who in turn forwards the money to the developer according to the payment schedule. Similarly, in Scotland, the money is usually paid to the builder's solicitors.
- Sometimes a small amount of the last instalment is kept in deposit as security for repair of defects (Finland: 2 %, Netherlands: 5 %).

If a notarised deed is required, it has, as a rule, executory force.

5.4.2. Securities (cf. also under 5.5.3)

There are mandatory guarantees or insurance for the buyer in France, Belgium and Spain in respect of the completion of the building and/or the reimbursement of payments. However, the standard of those securities seems to differ. In most of the countries, there are no mandatory guarantees or insurance providing for claims against third parties (England, Greece, Italy, Netherlands, Poland, Scotland). In Germany, a suretyship (normally from a bank) is required only if the parties agree upon payment to be made before the buyer's notice is registered in the land register. Under the Austrian Building Promotion Act there is the (alternative) possibility to secure the buyer's interests by depositing a bank guarantee with the escrow agent. In England and Scotland most builders are members of the National House-Building Council, which provides for a Buildmark warranty, and banks are reluctant to lend money on security of a new house which is not covered by such a scheme. The same applies in the Netherlands under operation of the GIW.

- In **France**, the contract of sale of the future state of completion must include for the protection of the buyer a guarantee of completion of the construction works or for the reimbursement of payments made in the event of dissolution of the contract or in case the building remains unfinished.
- In **Belgium** the seller has to provide for a security of 5 % or 100 % of the value of the building, depending on whether he is "recognised".
- In **Spain**, if the purchaser pays a share of the price in advance (so as to purchase a dwelling) during the construction, the developer, on receiving these amounts, has the legal obligation to guarantee their repayment (plus 6 % annual interest) for the event that the construction does not begin or is not correctly completed in due time, through an insurance contract signed with an authorised and registered insurance company. Additionally he must deposit these advanced sums in a special bank account, separated from any other kind of funds.
- In **Finland**, under the RS-system and according to the Housing and Transaction Act the founding shareholder has to put up security for the benefit of the individual share buyer. The securities must be used primarily to compensate losses to the housing company.
- In **Sweden**, the standard contract ABS 95 states that the constructor shall have a comprehensive insurance, valid during the construction and two years more. If such an insurance is not taken by the constructor, the ordering customer can take it at the cost of the constructor.

5.4.3. Acquisition of Ownership

In most of the countries, the right of ownership is not transferred before the construction is completed and the payment is made (e. g. England, Finland, Germany, Greece, Scotland Spain, Sweden).

- On the other hand, in Belgium, France and Portugal (except for the contract of a future sale), the seller immediately transfers his rights as to the land and the property of existing constructions to the buyer, future parts of the building become automatically the property of the buyer.
- In Germany the future ownership of the buyer is ensured by the entry of a priority notice in the land register. The same may apply in Austria depending on the kind of security chosen by the parties.
- In a number of countries, a special investigation is made by the notary, solicitor or other lawyer in respect of encumbrances and legal defects of the title (England, Greece, Netherlands, Scotland).

The mortgage on behalf of the seller's bank is often released at the time of the payment of the purchase price.

5.4.4. Financing of the Buyer (questionnaire 5.4.5.)

It seems to be general practice that the **buyer** normally sets up a **mortgage** on his future property, in order to finance his purchase. However, in most countries the mortgage can only be established after the transfer of land has taken place or after the premises have been created (e. g. Belgium, Scotland, Netherlands, Poland, Portugal).

- Therefore, the period between disbursement of the loan for the payment of the purchase price and creation of the mortgage has sometimes to be filled in by loan repayment insurance (Poland) or by way of a personal security (Portugal).
- In Scotland the bank releases the money slightly earlier to the transfer of property and the registration of the mortgage, in time for the buyer to use it to pay the purchase price.

Likewise, it is common that the **developer takes out a mortgage** in order to finance the construction. The buyer may therefore offer the purchaser the possibility to surrogate the loan (as in Italy or in Spain) or the bank of the seller may promise to release its (prior) security against payment of (parts of) the purchase price (as in Belgium or in Germany). This may require complex legal arrangements involving both parties to the contract as well as their banks.

5.5. Builder's Duties - Protection of Buyer

5.5.1. Description of the Building

In a number of countries, the contract must specify the description and sometimes also plans of the construction (Austria, Belgium, France, Germany, Greece, Italy, Netherlands, Spain). In other countries a technical description and architectural drawings are common (e. g. Poland or Sweden). In Scotland, except for apartments, the description is of the land rather than of the building, which is sufficient for the contract; by the time that the disposition is being prepared the house is usually complete. In Portugal, according to the new regime of construction activity the contract must mention the identification of the property and include a copy of the plan. In Finland, technical specifications of the building are included among the safekeeping documents under the RS-system and become part of the individual contracts of sale.

5.5.2. Late Termination of the Building

In most countries the contract normally provides for a fixed time for the termination of the building and possibly a penalty against the seller in case of delay (Austria, Belgium, Germany, Greece, Italy, Netherlands, Poland, Spain, Sweden).

- In France, the contract of sale of future property must determine a precise time period for the termination of the building. Apart from events of *force majeure*, bad weather or the buyer's intervention the seller is liable if the deadline is exceeded.
- In Portugal the contracts usually provide for an exact date, when the building must be completed; according to the new regime of construction activity, the contract must mention due dates for completion of the building.
- In England and Scotland it is unusual for builders to commit themselves to a firm completion date, but it is an implied term that the building must be completed within a reasonable time (in Scotland).

5.5.3. Material Defects

In most countries a distinction is drawn between **latent (hidden) and open defects**, which

have to be asserted by the buyer at the time of an acceptance inspection or within a short period after change of possession. The prescription period sometimes differs according to the kind and weight of the defect.

In a number of countries, the seller has to procure adequate **insurance** at his expense, which may refer to different kinds of defects (Belgium, France, Sweden) or only to substantial defects (Spain). The guarantees under the British NHBC or the GIW in the Netherlands also cover structural and other major defects. Often the general remedies regarding sales and construction apply to material defects (e. g. Austria, Germany, Greece, Italy) which may, however, be mandatory in a consumer contract (as in Germany in respect of the building works). In Austria, the buyer has a statutory claim against third parties, in case the builder goes bankrupt or warrant claims cannot be brought forward against him.

- In **France**, there is a liability in respect of latent defects during a period of two or ten years depending on the nature of the defect and for defects, which are patent within one month after change of possession, if asserted within a year afterwards.[53] The seller must also have an insurance policy for damages. The buyer may deposit the last instalment on a frozen account until the defect is removed.
- In **Belgium**, after the completion of the building, a meeting at the new construction is scheduled ("*voorlopige oplevering/reception provisoire*"). Liability for apparent defects, which have not been notified, will extinguish afterwards. A year later there will be a final completion of the building. The architect and the constructor remain liable for any substantial defects to the building for a period of 10 years and for minor defects for a period between 6 months and 2 years. The constructor has to procure and maintain an adequate insurance at his expense.
- In **Spain**, the developer and the experts involved in the construction are responsible during a 10 year term for the damages which may affect the building's structure, during 3 years for the physical damages due to defects of the building's elements or of the installations, which could make it uninhabitable, and during 1 year, for damages in the small completion facilities and components. In addition, insurance is required to cover the liability for structural damages during the first 10 years. The Notary has to verify that this insurance policy has been contracted in order to sign the notarial act authorising the declaration of new construction executed by the constructor.
- In **Sweden**, after the completion the constructor guarantees the quality for a period of two years. When the guarantee period has expired, the constructor is responsible for defects that stem form his negligence during another eight years. A mandatory insurance covers costs of defects in the construction of a building, in material used and repair costs.
- In **Portugal**, the developer is not responsible for the defects of the work, if the acquirer knew them and accepted the building without reservations. The acquirer can claim for the elimination of the defects. If they cannot be eliminated, the acquirer can demand a new construction, except if the costs are not proportional. Furthermore, if the building is not repaired or reconstructed, the acquirer can demand a reduction of the price or rescission of the contract, if the defects prevent the building to be used for its normal function. He is also entitled to claim damages.
- In **Italy**, the general remedies regarding sales and construction will apply to material defects.

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53 *Frank*, MittBayNot 2001, 113, 119.

- In **Austria**, the general provisions of the ABGB do apply in cases of material defects.[54] The limitation period for the general warranty for material defects is three years. The buyer may have claims against third parties in case the builder goes bankrupt or warrant claims cannot be brought forward against him (§ 16 BTVG).
- In **Germany** the general provisions of the BGB relating to the contract for services apply to material defects. These rules are mandatory in a consumer contract. The bank surety according to § 7 MaBV may be used, if the defects are claimed at termination of the building at latest. In practice, the seller often assigns his claims against third persons to the buyer, which does not debar the buyer from his rights against the seller.
- In **England**, there is generally a short period during which the builder must remedy defects and a longer 10 year guarantee period. In **Scotland** there is a claim against the builder, usually for damages, which is subject to a prescription period of five years from the date when the buyer discovered (or ought reasonably to have discovered) about the defect, but subject to an overall limit of 20 years. If the builders are members of the NHBC, there is also a Buildmark warranty. This allows direct recovery from the NHBC in respect of structural and other major damages.
- In the **Netherlands**, for material defects in the building the rules of Art. 7:756-762 BW apply. The buyer has to check the building for defects on the day of completion. The builder is after the check not liable for defects the buyer should have noticed. For hidden defects the buyer has to claim as soon as possible. For hidden defects known to the constructor there is a term of limitation of 20 years. Usually the GIW guarantee will also be applicable.
- In **Finland**, in case of defects, the buyer may withhold payment, demand that the seller repairs any defect, claim compensation of loss sustained and (if rectification is not performed) claim a reasonable price reduction or cancel the transaction if the breach is significant. Within twelve to fifteen months from the building inspector's approval, the seller must organise a one-year inspection, where all defects are recorded in minutes. Afterwards, the seller is only liable for later-discovered latent defects for a period of ten years.
- In **Greece**, according to the general provisions of the contract for services the buyer is entitled to claim either reversal of the selling or the reduction of the price. For the real estate, the time for the limitation of actions is two years from delivery.

5.6. Builder's Insolvency

5.6.1. Unfinished Building

In most countries the buyer is protected only insofar as according to a mandatory instalments schedule or the usual contractual arrangements payments cannot any more be demanded (e. g. Austria, Germany, England, Netherlands, Scotland).

- There are external guarantees that also cover completion of the construction in France, in Sweden (in case of a single-family house) and in Belgium (where "recognised" sellers and building contractors are obliged to give a security of 5 % of the value of the building, "non-recognised" sellers a security of 100 %) and mandatory guarantees for repayments in Spain.
- In England, Scotland and the Netherlands the NHBC or GIW will complete the building or return the money paid, if the builder is a member. In practice, the bank of the seller may also take care that the building is completed (as it is often the case in Germany).

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54 *Grötsch*, in: Frank/Wachter (see above fn. **Fehler! Textmarke nicht definiert.**), on pg. 892.

5.6.2. Repayment

In most countries, the buyer is entitled to participate in the bankruptcy proceedings only as a bankruptcy creditor. The success of the claim therefore depends on the existence of assets on the part of the seller. As was mentioned before, in some countries there are mandatory guarantees or insurance in respect of the completion of the building or the repayment of the money.

However, it seems that nevertheless there is no specific protection in case of dissolution of the contract. The rescission of the contract would also terminate guarantees under the NHBC or the GIW. In Germany, according to a recent judgement of the Supreme Court the buyer may demand repayment from the seller's bank, if it has received the payments on behalf of the seller.[55] The bank surety according to § 7 MaBV also covers repayments.

[55] BGH ZfIR 2005, 313.

6. Private International Law

6.1 Contract Law

For most countries, the applicable law on contracts concerning real property is governed by the Rome convention of 1980, which admits choice of law and, failing such a choice, declares applicable the lex rei sitae. To the extent that there are no internationally mandatory domestic provisions, the form of the contract must observe either the lex rei sitae or the lex loci actus.

6.1.1. Conflict of Laws Rule

For all European states parties to the Rome convention of 18 June 1980 (Belgium, Denmark, France, Greece, Germany, Italy, Luxembourg, the UK and Ireland, the Netherlands, Portugal, Spain, Austria, Sweden and Finland), the applicable law on contracts concerning real property is governed by the rules of that act.

Art. 3 para. 1 Rome Convention generally allows the choice, by the parties, of the law (professio iuris) applicable to contractual obligations, including sales of real property. However, in States such as Germany in which property is not transferred by means of the sales contract alone but only through a second agreement with effect in rem, the latter agreement, the transfer contract, is not covered by Art. 3 para. 1. This implies that the sales contract and the real property transfer contract may be governed by different laws (dépecage). Conversely, in Italy where the sales contract alone entails the transfer of property, the lex rei sitae covers only the real effects of the agreement (including the notion of property, i.e. notably the distinction between real property and chattels), whereas the contractual obligations may be governed by a different lex contractus chosen by the parties. These complex problems are avoided by some States not yet members to the Rome Convention such as Hungary and Poland which do not admit choice of law for contracts related to real property in the first place

In the absence of the choice of the applicable law by the parties, the Rome Convention contains in Art. 4 para. 3 a (rebuttable) presumption in favour of the application of the lex rei sitae. This does not apply, however, if the contract is more closely connected to another State (Art. 4 para 5).

6.1.2. Formal Requirements

Formal requirements affecting the obligation to transfer real property are governed by Art. 9 Rome Convention. According to Art. 9 para. 1, it is sufficient for the validity of the contract if the formal requirements of either the lex contractus or the lex loci actus (i.e. the place where the contract has been celebrated) have been observed. This principle is however derogated by Art. 9 para. 6 according to which contracts related to real property are governed by the mandatory formal requirements of the lex rei sitae ("*loi de police*"). Whilst land registration is always governed by the law of the country of the register, the form of a contract is regulated in mandatory provisions only in a minority of States examined here, e.g. in Greece. To quote the German example, the provision of § 311 b BGB requiring a notarial act is not, according to the dominant view, internationally mandatory in that sense. As a consequence, if a contract on the sale of land situated in Germany is concluded in Austria in writing, the contract would be valid, since according to Austrian law in contrast to German law the written form is sufficient to establish an obligation to transfer ownership in land.

6.2 Real Property Law

The *lex rei sitae* rule applies to the transfer of immovable property without any exception everywhere in Europe. In addition, many states insist on the respect of domestic formal re-

quirements whereas for others observance of the lex loci actus is sufficient.

6.2.1. Conflict of Laws Rule

The real property law side of land transactions is not governed by the Rome Convention on the law of contractual obligations in its present shape. However, the *lex rei sitae* rule applies to the transfer of immovable property without any exception everywhere in Europe, and is stipulated also in the draft of the forthcoming Rome II-regulation.

6.2.2. Formal Requirements

Unlike for the sales contract, in most States there are mandatory provisions hindering the registration of real property on the national land register if the act of transfer took place in another State. Thus, in Germany and in the Netherlands, only acts of transfer carried out by a national notary are considered valid (§ 925 BGB, BW 3:89). In Italy, only acts prepared or deposited by local notaries may be registered. Conversely, in England, Scotland, Sweden and Finland where no particular formal requirements apart from a written act exist, respect of the lex loci actus is sufficient. The same has been recognised in a remarkable decision of the Polish Supreme Court in early 2004.

6.3 Restrictions on Foreigners acquiring Land

Whilst a minority of European states still practise restrictions on the acquisition of land by third country nationals, as regards EU nationals, restrictions have been abolished everywhere except in the accession States Hungary and Poland where they persist only for agricultural land and second homes for transitional periods.

6.3.1. Restrictions limited to Foreigners

The European picture of restrictions on foreigners acquiring land is diverse. In the majority of countries including England and Scotland, France, Germany, the Netherlands, Portugal, Finland and Sweden no such restrictions exist at all. In Italy and Spain, restrictions exist in alleviated forms (with exceptions e.g. for persons having their residence in the State in question since a certain period of time) for third country nationals whereas they have been completely abolished for EU nationals according to the mandate of the basic freedoms stipulated in the EC Treaty. In Hungary and Poland, such restrictions have also been abolished for EU nationals, but with a transitional period of 7 respectively 12 years for arable land, and of 5 years for second residences (Poland). In other States which have joined the EU already some years ago such as Austria, similar restrictions have already expired.

6.3.2. Other Restrictions

Other restrictions on real property transactions have already been described above at 1.6. Remarkable examples include Austrian restrictions on the sale of farm land recently declared unlawful by the European Court of Justice[56] and the notorious Greek requirement of permits for the acquisition of land in (large) border areas.[57]

6.4 Practical Case: Transfer of Real Estate among Foreigners

Case: Let us suppose that a couple of nationals of another EU Member State own a vacation home in your country. They consider transferring ownership either to their children (as a gift) or to another couple, who are nationals of the same Member State as them. If possible, the

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[56] ECJ Case C-302/97 (Konle – GrdStVG Tirol); 15.5.2003 – Case C-300/01 (Salzmann); Case C-515/99 (Reisch – GrdStVG Salzburg); 30.9.2003 - Case C-224/01 (Köbler – GrdStVG Vorarlberg); Case C-452/01 (Ospelt GrdStVG Vorarlberg).

[57] PAPACHARALAMPOUS/LINTZ, *Immobilien in Griechenland*, MittBayNot 2003, 464, 471.

parties want to conclude all necessary contracts in their state of origin. They ask a local lawyer/notary there to prepare the transaction. This lawyer/notary asks you about the easiest way for the parties to do this. What do you recommend – or what is considered to be best practice?

This case shows the persisting practical restrictions on real property transactions even within Europe quite clearly. Whereas it is in theory possible in many States that the contract be concluded abroad, basically all reporters strongly recommend to involve local notaries or lawyers. If the contract is to be concluded abroad, the only practicable alternative seems that thereafter the parties have the registration done by a local notary or lawyer and grant power of attorney to the buyer or the local notary/lawyer to complete the necessary steps in the country where the estate is situated. Yet, even in this alternative, several reports including the Italian one mention the danger of doubling the lawyers' and notaries' fees. As a result the easiest and cheapest solution would still be to carry out the whole transaction in the country where the estate is situated.

7. Mortgages

7.1. Definition and types of Mortgages

A mortgage is a real right in land created by the owner (mortgagor) entitling the mortgagee to payment of a certain sum of money out of the land with priority to other creditors on the forced sale of the property. Typically it is used as a security right.

In most European states, there is **only one type of mortgage**, usually an accessory mortgage (e.g. Austria, Finland, France, Portugal: *hipoteca*, articles 686 to 732 CC; Scotland, Sweden, Spain), although there might be several subtypes (e.g. Austria, Spain).

- Some legislations distinguish different types of mortgages. In particular, a **non-accessory mortgage** generally coexists besides an accessory type of mortgage (e.g. Estonia; Germany *Hypothek* and *Grundschuld*, §§ 1113, 1191 BGB; Hungary, Slovenia; in Bosnia-Herzegovina and Poland, parliamentary proposals to introduce a second, non-accessory type of mortgage have been introduced).
- In the **English** and Irish system, there are equitable mortgages besides **legal mortgages**.

a) Definition

The definition of a mortgage varies according in particular to whether the mortgage is accessory:

- In an accessory system, the mortgage may be defined as a **security right** in land securing a money claim. More precisely, one might talk about a right of preference to be paid in priority to other creditors on the forced sale of the property (e.g. article 2741 CC Italy).
- The German law (§§ 1113, 1191 BGB) describes the mortgage as a right to demand **payment of a certain sum of money "out of the land"** (both for the accessory and non-accessory mortgages). We have opted for this definition because it includes both accessory and non-accessory mortgages.

b) Types of Mortgages

Even if a legal system provides different types of mortgages, in this final report, for each country, we will cover only the most commonly used type of mortgage, unless stated otherwise[58]. That is:

- in England and Ireland the **legal mortgage**,
- in Germany the "**Grundschuld**" (§§ 1191 ss. BGB).

Just a brief remark concerning the types of mortgages not covered in this study:

- The **equitable mortgage** under English law may arise, if some requirement for a legal mortgage is missing (e.g. if the formal requirements of a legal mortgage are not met or if an equitable interest is mortgaged). To enforce an equitable mortgage, the mortgagee has to go to court. Thus an equitable mortgage is used only for short term or low risk lending.
- In Germany, the *Hypothek* is distinguished from the *Grundschuld* by its accessoriness. Banking practice clearly prefers the non-accessory *Grundschuld*. Thus, the *Hypothek* is used primarily for securing private creditors (in order to protect the owner against

[58] In internet, reports on mortgaging practice in Germany, the Netherlands and in Sweden from a seminar of EULIS on 25./26.9.2003 may also be found on the EULIS homepage (http://www.eulis.org/).

c) Statutory charges and forced mortgages

In all systems, there are other charges imposed by law. These charges, sometimes also called "**statutory mortgages**" or statutory charges are not covered by this report – neither are mortgages created by an enforcement procedure ("forced mortgage").

7.2. Setting up a mortgage

The requirements for setting up a mortgage generally are the following:

- A contractual mortgage (as opposed to a legal mortgage) can be created only with the **owner's consent** (generally an agreement between the land owner and the mortgagee).
- Often a specific **form** is required for the owner's declaration.
- **Registration** is a requirement normally for the creation of the mortgage, at least for opposing the mortgage to third parties.
- If the land register delivers a **mortgage certificate** (such as for certain types of mortgages in Germany, Sweden and Switzerland), the mortgage comes into existence only after the certificate has been handed over to the mortgagee.
- In an accessory system, the mortgage does not come into existence unless the **claim secured by the mortgage** also exists.

7.2.1. Owner's consent (Contract between owner and mortgagee)

In all European states, setting up a mortgage requires a declaration by the land owner (mortgagor), generally not merely a unilateral declaration, but an agreement between the land owner and the mortgagee (e.g. France, Germany, Portugal).

- This requirement distinguishes a contractual mortgage from a "statutory mortgage" or a mortgage created by an enforcement procedure ("forced mortgage").
- Even if the mortgage is called a unilateral contract (as in Greece), it still requires the consent also of the mortgagee.
- For registration however, proof of the declaration of the owner might be sufficient (and proof of the consent of the mortgagee might be unnecessary) (e.g. in Germany).

7.2.2. Formal Requirements

In most states, there are specific formal requirements for the mortgage. Often, the form is necessary only for the owner's declaration. Sometimes, the form is not a substantive requirement, but only a procedural requirement for registration:

- In most states with a Latin notariat, an **authentic instrument** is required for the mortgage to be valid (e.g. France, Netherlands, Poland – with some exceptions -, Portugal articles 714 CC, 80 n° 2 g CN, Spain, Switzerland).
- In some states with a Latin notariat, a **certification of the owner's signature** is sufficient for the creation of the mortgage (and required for registration only, not for the material validity) (e.g. Austria, Czech republic, Germany, Hungary, Slovenia). However, e.g. in Germany most mortgages are created by notarial instrument because only then the mortgage is enforceable without a court procedure.
- In England, Ireland and Scotland, the (legal) mortgage requires a **deed**, which must be signed and witnessed.
- In Sweden, **writing** is required for registration (whereas the mortgage itself is valid even if pledged orally).

In some systems, especially if the mortgage is accessory - for the loan contract also an authentic instrument is required (e.g. in Portugal article 1142 CC for loans of more than 20.000.- €).

7.2.3. Registration

As a common standard, the mortgage is **opposable to third parties only after registration**.

- In most states, registration is required for the creation of the mortgage (**constitutive effect**) (e.g. England, Germany, Netherlands, Poland, Scotland, Spain, Sweden). Some states require registration as a precondition for the creation of a mortgage, even though registration of the transfer of ownership in land is merely declaratory (Italy, Poland, Spain).
- In some states, however, the mortgage is valid even without registration. Registration is required only in order to take effect against third parties (**opposability**) (e.g. Belgium, France, Luxembourg).

The effects of registration have been shown in further detail under number 2.5.

no protection of bona fides acquirer in Sweden

Portugal: provisory registration before notarial instrument on the mortgage is made.

7.2.4. Traditio of the mortgage certificate

If the land register delivers a mortgage certificate (as it possible, if the parties choose so, in Germany for the *Grundschuld* as well as for the *Hypothek*, in Sweden and in Switzerland for the Schuldbrief), then the mortgage comes into existence only after the certificate ("*Grundschuldbrief*" or "*Schuldbrief*") has been handed over to the mortgagee.

7.2.5. Time and Cost (Questionnaire 7.2.4.)

According to the national reports, the following time and costs are usual for the creation of a new mortgage for 100.000.- or 300.000.- Euro respectively (securing a bank loan for residential purposes).

state	time for registration	lawyer's or notary's fees	land register fee	mortgage tax/ stamp duty	total mortgage cost
England	some days (less than 28)	not stated	60.- € 100.- € (40.-/70.- £)	none	
Finland			40.- € 40.- €	none	
France		550.- € 1.650.- € (0,55% + VAT)	50.- € 150.- € (0,05%)	615.- € 1.845.- € (0,615% land registration tax)	1.900.- € 4.500.- € *the total does not add up*
Germany		200.- € 500.- €	200.- € 500.- €	none	400.- € 1.000.- €
Ireland[59]		lending agency fee		0.- 300.- €[60]	

[59] source: Oasis website of the Irish government -

Italy		1385.- € 2.000.- € (mortgage of 200.000.- or 600.000.- €)	35.- € 35.- €	250.-€ 750.- € (0,25% of the loan)	*mortgage of 100./300.000.*
Netherlands		ca. 500.- ca. 600.- (excl. VAT)	95.- € 95.- €	3.- € 3.- €	600.- € 700.- €
Poland	a week up to some months (in the big cities)	165.- € 370.- € (non-residential purposes: 330.- 740.- €)	540.- € 1.540.- €	100.- € 300.- € (0,1 %)	805.- € 2.210.- €
Portugal		155.- € 155.- €	135.- € 135.- €	600.- € 1.800.- €	890.- € 2.090.- €
Scotland	some days	600.- € 1.800.- € (incl. VAT)	110.- € 355.- €	none	710.- € 2.155.- €
Spain				1.750.- € 5.250.- € ca. 1,5% - 2%	
Sweden	1-12 days	bank: 50.- € bank: 50.- €	40.- € 40.- €	2.000.- € 6.000.- € 2%	2.090.- € 6.090.- €

Remark: The figures in the table are rough estimates by the national reporters (rounded up or down for this table). If the national report indicates a broader range of costs, in the table we have shown the medium costs (unless the report states the most usual costs).

Because of legal and practical differences, the figures in the table are not fully comparable: E.g. some costs relate to fees fixed by statute, whereas for other costs only an approximate range can be given. Or the tax might refer to the loan, not to the mortgage (e.g. in Italy: here the mortgage might be double the amount of the loan).

Taking these precautions into consideration, some conclusions may be taken from the figures, even if the figures are not completely precise and comparable:

- The **time** for registering a mortgage seems to be somewhat **between 1 day and 2 weeks** in all European systems. The time seems to depend less on the different legal system or the type of land register, but rather on the **individual register**. None of the reporters reported a serious general problem with the time of registration; a few indicated problems with specific registers (e.g. big city registers in Poland, where registration might take up to some months).
- The total mortgage costs depend mainly on whether the state charges a **mortgage tax or stamp duty** (e.g. in Belgium, France, Greece, Spain or Sweden). In some states, the taxes have even wiped out mortgaging altogether (Greece). The state's decision to tax the creation of mortgages is based on fiscal reasons unrelated to land law.
- **Registration costs** vary considerably. Generally, however, they are lower than 0,2% or

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http://www.oasis.gov.ie/housing/buying_a_house_or_flat/costs_of_buying_a_home.html

60 Mortgages up 254.00.- € are exempt from the stamp duty. If the mortgage is greater, duty is charged at 1 euro for every 1.000.- € borrowed.

the mortgage value (only in Poland amounting to about 0,5% of the mortgage value). Countries with higher registration costs tend to have no or only a small mortgage tax – giving rise to the assumption, that in theses countries the registration fee also is intended to create some income for the justice system in general – whereas one might ask whether in countries with a mortgage tax, but with very low registration fees some part of the mortgage tax might be used also to finance the land register.

- **Lawyers' or notaries' fees** also vary. Interestingly, lawyers' fees tend to be higher, if a system does not fix the fees (e.g. in the Netherlands and Scotland – if compared with the figures for Germany or Poland). The reason probably is that with a statutorily fixed fee scheme, high value transactions subsidise transactions with lower value.
- Some national reports did not give figures for lawyers' fees, because usually mortgages are drawn up by the **banks** themselves. Only the Swedish report lists a (small) bank fee for that service. We could not verify whether the banks in these countries include the cost of drawing up the mortgage in the costs charged for the mortgage (i.e. the interest rate); however one would assume that they do so and that in these countries the borrower is charged more for the loan.

7.3. Accessory and non-accessory mortgages

7.3.1. Accessoriness and causality in general

In most countries **accessoriness is the dogma, non-accessoriness the practice**.

- In most European states, mortgages are **accessory**, that is their existence depends on the claim they are created to secure (e.g. Austria, Belgium, England, France, Portugal, Scotland, Spain, Sweden).
- Traditionally, only Germany and Switzerland had a **non accessory mortgage** (*Grundschuld* in Germany, *Schuldbrief* in Switzerland). However, non accessory types mortgage have been introduced recently in Estonia, Hungary and Slovenia. Draft legislation has been introduced in Bosnia and Poland. (In most countries, the non-accessory model comes as an additional type, not replacing the accessory model.) Also, the proposals for a "Eurohypothec" under European law always proposed some form of non accessory mortgage.
- Upon closer inspection, it can be seen that **accessoriness has been loosened in many systems**[61]: Some countries allow the accessory mortgage to secure „all money claims" (England/Wales and Scotland), an abstract promissory note (Sweden) (similarly also the Danish *ejerpantebrev*) or a current account (Spain). In other countries, special types of hypothec exist with relaxed accessoriness (*Höchstbetragshypothek* in Austria, *Bankhypothek* in the Netherlands, *hipoteca de máximo* in Spain).

In banking practice and in recent legislation, one may observe a **trend towards non-accessory forms** of mortgages.

In practice, also non-accessory (and even abstract) mortgages are used to secure a claim. The link between the mortgage and the secured claim is the **security agreement**. The security agreement stipulates under which terms the mortgagee may keep and enforce the mortgage.

a) Definitions

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[61] *Soergel/Stöcker*, EU Enlargement in Eastern Europe and Dogmatic Property Law Questions – Causality, Accessoriness and Security Purpose, Notarius International 2002, 236, 241. (For the original German version see: ZBB 2002, 412 = French version: Elargissement de la Communauté européenne aux pays de l'Est et questions dogmatiques soulevées par le droit immobilier – causalité, droit accessoire et objet du contrat de garantie, Notarius International 2002, 227).

Traditionally, one distinguishes between accessory and non-accessory security rights. Non-accessory mortgages are often also called "abstract" mortgages (because the German and the Swiss non-accessory mortgages were also abstract, not only non-accessory). However, one might distinguish:

- A mortgage is **accessory**, if the existence of the secured claim for money payment is a requirement for the creation of the mortgage: *Accessorium sequitur principale*. In civil law countries, the accessory type of mortgage usually is called "*hypothec*" (*hypothèque* in French).
- A mortgage is **causal**, if a claim for creating a mortgage is a requirement for the creation of the mortgage.

Traditionally, the notion of causality has used for the transfer of ownership, not for mortgages. In theory, causality is less than accessoriness, because it requires only that the mortgage is based on a valid *causa*, that is the obligation to provide a mortgage. In practice, however, at present there is no such distinction, because all causal systems are also accessory systems (with the possible exception of Sweden, which one might consider as a non accessory, but causal system).

However, the distinction might be important for the introduction of a common European **Eurohypothec**. Here, one might consider a **non-accessory, but causal system**[62].

b) Legal traditions

Until recently, you did not have to bother about non-accessoriness, unless you were talking about the German law.

- **Accessoriness** has been the underlying principle not only in the tradition of the **Code Napoleon**, but also in the **common law** and in the **Nordic systems** – as well as under the **formerly communist regimes**.
- Traditionally, only in the **German legal family**, **non-accessory mortgages** existed. Even here, in the Austrian system there is only an accessory mortgage and in the German system, the Civil Code (BGB) uses the accessory *Hypothek* (§§ 1113 ss. BGB) as the basic model on which the non-accessory *Grundschuld* (§§ 1191 ss. BGB) is based.

c) Mortgaging practice

However, the national reports clearly show that the traditional distinction between accessory and non-accessory mortgages tells only half of the story: There is an ample middle ground or grey area in between. **Accessoriness may be more or less strict**. Law in action, tends to be less strictly accessory than the law in the books.

Mortgaging practice, if given a choice, clearly **favours the non accessory models** or models with less strict accessoriness.

- If a legal system offers a choice between accessory and non-accessory mortgages, clearly the non-accessory mortgage type is favoured by the banking practice. E.g. in **Germany**, the hypothec (*Hypothek*, §§ 1113 ss. BGB) has become almost extinct in bank lending.
- In other countries, banking practice has developed less accessory types of mortgages – reflecting a preference by the bank. If an accessory mortgage is used to secure an "**all**

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62 compare the precited article of *Soergel/Stöcker* and the "Basic Guidelines for a Eurohypothec" 2005, drafted by a joint working group of different research groups (internet: http://www.fukrehip.pl/fukrehip_en/Default.aspx?tabid=134 or http://www.hypverband.de/hypverband/html/smartcms/index.cfm?fuseaction=showPage&pageid=187

moneys claim" (e.g. England, Scotland), a **promissory note** (e.g. Sweden) or a **current account** contract (e.g. Spain), it has become a non-accessory mortgage for all practical purposes but for the name.

For all practical purposes, an accessory system can be made non-accessory in the creation of the mortgage by allowing to base the mortgage on an abstract promise of money payment as the secured claim, which then would separate the mortgage from the loan contract.

- This option seems to be possible e.g. also in France (with a mortgage to secure an autonomous guarantee). However, it is not used there in practice. In France, practice seems to be happy with accessory mortgages.

On the other hand, the abstract mortgage systems in Germany and Switzerland are less abstract in practice: In practice, all mortgages are given for security purposes. There is an underlying claim which the mortgage is supposed to secure. However, the mortgage and the secured claim are not bound together by statutory concepts of accessoriness or causality, but by the **security agreement** (*Sicherungsvereinbarung*)

d) Legislative developments

The trend towards non-accessory mortgages has also been mirrored by the legislation in those states which had to reform their legal systems anyway:

- Recent **legislation in several reform states** in Central and Eastern Europe has introduced non-accessory mortgages (Estonia, Hungary 1996, Slovenia).
- In Bosnia-Herzegovina and Poland draft laws on non-accessory mortgages have been introduced in the parliamentary process).

7.3.2. Invalid Loan Contract and Right of withdrawal

The principle of accessoriness may apply more or less strictly. The distinction between accessory and non-accessory systems blurs further, when one considers the consequences of an invalid loan contract or of the right to cancel the loan contract in the various accessory systems.

- In most systems, the mortgage can be **registered even before the debt has come into existence**. The mortgage in itself does not come into existence, before the debt has come into existence. However the rank of the mortgage is determined by the registration (or the application for registration or the time of creating the mortgage), not by the time when the debt came into existence. Thus, when the bank hands out the loan, it knows already which rank the mortgage will get.
- If the loan **contract is invalid**, in an accessory system normally the mortgage is invalid, too (e.g. France, Portugal article 730 CC). In some accessory systems, however, the mortgage would still cover the mortgagee's claim to repayment if the loan has already been delivered (e.g. Scotland). Or even further, the invalidity of the loan contract might not do not invalidate the mortgage, but merely oblige the mortgagee to return the mortgage to the owner (e.g. Sweden).
- The consequences of a **consumer's cancellation or withdrawal** from the loan contract are not quite clear. In most legislations, the consumers' right to cancellation (e.g. in doorstep situations or in consumer credit) does not apply for mortgages[63] – precisely in order –

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[63] Compare the "Study on Mortgage Credit in the European Economic Area – Structure of the Sector and Application of the Rules in the Directives 87/102 and 90/88" (Final Report on Tender XXIV/96/U6/21) by *Lea/Welter/Dübel*, 1997.

as the Scottish reporter phrases it – "to avoid the problems thrown up by this question". So there is no case law to answer the question. However, most reporters agreed, that probably in the theoretical case of cancellation, recovery of any money already paid to the debtor would be guaranteed by the mortgage (e.g. Spain, Sweden). This would be an exception to the strict principle of accessoriness, if the right to cancel is construed as avoiding the loan contract.

7.3.3. Changing the secured debt

- In England and Scotland, with „all money's clause" the mortgage secures also future debts to the same creditor. Especially in Scotland, the „all money's clause" is very common. However, when the property is sold, usually the mortgage is paid back. The buyer then establishes a new mortgage.
- Some of the "middle ground systems" also allow to change the secured debt (e.g. Netherlands, Sweden) – which "of course" is impossible in a strictly accessory system and which "of course" is possible in a non-accessory system.
- Spain allows subrogation.

7.3.4. Independent/abstract promise of payment

The mortgage is enforceable only against the mortgaged land. The bank however might want to have the option also to enforce against the debtor's movables or income. This option seems to common in countries with Latin notarial system, but not existing in other countries.

- In **Germany**, when granting a mortgage (*Grundschuld*), in the same document the debtor usually also grants an **abstract promise of payment** (*abstraktes Schuldversprechen*, § 780 BGB) and submits to enforcement out of court also therefor. Thus the bank has the choice to enforce either the mortgage or the abstract promise of payment.
- A specific submission to enforcement is unnecessary, if the loan contract is made by an authentic act and if this **authentic act is enforceable by law** (as in most countries of the **Code Napoleon system**, e.g. in Belgium, France, Portugal).
- In the common law and the Nordic systems, the bank, unless by relying on the mortgage, cannot enforce its claim out of court. In Sweden, the mortgage might be based on a promissory note. However, the creditor cannot enforce the promissory note out of court.
- In some countries, an abstract promise of payment is unknown (e.g. Netherlands).

7.3.5. Mortgage for the land owner himself

Both the **non-accessory** (e.g. Germany) and the **middle ground systems** (e.g. Sweden) allow for a mortgage to be created for the land owner himself as both mortgagee and mortgagor – which "of course" is not possible in a strictly accessory system (because nobody can be his own creditor) (impossible e.g. in France, Portugal, Spain).

The practical importance is quite limited. Basically, the mortgage for the land owner is used in two situations:

- Either, the owner wants to **reserve priority** for a mortgage, but does not know yet who would be his creditor (and future mortgagee).
- Or the owner does not want to have the name of the mortgagee registered in the land register. He can **avoid registering the name of the mortgagee**, if he sets up a certificated mortgage for himself (*Eigentümerbriefgrundschuld*) which he may transfer without registering the new mortgagee.

7.4. Mortgagee's rights, in particular priority in enforcement

7.4.1. Money only: Capital and interest

In all countries, a mortgage is a real right for a **money claim**.

In some systems, the mortgage covers only the capital amount stated (e.g. Italy), in other systems, the mortgage may also bear **interest** (e.g. Germany). If interest is covered, in a forced sale usually only some years of interest payments enjoy the same preference as the capital (mostly around 4-5 years).

Generally, no other claims but **money** claims can be secured by a mortgage (or – phrased in a non-accessory system – can be content of a mortgage).

- Specific performance generally cannot be secured by a mortgage. Damages however usually could be secured by a mortgage.
- According to the *Trummer* decision of the European Court of Justice[64], free capital movement requires to open up mortgages to **currencies of other EU member states** (at least if any other currency is allowed).
- Often the currencies allowed for mortgages include also some other major currencies such as the US-Dollar or the Swiss Franc (e.g. in England any currency may be chosen; in Germany besides EU-currencies also the Swiss Franc or the US-Dollar).

Whether the mortgage includes **interest**, is important both for the mortgagee and for lower ranking mortgagees:

- If the mortgage includes interest, than in case of enforcement lower ranking mortgagees have to give priority not only to the capital amount of the higher ranking mortgage, but also to the interest – at least for the number of years, for which the interest may be claimed in the enforcement procedure.
- If the mortgage does not include interest, it is usual to set up a higher amount for the mortgage than for the loan in order to cover also the interest of the loan[65].
- In England, variable rate mortgages are prevalent (which causes a high instability in interest rates).

7.4.2. Enforcement Procedure: Forced sale or sale out of court

In most systems, the mortgagee can start the sales procedure without obtaining a court title first.

- The regular way to enforce a mortgage is by a **forced sale** (public auction) (e.g. Germany § 1149 BGB, Portugal).
- The common law countries also allow for a **sale by the mortgagee out of court** (England).
- Most systems forbid the *lex comisoria*, that is a contractual clause which would allow the **mortgagee to acquire ownership** in the mortgaged land instead of obtaining payment from a forced sale (Germany § 1149 BGB, Portugal article 694 CC).

Generally, the mortgage does not give a personal claim against the owner, but only a claim against or a **security in the land**. The personal obligation is only the secured claim. Eco-

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64 ECJ 16.3.1999 – case C-222/97 (*Trummer und Meyer*), Rep. 1999 I-1661; 11.1.2001 – case C-464/98 (*Westdeutsche Landesbank Girozentrale*), Rep. 2001 I-173.

65 E.g. the Italian report assumes, that the mortgage will be double the amount of loan (8.2.4.)

nomically, however, the owner has to pay, if he does not want to suffer the forced sale of his land. (However, the mortgagee might to be able to enforce either payment from the loan contract or from an abstract promise of payment – compare 7.3.4.).

In most systems, the mortgagee does not need to obtain a court title before starting the forced sales procedure:

- In legal systems with a **Latin notariat**, enforceability generally is based in the character of the authentic instrument. In some countries, notarial instruments are enforceable by operation of statute (e.g. France).
- In other countries, an extra **submission to enforcement** in the notarial instrument is required (and is usually part of the mortgage instrument) (e.g. in Germany).
- In the **common law** systems, a court procedure is also unnecessary.

All state provide a procedure for a **forced sale by public auction**.

- In the civil law countries, this is the regular procedure (e.g. in Germany).
- In the common law countries, normally the bank uses its **right to sell out of court** (e.g. in England). The mortgagee is obliged to meet some procedural standards for the protection of the owner .

The **duration of a forced sale procedure** can be drawn out for several years, in particular for a self occupied family home, might take years, if the possessor exercises the various rights of appeal and the grace periods which the national enforcement law might grant to him.

- For the lender, the possible time of the enforcement procedure clearly has to be considered when evaluating the value of the mortgage as a security: Interest is running all the time.
- The Forum Group on Mortgage Credit has identified the duration of the forced sale procedure as one of the main economic obstacles for mortgaging practice. The group even proposed monitoring by the European Commission and measures to limit the duration to a specified term, for example two years[66]. However, it is hard to imagine that European law would harmonise national enforcement procedures.
- Some of the national reports have stated, that the time frame for a regular enforcement procedure is within these limits (e.g. Portugal 1-2 years).

7.4.3. Overriding interests and priority (questionnaire 7.5.)

The economic value of the mortgage is defined by its rank in relation to the total of the mortgaged property. However, some legal charges which enjoy priority may not be registered (overriding interests).

Overriding interests or charges may comprise the following:

- Regularly, **taxes levied on the land** enjoy priority over contractual charges.
- For **apartment ownership**, the co-owners' claims for maintaining the building may enjoy priority (e.g. Netherlands; legislative proposal also in Germany)

Overriding interests are an economic problem for the mortgagee:

- The **Forum Group** on Mortgage Credit has identified hidden overriding interests as one of the most important impediments for foreign lenders in order to evaluate the economic

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[66] Recommendations 28 and 29. Internet: http://www.europa.eu.int/comm/internal_market/finservices-retail/docs/home-loans/exsum_en.pdf.

value of a mortgage. It has recommended that "all charges affecting real estate must be registered in a Public register in order to be binding on and take effect against third parties, regardless of their nature"[67].

- We are not sure, whether the recommendation can be implemented in such a radical manner. The "**Basic Guidelines for a Eurohypothec**" 2005 limit overriding interests to rights "constituted by statutory provisions, which are property related, limited in time and calculable"[68].

7.4.4. Scope of the Mortgage (questionnaire 7.6.)

As to scope of the mortgage:

- **Buildings** on the mortgaged land are generally encompassed by the mortgage, unless there is separate ownership of the building (e.g. Portugal). However, improvements made by a new owner who did not mortgage himself, may be exempt from the mortgage (e.g. Spain).
- If business premises are mortgaged, generally the mortgage extends to **machinery** and other movables, at least if they are a component part of the land (e.g. Spain), sometimes even if they are no component part (e.g. Portugal).
- **Insurance premiums** are affected by the mortgage, at least if the insurer has been notified about the mortgage; then the insurer may pay the insurance proceeds only with the consent of the mortgagee (Portugal articles 692, 702 CC, Spain).

7.5. Rights and objections of the owner (in particular right to redeem) (questionnaire 7.7.)

7.7.1. Extinction or redemption upon payment

If the secured debt has been paid back, the fate of the mortgage depends on whether the mortgage is accessory:

- In a **non-accessory** system, the mortgage is not affected if the secured debt has been paid. However, the owner may demand from the mortgagee to have the mortgage extinguished (or have it assigned either to himself or some other person of his choice). That is the solution for the German *Grundschuld*. (However, if payment has not been made on the secured debt, but on the mortgage itself, the *Grundschuld* is transferred to the owner by operation of law.)
- Under an **accessory** system, the mortgage is extinguished by operation of law, if the secured debt has been in full. However, according to the Code Napoleon, if the debt is only partially paid, the mortgage remains in its entirety, because it is considered indivisible (France article 2180-1 CC, Portugal article 730, 696 CC). In the German law, if the debt has been paid, the accessory *Hypothek* is transferred to the owner by operation of law; partial payment leads to a partial transfer (§ 1163 BGB).

7.7.2. Objections to mortgagee's claim

7.6. Third parties, plurality of mortgages and several properties

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67 Recommendation 30.

68 Guideline 7.2. - internet: http://www.fukrehip.pl/fukrehip_en/Default.aspx?tabid=134 (Mortgage Credit Foundation, Poland) or http://www.hypverband.de/hypverband/html/smartcms/index.cfm?fuseaction=showPage&pageid=187 (VDH, Verband Deutscher Hypothekenbanken, Germany).

7.6.1. Security granted by a third party (questionnaire 7.6.)

In all systems, the owner of the mortgaged property and the debtor of the secured money claim, may be two different persons. However, if the third party is a consumer, his liabitlity might be limited by some form of reasonableness test.

7.6.2. Plurality of mortgages (questionnaire 7.9.)

Most states provide the possibility to set up more than one mortgage on the same land.

- In some systems, the prior mortgage may contain a clause requiring consent of the prior mortgagee for further mortgages; this restriction should also appear on the register (e.g. England).

The rank of several mortgages may be determined either by the time of registration or by the time of setting up the mortgage.

- Most systems also provide the possibility to agree on the rank.
- The parties may also create two mortgages of equal rank. This, however, rarely happens in practice.

7.6.3. Several properties (questionnaire 7.10.)

In most states, a single mortgage can affect several properties (**multi-parcel or joint mortgage**) (e.g. England).

However, presently a **transnational mortgage** is not feasible, because in the absence of an harmonisation of the national mortgage law (land register law, law of enforcement etc.) that would require to apply two different national laws.

7.7. Transfer of the mortgage (questionnaire 7.11.)

Transfer of the mortgage always requires an **agreement** between the present and the future mortgagee.

- Under an accessory system, the mortgage cannot be transferred without the **secured claim**. Some countries allow a partial transfer of the claim (e.g. France or the Netherlands), while in others the mortgaged claim may be transferred only as a whole (e.g. Poland). In some systems, accessoriness for the transfer is more relaxed: E.g. in Portugal (article 727 CC).
- **Registration** of the transfer is universally required. Whether registration is necessary for the constitutive effect or whether it is required only for the opposability to third parties, follows the same distinction as for setting up the mortgage.
- For a certificated mortgage, normally the transfer of the **certificate** is required, but not the registration of the transfer (Germany § 1154 BGB for *Briefgrundschuld*).

7.7.1. Transfer of the secured claim or transfer of the non-accessory mortgage

In an accessory system, by definition, the mortgage cannot be transferred without the secured claim. More precisely: The transfer of the secured claim results in the transfer of the mortgage.

- In England, it is relatively rare for individual mortgages to be transferred. The reason is that the banks are afraid of consolidation. Under the English **doctrine of consolidation**, two mortgages are linked together, if at some moment the lenders and the borrowers were the same.

7.7.2. Formal requirement

The transfer of the mortgage (or of the secured claim) is subject to the same formal requirements as the creation of the mortgage (i.e. authentic act, certification of signature, signed and witnessed deed or mere writing).

7.7.3. Registration or certificated mortgages (letter rights)

The transfer of the mortgage (or of the underlying claim) has to be **registered** according to the same rules as for the creation of the mortgage.

- Whether registration is constitutive or just necessary for opposability, follows the same rules as for the creation of the mortgage.
- However, if mere opposability applies as a general rule, but registration is required for the creation of a mortgage, still for the transfer of the mortgage, the general rule of opposability seems to apply (Italy, Poland, Spain).

In a constitutive system, for the transfer of a **certificated right (letter right)** registration is not necessary; it suffices to transfer the mortgage certificate (Germany, Switzerland).

- The banks like the certificated rights, because they can transfer the mortgage by transferring the certificate without registration of the transfer.
- It might seem to be dangerous for the owner, if he cannot check in the register who presently holds the mortgage. However, the original bank to whom the owner granted the mortgage is still contractually liable to the owner. Thus the owner may just fall back on his claim against the original bank – the bank he has chosen as his contracting partner. Thus, a real danger for the owner exists only, if the owner did not choose carefully his contracting partner.
- The main real risk is the **loss of the certificate**. There are legal procedures to invalidate a lost certificate, but it takes about a year (because a potential holder of the certificate has to be given sufficient time to claim his right). Therefore, in German practice, some banks even switch back to registered only rights.

7.7.4. Trust

The administration of the mortgage by a trustee is possible in the common law countries (e.g. England) and also in those civil law countries recognising the trust (Italy, Netherlands).

7.8. Conflict of Laws issues (questionnaire 7.12.)

For the mortgage itself, under all systems, the *lex rei sitae* rule applies.

Some legal systems apply the *lex rei sitae* rule also to the secured claim (e.g. England; however not in Germany).

Lex rei sitae also is applicable to the transfer (assignment) of the mortgage. However it is debated, whether *lex rei sitae* applies also to the transfer of the secured claim: Some apply the law of the assigned claim, others apply the law governing the underlying sales contract.

Finally, the sales contract for a mortgage is also governed by *lex rei sitae* (article 4 par. 3 Rome I Convention). In an accessory system however, the secured claim is sold. It is being debated, whether this sale is also governed by *lex rei sitae*.

The fast and easy conflicts rule of *lex rei sitae* can be applied to non-accessory mortgages without problems. For accessory mortgages however, legally the most important part is the **secured claim**; the mortgage is an accessory only.

- If you want to make sure, that the secured claim and the mortgage are governed by the same law, you have to apply *lex rei sitae* also to the secured loan (such as the English law)

– reversing accessoriness for conflict of law purposes: The secured claim follows the law of the mortgage.

A similar problem arises for the **sale of a mortgage**. The applicable law is determined by articles 3 and 4 of the Rome I Convention. Absent a designation of the applicable law by the parties, one might consider applying the *lex rei sitae* according to article 4 par. 3 Rome I Convention.

- If the mortgage is non-accessory, *lex rei sitae* applies also for the sale (absent a choice of law).
- For an accessory mortgage however, the German Supreme Court (BGH) has just decided that, the sale of the secured claim is not necessarily governed by the *lex rei sitae* rule (although in a given case, the situs might indicate the closest connection of the contract)[69].

The assignment or general the **transfer of the secured claim** is only partially governed by article 12 of the Rome I Convention. The solutions in the national law of conflicts vary:

- According to the decision of the German Supreme Court just mentioned, the assignment itself is governed by the law that applies to the assigned claim. The same solution is applied in Austria[70] and England.
- Other jurisdictions apply the law of the sales contract also for the assignment (e.g. France, Netherlands[71]).

7.9. Eurohypothec[72]

7.9.1. Economic issues of cross border mortgage credit

So far, there have not yet been any proposals for harmonising land law in Europe. However, there has been a constant, though always limited discussion about the desirability of a common mortgage for Europe, generally called "Eurohypothec".

- Some **banks** have been interested in the idea of selling mortgage credit all over Europe under the same conditions, including the standard terms for a common mortgage[73]. Or they are interested in packaging mortgages from different European countries together for refinancing and for diversifying their local risks.
- **Academics** have been fascinated by the idea to develop a common standard in area not yet covered by harmonisation.

a) Economic arguments for a Eurohypothec

Up to now, no scientific study on the **economic effects** of a harmonised Eurohypothec has yet been undertaken. So we can just guess about possible consequences.

- The economic advantages of **cross border refinancing** and risk diversion are pretty clear,

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69 BGH, 26.7.2004, RIW 2004, 857 with note by *Freitag*, RIW 2005, 25 = WM 2004, 2066 = ZIP 2004, 2007 (internet: www.bundesgerichtshof.de)

70 OGH, IPRax 1992, 47 (with note by *Posch*).

71 Hoge Rad, NJ 1998, 585.

72 Compare also the special report on Eurohypothec by Dr. *Nasarre-Aznar* for this study: http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Projects/Real%20Property%20Law%20Project/Background%20Paper%20Eurohypothec.pdf
The special report cites also the various academic proposals for a Eurohypothec from the 1980s up to now.

73 Compare: *Dougherty*, European banks keep borrowers home, International Herald Tribune (IHT) 30.4./1.5.2005, p. 13, 15.

even if the exact size has not yet been estimated[74]. However, the main obstacle here seems accessoriness, not so much the diversity of land law. Even if the mortgage law were the same, the banks would still have to consider different country risks (or a different value of the mortgage due to the legal environment, such as overriding interests or the time and costs of an enforcement procedure).

- Also, according to banking representatives, cross border financing for **commercial real estate** has become an important business and is growing constantly. Here banks might follow their customers. And the high volume for the individual transaction makes allows to incur also larger transaction costs for cross border lending.
- Based on anecdotal evidence, cross border mortgage financing for **consumers** has also risen considerably, while it was almost non-existent some years ago. However, it is still assumed to be no more than about 1%. Consumer mortgage financing is still a very local business. Also within one state, banks tend to give mortgage loans mainly where there have some offices on the ground – and where they know the local market. So we are not sure whether harmonisation would increase cross border mortgage for consumers significantly. More probably, consumers will benefit, if cross border refinancing makes the credit cheaper.

b) Present obstacles to cross border mortgage credit

For an insight in what the banking industry defines as the greatest obstacles to cross border mortgaging, one might consult the report by the "**Forum Group on Mortgage Credit**" on "The Integration of the EU Mortgage Credit Markets"[75]. Here the Eurohypothec is but one tool for achieving a more flexible and efficient mortgage.

- Following the order of the recommendations, among the legal issues, the Forum Group proposes to promote measures to ensure that the **duration of a forced sale procedure** should not exceed a specified term (recommendation 29).
- In the collateral issues, the Forum Group advocates the **abolition of non registered charges** (overriding interests) (recommendation 30).
- Further, it demands "that the links between mortgage debts and the collateral security are made more flexible", in particular **relaxing standards of strong accessoriness** (recommendation 36).
- Then the Forum Group goes on: "The Commission should explore the concept of the **Euromortgage**, for example by way of a study, to assess its potential to promote EU mortgage credit markets integration" (recommendation 38).
- Also it proposes to increase the transferability of mortgages by introducing pan-European Security Trust instruments (recommendation 39).
- Other recommendations concerning finance address tax distortions (n° 47) and existing prohibitions to pool mortgage collaterals from issuers based in different jurisdictions (n° 48).

7.9.2. Initiatives for the creation of a European mortgage instrument („Eurohy-

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74 The study on mortgage credit in Europe (see note 74) also provides very few numbers concerning the economic relevance of cross border mortgage credit.

75 Internet: http://www.europa.eu.int/comm/internal_market/finservices-retail/docs/home-loans/2004-report-integration_en.pdf
Recommendations: http://www.europa.eu.int/comm/internal_market/finservices-retail/docs/home-loans/exsum_en.pdf

pothec")[76]

a) Report Segré 1966

More than 30 years ago the Commission of the European Communities charged a group of experts under the leadership of Prof. *Claudio Segré* with the task of carrying out a comprehensive investigation of the problems arising from the liberalisation of movement of capital and the implications of the integration of capital markets. In 1966 this group of experts produced a paper entitled "Development of a European Capital Market", the so-called Sergé Report, in which it was proposed, inter alia, to harmonise the legal provisions in the individual member states dealing with security rights over real property, with the German certificated non-accessory mortgage (*Briefgrundschuld*) being put forward as the model.

b) Proposal of UINL (CAUE) 1987

This initiative was taken up later by the International Union of Latin Notaries' (UINL) (scientific) Commission for European Affairs (CAUE) and on 22nd May 1987 they made a proposal that

- along with the currently existing security rights over real property in the individual member states, a European mortgage uniformly regulated in all member states be made available to lending institutions;
- this uniformly regulated security right over real property should be structured largely on the example of the Swiss certificate of indebtedness (*Schuldbrief*);
- lending institutions and borrowers within the EEC would thereby be offered a more marketable and versatile security right over real property as an alternative to the security rights over real property already existing in each member state and in this way the legal, economic and practical disadvantages of a conventional, strictly accessory mortgage would be avoided[77].

c) Draft Wolfsteiner/Stöcker 1998

Later on, as the former communist countries reformed their legal systems, the necessity for a modern (and possibly harmonised) mortgage system was also felt. Thus, the Association of German Mortgage Banks (*Verband Deutscher Hypothekenbanken* - VDH) initiated a working group which produced a discussion paper containing basic guidelines for a non-accessory security right[78]. For this purpose ideas were taken from several legal systems, in particular from the statutory provisions and the practice developed by the courts and the banks in relation to the Swiss "*Schuldbrief*" (certificate of indebtedness) and the German "*Grundschuld*" (non accessory mortgage).

d) Research Group "The Eurohypothec: a common mortgage for Europe"

The work of this group has been continued by the mainly Spanish-led research group "**The**

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76 compare: *S. Kircher*, Grundpfandrechte in Europa. Überlegungen zur Harmonisierung der Grundpfandrechte unter besonderer Beachtung der deutschen, französischen und englischen Rechtsordnung, Dissertation Berlin 2004.

77 compare: UINL (*Internatioanl Union of Latin Notaries*), The Euro-mortgage, 2nd edition, Amsterdam, 1994 (with an example of a security agreement and confirmation of ranking); *Wehrens*, Observations on a Euro-Mortgage, WM (Wertpapier-Mitteilungen) 1992, 557 ff. (in German); *Stöcker*, The Euro-mortgage, Berlin, 1992.

78 published first in German: DNotZ (Deutsche Notarzeitschrift) 1999, 451; afterwards in an English translation in: ZBB (*Zeitschrift für Bankkredit und Bankwirtschat* – journal for bank law and economics) and also in: Notarius International 2003, 116.

Eurohypothec: a common mortgage for Europe"[79], which has been working on an updated version of the prior paper for a model European instrument.

In April 2005, this group, together with the members of the Subgroup Collateral of the Forum-Group on Mortgage Credit, of EULIS (European Land Information Service) and of the European University Institute (EUI), Florence, have presented a new paper containing "**Basic Guidelines for a Eurohypothec**"[80].

e) EU Commission: Forum Group on Mortgage Credit and Green Book

As has been mentioned already, the Forum Group on Mortgage Credit established by the EU Commission, DG Internal Market, has also treated, among other, the question of a euromortgage.

In the second half of 2005, a **Green Book on Mortgage Credit** is to be expected which certainly will also address the question of a European mortgage.

7.9.3. Main content of the proposals

a) Non-accessory mortgage

So far, a variety of concepts has been linked with the term "Eurohypothec". Not surprisingly, one of the main points has always been the question of accessoriness:

- Generally, the proposals put forward a **non-accessory** concept of mortgage, based in particular on the existing models in Germany and Switzerland. This approach is clearly favoured also by the scientific co-ordinators of this study (both of whom admittedly are German lawyers and therefore used to the concept of non-accessoriness).
- So far, only *Wachter*[81] proposed an accessory mortgage, because he assumed that this would be easier to achieve since it was closer to the existing types of mortgage in most European states.
- Recently particularly *Stöcker*[82] has proposed some form of compromise by introducing a **non-accessory, but causal type** of mortgage. This idea has been adopted by the Basic Guidelines drafted by the Eurohypothec Group and other groups in co-operation.

b) Easy transferability of the mortgage

While the specific features of each of the proposals vary, all also emphasise the **easy transferability** of the future Eurohypothec.

- Transferability is another major argument for a non-accessory mortgage. Refinancing (cross boarder or within the country) is much easier in a non-accessory system, if the loan and therefore also the loan management stays with the original bank and only the mortgage goes up the chain of refinancing banks.
- In particular, also the idea of a **certificated mortgage** (letter right) has been spelled out in most proposals for a Eurohypothec.

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79 www.eurohypothec.com

80 Internet: http://www.fukrehip.pl/fukrehip_en/Default.aspx?tabid=134 (Mortgage Credit Foundation, Poland) or http://www.hypverband.de/hypverband/html/smartcms/index.cfm?fuseaction=showPage&pageid=187 (VDH, Verband Deutscher Hypothekenbanken, Germany).

81 *Wachter*, Die Eurohypothek – Grenzüberschreitende Kreditsicherung an Grundstücken im Europäischen Binnenmarkt, WM 1999, 49.

82 *Soergel/Stöcker*, EU Enlargement in Eastern Europe and Dogmatic Property Law Questions – Causality, Accessoriness and Security Purpose, Notarius International 2002, 236, 241; also the "Basic Guidelines for a Eurohypothec" 2005.

c) European mortgage or European standards for national mortgages

In recent years, the focus of the discussion has **shifted from a uniform instrument to adjusting existing (national) mortgage law**:

- The first proposals (*report Segré, CAUE*) proposed a uniform European instrument which would be added to the existing national mortgages.
- The *Wolfsteiner/Stöcker* draft was a single model, but which was proposed to be adopted not by a uniform European act, but by national legislation (in the Central and East European reform states).
- The Forum group (recommendation 19) and the "Basic Guidelines for a Eurohypothec" (the most recent paper developed jointly by the Eurohypothec Group together with members of other research groups) focus strongly on the basis of *lex rei sitae*, recommending adjustments only where deemed necessary while the other questions open to national law. Thus, the Basic Guidelines consider both options, either reforming existing national law or adding a new 26th regime for the Eurohypothec. The first option would be rather European mortgage standards than a European mortgage.

It is very important to keep in mind, that the economic value of any mortgage (be it a mortgage under national law or a future Eurohypothec) depends largely on the **legal environment** (i.e. the land registration system, unregistered overriding interests, the enforcement law etc.). This has been emphasised both by the Forum Group and in the recent "Basic Guidelines".

8. Literature

In this general report, as far as we rely on information given in the various **national reports**, we have not quoted the source. However, we did quote our source in a footnote, if we introduce any information not yet contained in the respective national report.

In the various states, there is plenty of legal literature on the respective national land law. There are also of couple of monographic studies comparing specific aspects of land law in two or several European states. However, at least to our knowledge, there are just a few works on **comparative law concerning real estate** (land law) in Europe (though, admittedly, we might have missed out same works in foreign languages):

- *von Bar* (ed.), Sachenrecht in Europa, 2000/2001 (in German language), contains national reports on 16 European countries, covering movable property as well as immovable property. Relevant statutes are translated in German.
- *Frank/Wachter*, Handbuch Immobilienrecht in Europa - Zivil- und steuerrechtliche Aspekte des Erwerbs, der Veräußerung und der Vererbung von Immobilien, 2004 (in German language). The work is a very valuable practitioner's handbook on conveyancing and other issues of land law in 24 European countries (including Turkey), designed for the German notary or other lawyers, counselling clients owning real in other European states.
- *Hurndall*, Property in Europe – Law and Practice, 1998 (English language).
- *Schönhofer/Böhner*, Haus- und Grundbesitz im Ausland, 3 volumes, looseleaf (in German language), last update in 2000, will not be updated any longer. The work has been designed for the German practitioner counselling clients owning real estate in other countries. The work contains national reports on conveyancing and land law in 17 European states as well in several countries overseas.
- Even a lawyers' formbook as *Weise* (edit), Beck'sches Formularbuch Immobilienrecht, (C.H. Beck) 2001 (in German language), contains forms for a land sale and for a mortgage in 7 European countries.