

Certainty of Title in Cross-Border Real Estate Transactions in Europe A goal for The Public Sector or an Opportunity for The Private Sector?

Hendrik PLOEGER and Bastiaan VAN LOENEN, the Netherlands

Key words: EuroTitle; title insurance; harmonisation of land registration.

SUMMARY

In 2007 the European Commission published the White Paper on the Integration of EU Mortgage Credit Markets (COM (2007) 807 final). In this document the Commission proposes measures to reach a competitive and efficient cross border mortgage credit market. The issue of efficiency of land registration procedures proved to be an important point, and the Commission considers that improvements in this field should be made. The White Paper announces recommendations to the Member States to ensure that their land registers are available online, to adhere to the EULIS project and to introduce more transparency and reliability into their land registers.

This is a minimalist approach, and the recommendations will not resolve the problems of the diversity of the national systems of land registry, with different levels of legal certainty.

In this paper we will propose a more comprehensive approach. The required transparency and certainty may be achieved through a common way of land registration in Europe. The EuroTitle concept offers such a model. We discuss whether the development of a common standard should be left to the private sector (by the concept of title insurance) or the public sector (the land registries). In this analysis, we will take into account the situation in the US where similar issues have been dealt with by the title industry.

Certainty of Title in Cross-Border Real Estate Transactions in Europe A goal for The Public Sector or an Opportunity for The Private Sector?

Hendrik PLOEGER and Bastiaan VAN LOENEN, The Netherlands

1. INTRODUCTION

The European Union's 'four freedoms', the free movement of goods, services, capital, and persons, seem to provide a good basis for an increase of trans-border real estate transactions and to open the mortgage markets in Europe. Citizens of the European Union are flexible to work and live anywhere they prefer in the Union. Indeed, websites such as www.webcei.com (European Confederation of Real Estate Agents) or www.europeanproperty.com offer the possibility to search for real estate within Europe. However, we must conclude that a real European real estate market is far away. The buyer of real estate still needs the help of local experts, who are familiar with the local system of land law and land administration. Also the mortgage markets are still local, especially in the case of consumers.

In the past years major developments in this area took place. First of all the European Union Land Information Service (EULIS) started to operate in 2007. This project brings together the computerised information of the land registers of several European countries in one portal. In this way it provides cross-border access to information on rights and restrictions on real estate, using the information in the computerized databases of the participating land registries. In the same year the European Commission published the White Paper on the Integration of EU Mortgage Credit Markets (COM (2007) 807 final). In the White Paper the Commission announces the first steps to be taken in order to minimalise the effect of the different systems of land registration within the EU: the recommendation to the Member States to ensure that their land registers are available online, to adhere to the EULIS project and to introduce more transparency and reliability into their land registers.

The approach of the European Commission is a minimalist one. In this paper we argue that a more drastic approach is needed to obtain a common level of certainty of title that a real European Real Market needs. The question is, is this a task for the existing Land Registries (the public sector), or will it be a welcome opportunity for the so-called Title Industry (the private sector)?

2. REAL ESTATE AND EUROPE: RECENT DEVELOPMENTS

2.1 EU and private law

The influence of the European Union on private law increased in the past decennia, notably in the field of consumer protection. But EU law (directives, regulations and case law of the European Court of Justice) is fragmented. For several year academics discuss the need and feasibility of further harmonization of private law, a discussion that may lead to a uniform European Civil Code. An important development is the so-called 'Common Frame of

Reference' (CFR) that aims to systematise the existing EU rules on private law, with a focus on contract law. A draft version of the CFR has been delivered to the Commission in December 2007 (Von Bar et al. 2008). This consists of 'model rules' for contract law, tort law and unjustified enrichments, and furthermore (in annex 1) a set of definitions of crucial legal concepts (e.g. 'goods', 'contract', 'ownership').

Provision 295 of the EU Treaty ("the Treaty shall in no way prejudice the rules in Member states governing the system of property ownership" suggest that these developments will not affect real estate (land law, mortgage law and land registration). However, the interest of the European Commission for this area is clear. In 2005 the European University Institute (EUI) published the report Real Property Law and Procedures in the European Union, commissioned by the European Commission. This report gives a systematic overview of the existing principles of real estate law, the procedures of sale and transfer of rights and the system of land registration in all (at that time 25) Member States (EUI 2005). Furthermore the report discusses the need and possibilities to create a Eurohypotheec, a common model for a mortgage to be used within the EU, as proposed by the Euromortgage group (see www.eurohypotheec.com). A second report for the European Commission researched in more detail the process of conveyance (sale and land administration), and more specific on the role of legal specialists (attorneys and/or notaries) in the process (ZERP 2007).

As we will see, especially the field of cross border mortgage credit gets a lot of attention from the European Commission and we might expect that this will have its impact on the area of land registration.

2.2 EU and the mortgage market

In 2003 the European Commission established the Forum group on Mortgage Credit in order to identify the barriers to an integration of the mortgage market, and to make proposals to tackle those barriers (EU 2004). Based on the findings in this report we conclude that a common European real estate market requires:

- 1) Transparency of mortgage products
- 2) Transparency of information from national land registries
- 3) Uniform level of certainty concerning rights and interests in real property.

Taking in account the recommendations of the Forum Group the Green Paper on Mortgage Credit by the Commission (EU COM (2005) 327 final) addresses this subject in more detail. The Green Paper stresses the importance and impact of mortgage lending on the Union's economy. Intervention of the Commission to integrate the mortgage markets will be aimed at making them more efficient and competitive.

The White Paper on the Integration of EU Mortgage Credit Markets (COM (2007) 807 final), published two years later, is rather reserved with regard to the action that should be taken. With regard to the national land registries in the impact assessment Annex 3 mentions the following objectives (EU SEC (2007), 1683 final, p. 130):

- ensure non-discriminatory access to land registers;
- encourage the availability of on-line registers;
- encourage a reduction in the average duration and cost of registration procedures;
- encourage more transparency with regard to non-registered (hidden) charges.

In this area the White Paper concludes that Member States should improve the efficiency of their land registration procedures (EU COM (2007) 807 final, p. 8). To monitor this, the Commission will publish regularly updated 'scoreboards', presenting objective information on the cost and duration of land registration and foreclosure procedures in all Member States. Furthermore, the Commission will make further recommendations to the Member States in this field, in particular:

- to invite Member States to ensure that their land registers are online available;
- to encourage Member States to adhere to EULIS;
- to invite Member States to introduce more transparency and reliability into their land registers, especially with regard to hidden charges.

Should however the suggested measures prove ineffective, the Commission could consider legislation at European Level (EU SEC (2007), 1683 final, p. 130).

2.3 Minimalist approach sufficient?

The White Paper, like the Green Paper focuses on the issue of the transparency of land registries within the EU. However, opening the on-line information, and make it available for users also outside the area (as EULIS aims), does not solve all problems. The differences in legal security stay. To put it short: the distinction between registrations based on title registration and those based on deeds registration. The recommendations of the Forum Group on Mortgage Credit, and the White Paper acknowledge that the mortgage market highly values the transparency and certainty of rights in real estate. A solution has therefore to meet the recommendations made by the Forum Group (EU 2004):

- 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;
- the creation, modification or extinction of a charge on real property shall become effective vis-à-vis third parties only at the point of registration in the Public Register;
- registered charges on real property in relation to the same estate shall rank in the order of priority disclosed in the Public Register.

Requirements that are quite the same as the international standards for land registration as formulated by the FIG in 'Cadastre 2014' (Kaufmann and Steudler 1998).

We assess that those interested in real estate in another country and their banks, will prefer a system that provides a uniform level of certainty of ownership rights within the EU. However, a choice for one single system of land registration is likely to encounter severe resistance from the Member States that need to change their national system. Moreover, reaching a agreement

about a preferred system may take several decades of discussion. If in the end one general system is agreed upon, it may allow for exemptions addressing specific national situations.

We propose a more comprehensive approach. The required transparency and certainty may be achieved through a common way of land registration in Europe, to be introduced next to the existing systems. The EuroTitle concept offers such a model. We discuss whether the development of a common standard should be left to the private sector (by the concept of title insurance) or the public sector (the land registries).

3. CERTAINTY BY THE PUBLIC SECTOR: EUROTITLE

3.1 Introduction

This concept of a common standard of land registration for Europe, called EuroTitle, has been presented in Ploeger & Van Loenen (2005) and Ploeger, Nasarre-Aznar & Van Loenen (2005) and further discussed in Ploeger (2006) and Ploeger & Van Loenen (2007).

In our first papers we presented EuroTitle as a title registration based on new European standards, in order to meet the requirements for both transparency and certainty, as mentioned above. It is a common way of land registration within Europe, an alternative to the existing national land registrations, but not replacing it. This system does not need the introduction of a European Land Registry as such. Member states in the EU should support registration of such a title in the national registry and the national land registry can issue a EuroTitle within its jurisdiction. The EuroTitle is guaranteed by the national organisation that registers this title.

The EuroTitle system can very well be based on national systems of land law. Therefore, we think that the EuroTitle does not need a 26th regime of land law. We expect that some land registrations based on title registration are already “Eurotitle proof”. Others need to introduce the EuroTitle in addition to their current system of land registration. In this last case, it is not required that all real estate in one country is registered under EuroTitle. An owner can choose to have his land registered as EuroTitle, or keep his national title. In other words EuroTitle leaves the possibility that parcels are registered under the (existing) national system of land registration.

Land registered under EuroTitle guarantees not only certainty about rights on land in all member states of the EU, but also provides easy access to the information. Because it uses standard procedures all over Europe, this offers a good basis for e-conveyancing; the transfer of real estate by use of on-line exchange and registration of documents (Ploeger and Van Loenen 2005). In this respect it may be noticed that e.g. the intention of the Land Registration Act 2002 in England and Wales is to reach the e-conveyancing by ‘on-line exchange and registration of documents’ and the substitution of ‘registration by title’ by ‘title by registration’. This means that the registration itself creates the right, which didn’t exist until then.

To sum up, EuroTitle provides:

- a 28th regime for land registration within Europe;
- an uniform level of title registration, and therefore the necessary uniform legal certainty of the rights on land in all member states;
- on-line and cross border access to information;
- a basis for e-conveyancing by the use of standard procedures.

3.2 Critical Remarks

This solution need consensus of EU Member States. We expect that Eurotitle will not be among the highest priorities of Member States. The current differences in land registration systems in Member States provided, significant resistance from national land registration organizations as well as political resistance might be expected. It is unclear whether the European real estate market can wait for the public sector, or will seek alternatives. These alternatives may very well come from the private sector.

Although the involvement of government in guaranteeing ownership rights in a harmonised way across Europe is recommended (Ploeger & Van Loenen 2007), political processes towards such a system may be slow. The need of private banks and others to have uniform guarantees available across Europe may not wait. These parties may develop a uniform system providing uniform guarantees in ownership rights through a system well known in the United States: the title insurance.

4. CERTAINTY BY THE PRIVATE SECTOR

4.1 Introduction

Due to the wide variety of registration systems across the US and the different levels of certainty of rights, the national players in the financial market had a need for a single approach and guarantee to address these local differences. The private sector developed its' own national standard: title insurance (Johnson 1966; Moody 2005; Sirmans & Dumm, 2006).

4.2 The concept of Title Insurance

Arruñada (2002; p. 582) describes title insurance as “a contract whereby an insurer undertakes to indemnify the holder of a right in real property if he suffers a loss because the insured title is found to be defective, and to defend the title if necessary.” The insurance protects the insured against possible losses occurring by claims as result of defects in the title or boundary disputes. As opposed to other insurances, like fire insurance, these claims will have their basis in circumstances that existed prior to the date of policy. Title insurance provides the insured not only with indemnification in the event of defects in the title, but also with a title report, and defence in legal suits. “Title insurance is a single-premium, perpetual policy” (Johnson 1966, p. 410). The title insurance policy cannot be cancelled, nor by the insured, nor by the insurance company (e.g. if it later discovers a major defect in the title).

There are two types of title insurance:

- an owner's title insurance (an Owner's Policy), and
- a lender's title insurance (a Loan Policy)

In a typical residential transaction, the title policy often required by the mortgage lender will not safeguard the rights and interests of the buyer; therefore a separate owner's policy is necessary (ALTA 2007). Both insurances require a one-time fee. The policies are fairly uniform over the country.

The basis for title insurance is a search of the public records, the deed or title register maintained by the government (Moody 2005). Insurance companies maintain so called 'title plants'. These private registrations are continuously updated and contain virtually the same information as that found in public records. The title plants are better organized than the public registers. E.g. the privately owned title plants are organized geographically (indexed on parcel numbers), as opposed to the name indexes county recorders use. In major metropolitan areas, the title can be searched and insurance issued within one or two days.

The American Land Titling Association (ALTA), the national trade association for the title insurance industry in the US claims that during the title search, title companies find (and fix) problems with the title in 25 percent of the transactions (ALTA 2007). It seems that applicants are sometimes more interested in what the company examination of title discloses than the insurance itself.

4.3 The Rise of Title Insurance in the USA

The first title insurance company was founded in Philadelphia in 1876. But it took 75 years before title insurance became the national standard (Sirmans and Dumm, 2006). Nowadays title insurance is used in 85% of residential sales transactions in the US (Arruñada, 2002).

The development of a secondary mortgage market was very important in this development. (Moody 2005). For local lenders, with knowledge of their local clients, an uninsured evidence of title, based on the legal opinion of a local attorney could be sufficient. The demand for capital investment became so large that the supply of funds had to be found on a national basis. National lending institutions insisted on title insurance as security before they would accept a mortgage, because it is required by the secondary mortgage market (Johnson 1966,p. 393) (Sirmans and Dumm, 2006; p. 297). To put it in an other way: a title opinion from a local attorney will not provide the assurance for a national lender that is unfamiliar with local risks (ATLA, p. 9). This last issue will explain that although several US states offer state guarantee of property rights (e.g. Torrens system), nearly all institutional lenders require title insurance to protect their interests in the collateral of loans secured by real estate (Sirmans & Dumm, 2006).

4.4 Title Insurance outside the USA

According to Moody title insurance allows imperfect transactions to close, by providing coverage for risks that might otherwise not be acceptable to the buyer or lender (Moody 2005, p. 58). This element might offer an interesting prospect for cross border transaction. Wurm (2006) foresees a prosperous future of this product for the European market: in his view title insurance provides a private solution that allows investors, as well financial institutions, to benefit from a vast unified market. In 2004, it was reported that title insurance companies are operating in approximately 60 countries, including the UK, France, Germany, Italy, Spain and Greece (Stein, Calder & Spencer Compton 2006).

4.5 Critical remarks

The security in real estate as offered by the private sector, is as secure as the title companies itself (e.g. case of bankruptcy of the insurance company). Thus, if a title insurance company becomes bankrupt, the guarantees the insurance provided are likely to end.

More fundamental is that the title industry does not improve the transparency of rights on real estate. Insuring a title on a property involves a review and assessment that is carried out locally because the public records to be searched are usually only available locally. Also the real estate laws, customs and practices vary by state and sometimes even county in the US; this will not change because of the existence of title insurance. The information collected and maintained in the title plant is only available to those affiliated with the plant. In addition, the title plant does not have any legal value, and only serves the work of the title company.

Finally, Arruñada (2002) found that international policies offer less coverage than the standard policies in the USA. Unregistered interests in land (overriding interests) are typically excluded from the insurance. Further, the international title insurance companies operate in a different way than in the USA. Agents nor insurers carry out title searches, issue title reports or maintain title plants like in the USA, because of the availability of the land registrations maintained by the national authorities and the involvement of legal experts, like notary public, in the transfer of rights in real estate. This questions the value of title insurance in Europe.

We expect that such a private insurance system will particularly be developed and appear in systems where the land register and the (notarial) deeds are poorly regulated and/or insecure. In the contexts where the existing land register meet the standard of users, title insurance is likely to be less successful or needed.

5. CONCLUSIONS

An increase in cross-border transactions of real estate within the European Union puts a demand for easy access to the information of the national land administrations of the member states. The EULIS initiative is a major step. In addition a common European housing market requires a uniform system of land registration to promote cross-border transactions. A solution offers the introduction of a common way of land registration complimentary to the existing national land registrations. This may bring the required uniformity of land registration in Europe. This system does not need the introduction of a European Land

Registry as such. At least in two possible ways Europe may arrive at such uniform system: through public guarantees or through private sector guarantees.

The first finds its' basis in the public sector. Member States in the EU may support registration of a uniform title, EuroTitle, in the national registry. This is guaranteed by the organisation that registers this title. Land registered under EuroTitle not only provides certainty in real estate titles within the EU, but also easy and standardised access to the information. The EuroTitle concept meets the recommendations made by the Forum Group and the standard of Cadastre 2014 on the topics of registration of rights and insight in the legal status of land.

Another direction is a guarantee of title based on the concept of private title insurance as used in the USA. An analysis of this system shows similarities with the current European discussions. Due to the wide variety of real estate systems across the United States and the different levels of certainty of rights, the national players in the financial market had a need for a harmonized approach to address these local differences. Therefore, the private sector created its' own and now the USA national standard for the (secondary) mortgage market: title insurance. The experience from the USA shows that the required uniformity in ownership rights in real estate across Europe may not necessarily come from the public sector. A development in private sector may very well be most feasible as well. Especially when the political process to establish a uniform public sector standard develops at a slower pace than the market requires.

REFERENCES

- Arruñada, Benito (2002), A transaction-cost view of title insurance and its role in different legal Systems, *The Geneva Papers of Risk and Insurance*, 27:4, p. 582-601.
- ALTA (2007), American Land Title Association, Title Insurance: a comprehensive overview. Available: <http://www.atla.org>.
- EU (2004), Report by the Forum Group on Mortgage Credit, European Commission, Internal market Directorate General.
- EU COM (2005), 327 final, Green Paper on Mortgage Credit in the EU.
- EU COM (2007), 807 final, White Paper on the Integration of EU Mortgage Credit Markets.
- EU SEC (2007), 1683 final, Commission staff working document accompanying the White Paper on the Integration of EU Mortgage Credit Markets, Impact assessment, Annex 3: Impact assessment on specific issues.
- EUI (2005), Real Property Law and Procedure in the European Union: national reports and general report.
- Von Bar et al. (2008), Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference (DCFR), Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Sellier, European Law Publishers.
- Johnson, H.M. (1966), The nature of title insurance, *The Journal of Risk and Insurance*, Vol. 33, No 3, p. 393-410.

- Kaufmann, Jürg & Daniel Steudler (1998), Cadastre 2014, a vision for a future cadastral system, FIG – International Federation of Surveyors (Commission 7).
- Moody, Bill (2005), A timeline for title insurance, *Mortgage Banking*, Vol. 65, Issue 11, p. 57-62.
- Ploeger, Hendrik & Bastiaan van Loenen (2004), At the beginning of the road to harmonization of land registry in Europe, *European Review of Private Law*, pp. 379-387.
- Ploeger, Hendrik & Bastiaan van Loenen (2005), Harmonization of land registry in Europe, TS18 – Comparative Aspects of Land Administration Systems, From Pharaohs to Geoinformatics, FIG Working Week 2005 and GSDI-8, Cairo, Egypt April 16-21, 2005.
- Ploeger, Hendrik, Sergio Nasarre-Aznar & Bastiaan van Loenen, EuroTitle: paving the road to a common real estate market (2005), Ius Commune Conference, Edinburgh.
- Ploeger, Hendrik (2006). EuroTitle: Needs a common level of registration a common level of land law?, Ius Commune Conference, Utrecht.
- Ploeger, Hendrik & Bastiaan van Loenen, (2007), Security in real estate titles: Prerequisite for an European housing market, ENHR International conference, 25-28 June
- Sirmans, G. Stacy & Randy E. Dumm (2006), Title insurance: an historical perspective, *Journal of Real Estate Literature*, Volume 14, Number 3, p. 293-320.
- Stein, Joshua, J. Carmichael Calder & S.H. Spencer Compton (2006), A report on title insurance in international real estate transactions, *Briefings in Real Estate Finance*, Vol. 4, no 2, p. 165-172.
- Wurm, Jean-Bernard (2006), How US-style title insurance is transforming risk management in European real estate markets, *Housing Finance International*, June, p. 16-19.
- Zentrum für Europäische Rechtspolitik (2007), Study COMP/2006/D3/003, Conveyancing Services Market.

BIOGRAPHICAL NOTES

Hendrik Ploeger studied law at Leiden University and the Free University of Amsterdam, The Netherlands. In 1997 he finished his PhD-thesis on the subject of the right of superficies and the horizontal division of property rights in land. After an assistant-professorship in civil and notary law at Leiden University, he is since 2001 assistant-professor at Delft University of Technology, The Netherlands and teaches several subjects in the field of land development, land law and land registration. His research interests are land law and land registration, especially from a comparative legal perspective. Hendrik is national delegate to FIG Commission 7.

Bastiaan van Loenen holds a PhD from Delft University of Technology, the Netherlands (2006) and a MSc from Maine, USA. His PhD thesis concerned 'Developing geographic information infrastructures; the role of information policies'. His further research interest include location privacy, geo-portals, and land administration. He has published on a variety of other legal and policy related topics including: the role of access policies in the development of SDIs, the impact of data policies for scientific research, development of spatial data infrastructures, legal and organisational aspects of local land use plans, and the legal (im)possibilities of the introduction of electronic means within the Dutch National Land

Registry and Cadastre. For several MSc courses in the Netherlands, he teaches on Funding mechanisms for GII. Bastiaan participates the GSDI legal and economic working group. He has a special research interest in the harmonisation of geographic information infrastructures in general and land administration more specifically.

CONTACTS

Dr. Hendrik D. Ploeger and Dr. Ir. Bastiaan van Loenen, MSc
Delft University of Technology OTB Research Institute for Housing
Urban and Mobility Studies Section Geo-information and Land Development
Jaffalaan 9
2628 BX Delft
THE NETHERLANDS
Tel. + 31152782557
Fax + 31152782745
Email. h.d.ploeger@.tudelft.nl
Email. bv.loenen@.tudelft.nl