Cross Border Transactions with Immovables

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Introduction

Cross border transactions with immovables and the problems and risks involved with them are a classic subject where traditional legal-technical expertise may shine. It could already have been formulated 25 years ago when intra-community trade and migration took a sharp upturn after the completion of the internal market in the 1992 Treaty of Maastricht. Saying it is a classic subject which has not changed that much for the last decades conveys a dose of fin de siècle flavour. Indeed, there a much more pressing and existential problems in the EU of today than the pitfalls of cross border conveyancing. This is true not only for the very existence of the EU which is threatened by populist slips in the political landscape of several Member States. In our area of housing, too, serious problems of access, abuses such as black housing markets, and homelessness have developed. Spain has experienced a particularly drastic crisis with a big housing bubble, many mortgage defaults, and a high rate of vacant dwellings – factors which have probably contributed to social tensions and the current political instability.

Despite these more pressing problems, the European institutions have in the last ten years commissioned at least three studies on real estate markets and their dysfunctionalities: the 2005 study on conveyancing services regulation coordinated by myself for DG Competition; a Study conducted by a team led by Peter Sparkes on behalf of the European Parliament on cross border acquisitions of residential property and the ensuing problems published in 2016 – which constitutes the basis of the present text; and a big study, just tendered by CHAFEA, the consumers, health, agriculture and food executive agency of the European Commission, on the functioning of real estate services for consumers in the EU.

Of course I would not go so far to say that the regulation envisaged by the EU with these studies is hopeless since the beginning. However, it might be read as a symptom of crisis if the Commission puts a focus on consumer trust in the housing and real estate market in the current political situation and if different parts of the Commission launch new studies on the subject without being aware of the existing ones. Yet at the same time, every crisis is also a chance, and neglecting everyday life and its problems in the face of a crisis often achieves nothing but contributing to the crisis. To take up the famous quotation of the founder of the protestant church Martin Luther: “Even if I knew that tomorrow the world would go to pieces, I would still plant my apple tree today.” So let us plant such an apple tree together now.

Conspectus

When talking about cross border transactions, it should be made clear from the outset that there are almost no special norms referring exclusively to such transactions. Instead, cross border transactions are almost always treated in the same way as national transactions. Indeed, the few remaining prohibitions on foreigners to acquire land have been abrogated in the last decades, sometimes after the intervention of the Commission and the ECJ. And where significant limitations still exist, they do not apply to foreigners but to "non-locals" in general. For example, in the Swiss and Austrian Alps, non-locals are forbidden to acquire secondary residences, so as to prevent the spreading of ghost towns inhabited only for a few weeks a year with locals being priced out of the market. But again, these restrictions apply to all people with second residences, be they nationals or foreigners.

What renders our topic interesting are what may be called in EU law terminology indirect discriminations – which means legal problems and obstacles which formally apply to nationals and foreigners in an identical way but entail increased factual burdens and externalities for foreigners as compared to locals. In cross-border transactions, these are weak, unexpected, outdated, dangerous or "pitfall-prone" elements in national systems which are particularly troublesome for foreigners who are generally not aware of them but tend to expect structures parallel to their home systems.

Such dangers are considerable as current land law and conveyancing systems are hugely different all over Europe, and harmonization has neither been carried out so far, nor is it planned in the foreseeable future. According to the current literature, conveyancing systems may be grouped into familial groupings reflecting different legal, social and economic traditions:

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

Given the wide discrepancies between these systems, problems may arise in basically all aspects and fields of conveyancing. In the EP study, we have distinguished problems relating to:

- access to register and cadastre;
- identification of the property, its extent and condition;
- title and burdens;
- the buyer's family
- public rules;
- price – deposit, balance and costs;
- mortgage finance;
- professional assistance; and
- the buying process.

In this presentation, I will only be able to describe some highlights of these and expound a few basic conclusions and recommendations.

Access to register and cadastre

Once a particular property is identified, the buyer will need to make use of national resources to facilitate his or her purchase: the land register provides information on title and the cadastre on spatial details. Two thirds of the EU-28 states integrate the land registration and cadastre functions within a single organisation. Whereas different institutions using different graphical references operate in Spain and Portugal, a single institution operates in Belgium, France, Italy and the Netherlands – so that in each case the spatial information used in the cadastre and the land register are coordinated. The twofold system may of course prove more burdensome for foreign prospective buyers. Moreover, not all the information is provided in foreign languages, so for example a buyer in the Netherlands would need to translate the register from Dutch, whereas in Spain an extract (called *nota simple*) is provided to the interested party explained in plain English. Of course this still leaves many EU citizens facing a language barrier.

As regards substance, European land register systems are divided between systems of title and of deeds registration:

- In systems that register titles, information is arranged by parcel of land and the system generates a snapshot of the current state of the title. This is usual in Germanic states, Britain and Ireland, Nordic states and much of Central and Eastern Europe, and the register is also arranged by parcels in Spain and Catalonia;

- In systems that register title deeds, information is recorded in notarial deeds which pass title from one owner to another in succession. The current state of the title can only be discovered by tracing its history. This system operates in jurisdictions that belong to the Latin family, such as Italy, Portugal and the Netherlands (Latin as far as property law is concerned), and a few states in Eastern Europe. The deeds are accessed from a names index and cross-referenced against the cadastral parcel number in France, and accessed purely by name in Italy.

It is clear that a deeds registration system is less effective and more difficult to understand for foreigners in particular; the danger to overlook a single deed and thus to misinterpret the current title is much higher than with title registration. The register is likely to be most convenient if it records an up to date snapshot of the title or at least can generate such a snapshot (as has recently been introduced in the shape of a register extract, the *nota simple* in Spain).

Another important issue is the digitalisation of the register. Great progress has been made over the past decade or so in the digital delivery of title information. Digitalisation of registers is particularly relevant for cross border transactions, as it facilitates access over large distances and at reasonable cost. A public portal is available in many EU-28 states: the Germanic states (Austria but not Germany), many states in Central and Eastern Europe (including Bulgaria and Hungary), the Baltics (Latvia and Lithuania have very modern plans), the Nordic states (with Swedish plans being an exemplar), and Britain and Ireland. In Germany – where the registers are of excellent quality – cadastral and register information can only be requested in hardcopy by a paper form. Germany appears to be the main state with regionalised registers, which need to be connected to a nationwide portal. In France the cadastre had, until recently, to be accessed locally, but a government portal is now freely available, albeit that coverage remains somewhat patchy. In the Netherlands, the web-based cadastre is effectively only an index to public records which have to be accessed non-digitally.

In a few States including Germany, public access to the digitalized register is denied on privacy grounds. Access requires the demonstration of a legitimate interest which is normally only given once a transaction is under way and the notary checks the state of the title. Yet from a cross border perspective in particular, it would be desirable if access were ensured even before, i.e. when a consumer makes an initial selection among various offers. Otherwise, the time necessary for the translation of the contents of the registers may be too short as well. The compromise recommended in our study would be to ensure public access in general, but to exempt more sensitive information like the personal data of owners and right holders as well as prices and amounts of money (for example of a mortgage).

Identification of the property, its extent and condition

Spatial information about a property will be made available by the cadastre and the land registry, supplemented as necessary by information from title deeds and from the personal knowledge of the vendor. Again, locals will be more familiar with this kind of information so that the identification of the property and its extent will be easier for them as compared with cross border purchasers. To tell you a personal anecdote: One of the project officers, an English lady, competent within DG Competition for my 2005 project on conveyancing services regulation, accused her French notary for having deceived her at the purchase of a holiday home: When she visited it, it was shown to her together with a garden, but when she bought it the garden was no longer listed in the notarial act – which was of course drafted in formal legal French which she did not understand very well.

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

Practice diverges wildly as to surveys on the physical condition of the property: in some states a survey/valuation is routinely commissioned before contracting and certainly before a mortgage is granted; in others, reliance may be placed on the seller's duty of disclosure of defects. English law departs from the majority of civilian systems in applying the rule of *caveat emptor* (buyer beware – the seller is liable only for hidden material defects, which he knows) to purchases of existing homes. A seller is not required to disclose physical defects and so the buyer must satisfy him or herself as to the condition. This is invariably done through a survey conducted by a professional surveyor. Buyers often rely on the lender's valuation in order to save costs, but this is less than fully desirable. In Spain, the legal system does offer strong protection to the buyer since the seller is liable for hidden defects (even defects unknown to him) preventing the normal use of the property. It can be important, where necessary, to get an independent valuation of the property to uncover any problems such as subsidence and boundary disputes. Nonetheless, 75 per cent of Britons buying in Spain have no survey. When the buyer applies for a mortgage, most banks in Spain suggest that clients request a period be-

fore completion to allow for a survey made by an independent expert company, the buyer paying the costs. The situation is rather similar in Poland, where it is very unusual to have a full survey, but reliance can be placed to some extent on the valuation commissioned by a lender at the borrower's expense. In Germany, primary reliance is placed on the duty of the vendor to disclose defects. It is not usual to obtain a survey. In relation to surveys, for a civilian buyer in a common law state, general information needs to be provided in the buyer's language to explain the options available to him or her about a survey. For a buyer from a common law state in a civilian state, a warning needs to be provided about the dangers of buying without a survey, and information about how to secure access to surveying services if these are not generally available.

A final problem is related to affixture, which determines what items are regarded as constituent parts of the immovable. In all European countries we surveyed, a default sale of land includes items which are fixed to the property (for example built in kitchen units) and excludes fittings (such as curtains). Of course, such fittings, e.g. kitchen appliances, may be included in the contract. In English practice, in order to avoid the uncertainty of the case law rules, the seller completes a form detailing what is included and what will be left out; this is done before contracts are exchanged. Such a standardized form which may be easily translated to other languages would seem to constitute best practice in seeking to minimise disputes arising after completion.

Title and burdens

Full and unconditional ownership of the land and the building erected on it constitutes the title a buyer expects to acquire. Whilst ownership is largely identical in all European systems, most of them have some potentially confusing inferior real rights. In Germany, an important exception from the paradigm of ownership (*Eigentum*) is building lease (hereditary building right, *Erbbaurecht*). The object of sale is the ownership of the building whilst the land where the property is located remains rented under an index-controlled rent scheme for a period of typically 99 year. In Poland, likewise, although the right being sold is most often ownership, it may also be 'perpetual usufruct' – a transferable right, which is created on land owned by state or local governments, and where after the expiry of the right the land reverts back to the owner. Spain and Italy recognise the right to build (*derecho de superficie, diritto di superficie*), where only the building is transferred (not the land). In Catalonia, since 2015, the interesting categories of temporal (similar to the common law leasehold) and shared ownership exist. The first limits temporally (from 10 to 99 years) the ownership of the transferred land – the interesting idea behind

being to render ownership cheaper and thus more easily accessible; the second pursues a similar objective by combining the acquisition of a certain quota of the immovable (say 25%) with the lease of the remaining quota. Another example of potentially risky interests short of full ownership are life interests and reversion rights on a life interest, which are possible in many continental countries. Examples are the French *viager* or the usufruct commonly created on intestacy and the emphyteusis. One deal that went badly wrong was made by André-Francois Raffray, a lawyer in Arles, France. In 1965, at the age of 47, he bought, on a *viager* of 2500 Francs per month, the flat of Jeanne Calment, who was then 90 years old and had lost her only grandson two years before. However, Mme Calment saw him off as well, and when he died in 1995, Jeanne's monthly annuity had cost him three times the value of the flat. His widow had to continue to pay it until Mme Calment died in 1997, as the oldest human being ever documented, at the age of 122 years and 5 months.

Any purchaser expects that the seller holds the authority to sell the immovable. Some problems may arise because, for example, Spanish, Catalan and Portuguese legal systems lay down rules aiming to protect the family home. The consent of both spouses or, as the case may be, judicial authorisation replacing such consent shall be required to dispose of rights over the marital home and the furniture ordinarily used by the family, even if such rights should belong to a single spouse. So, if one of the spouses sold the property without the authorisation of the other spouse, the spouse whose consent was lacking was entitled to invoke the nullity of the sale. Under Catalan law, these legal consequences even extend to unmarried couples following an agreement or cohabitation. The same holds true under German law if the land which one spouse or registered partner agrees to sell constitutes all or nearly all of his property, provided that the buyer knew about the underlying factual situation (sec. 1365 BGB). The knowledge of such legal problems may be particularly difficult for foreign buyers from countries where similar provisions do not exist.

Other burdens, in particular mortgages, hypothecs and real (typically lifetime) rights of habitation, may pose different problems. Generally, such burdens will be redeemed by the vendor when selling, and it is up to the purchaser's conveyancer to ensure that this happens; but the buyer needs to verify this. In most civilian states the notary does the land register search, and it is the duty of the notary to inform the buyer of the legal state of the property, including whether there is a mortgage; this is true for example in Germany, Poland and Spain. Alongside mortgages and hypothecs, there are limited rights such as easements (servitudes) which exist in most European countries but are far from identical.

Most dangerous for a buyer are some interests in land which can be binding off the register. These exist in most European countries, though they are ex-

cluded in Germany where the principle of publicity of the register enjoys an almost absolute status. A spectacular case on rights off the register was decided in England in 2003. Farmland which Mr and Mrs Wallbank had received from the bride's parents at their wedding had many years before formed part of the glebe land of the parish, the land allocated to providing an income for the vicar. As a result, the liability to repair the chancel of the parish church attached to the owner of this field. The chancel repair liability was categorised as an overriding interest by the 1925 land law legislation so it would have been binding even if the Wallbanks had bought the farm in ignorance of it. As a result, the Wallbanks had to pay 250.000 Pounds and the high costs of litigation. All defences failed, including the argument that the chancel liability was an unjustifiable interference with their right to peaceful enjoyment of their possessions enshrined in the First Protocol of the European Convention on Human Rights. The liability was simply an incident of the ownership of the land, and peaceful enjoyment of land requires the discharge of burdens attached to it. After the case, this particular overriding interest has been abolished for sales occurring after October 2013, so now the chancel repair liability would only bind a purchaser if entered on the register.

Further overriding interests under the English Common Law include the rights of occupiers, in particular spouses and partners who have contributed to the purchase of a house. Whilst this feature may be welcomed from a perspective of commutative justice, it constitutes a considerable danger for purchasers.

Finally, the most wide-spread right off the register are leases. Though this is possible in some States, especially in case of long duration, leases are not normally recorded in the register, even though they will bind purchasers (on the famous principle *emptio non tollit locatum* valid in all European legal orders). Of course, it is the conveyancer's job to guard against liability for rights off the register. However, there is a real risk that a foreign buyer might misunderstand the situation. Therefore, inspection of the property by the buyer before the sale is at any rate strongly recommended.

The buyer's family

Whereas the section title and burdens was about obstacles on the seller's side, there may also be legal problems on the buyer's side. Thus, anyone buying a property abroad will need to make a series of decisions affecting the entitlements of his or her family. Differences between matrimonial systems in different states can cause hesitation for foreign buyers. According to German notaries and discussions among potential buyers, the matrimonial regime presents a dilemma for foreigners, and a potential source of confusion if the regime differs from that with which they are familiar in their own states. Specifically, a foreign matrimonial regime which is applicable, by means of private international law rules, also in the State of acquisition may trigger the consequence that the buyer's spouse becomes automatically co-owner of the house, a legal situation which needs to be reflected in the land register. Thus, completion of the transaction may be delayed until the foreign matrimonial regime has been researched and understood by notaries and registrars. A proposal for a European Regulation harmonizing matrimonial property regimes has been put forward, but its enactment has thus far been delayed. But even if it were enacted one day, it could not apply retroactively, so that the described problems would persist with respect to "backlog cases".

Another concern in the buyer's family may attach to succession and its planning. Here, unification has been brought about at the level of private international law by the Succession Regulation of 2015, which applies in all Member States except Denmark, Republic of Ireland and the United Kingdom. In our context, the main concern is to ensure that buyers on the continent have an awareness of the terms of the EU Regulation.

Yet serious problems may persist nevertheless. Thus, when a habitual resident of a civilian state buys in a common law state or a person domiciled in a common law state buys in a civilian state, the transaction crosses the civilian-common law divide, a factor which adds greatly to the complexity of the family planning aspect of conveyancing. If a civilian moves permanently to a common law state, so that habitual residence is established within a common law jurisdiction, the move risks upsetting existing succession arrangements and requires full advice to be given about its effects. Undoubtedly the most serious problems in cross border acquisitions will be encountered by a buyer from a common law state seeking to buy elsewhere on the continent of Europe. The archetype is an English couple with children buying a home together in France. Habitual residence in France (or any other Regulation state) will result in a succession being civilian and unitary (not under the old French private international law system which had adopted the scission system as well). Anecdotal evidence suggests that, in civil law countries, notaries often fail to advise

English couples sufficiently, or, to put it another way, do not regard it as part of their function to advise in a conveyancing transaction on future succession issues.

Flats and new build property

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

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

Despite this variety of models, the standard arrangement of condominium (apartment ownership) legislation is roughly similar in nearly all EU States. This is to divide the ownership of units from the communal ownership of the block ('dualist' systems as opposed to the cruder unitary systems based on co-ownership). The basics are ownership of the individual flat, collective ownership of the block, and a collective management scheme. The management scheme will usually involve a management company charged with management of the block, and ideally under the control of the residents themselves. There may be a particular problem if management is conducted through meetings at which personal attendance is required.

National and foreign buyers alike will require clear information about the block management scheme comprising:

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

Potential problems are management regimes imposed automatically without documentation (as exist, for example, in France, Italy and Poland), failure to register individual flat titles, complex or lengthy documentation that is not explained to the purchaser, excessive translation costs, and belated identification of pitfalls.

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

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

New build documentation is inevitably complex because it mixes a sale contract, a construction contract, and block management arrangements. For example, the contract may provide for stage payments, and when these become due will be linked to the stage that construction has reached (see e.g. Sec. 632 a BGB). The job of the conveyancer/notary is to assess the documentation to see whether it is safe to advise a client to enter into the transaction (which does not require line by line explication of complex documentation). However, the client also requires access to the documentation in a comprehensible language format in order to be able to make the decision to go ahead with a purchase and then to handle practical issues that arise during the construction work.

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

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

Public rules

Public rules constitute the major problem for cross border purchasers. Indeed, most rights off the register are rather exceptional and the dangers of leases and new build property might seem to be well-known all over Europe; moreover, checking and advising on the problems related to them is generally done by all types of conveyancers, including civil law notaries. Conversely, public rules are extremely divergent in EU States and therefore often unexpected for a purchaser; and conveyancers often do not regard it as their duty to check them.

Generally, a purchaser is entitled to know of any aspects of public land law that will affect the home he or she is buying and to have a guarantee that there are no unknown threats. Yet concerns are numerous and may include:

- development potential (for example, the extent to which the view from the property could be spoiled or neighbouring buildings could be erected in close distance);
- soil contamination liability (among others, in Germany, Belgium and Spain);
- urban renewal (in Spain, for instance, the purchaser must ask the local authority for a certificate so as to see whether or not there is an urban

charge that is not registered; for example, in France, the sales of property in an urban regeneration area must be authorised by the prefect);

- coastal zone protection (for instance, Portuguese law protecting the natural environment around coastlines and inland waterways enables the government to reclaim land deemed to be public property); and
- statutory pre-emption rights of the state or local authorities (in many states and affecting many types of land, for example land of cultural interest, special urban areas or the harbour).

All Member States have rules for legal building construction, and thus there is scope for illegals. In southern Italy, building was done in the past without permission on the basis that permission could be bought afterwards, but welcome steps have been taken to regularize the administrative procedures to exclude this. Whilst the European market should be open to all EU citizens, a common approach to the legality of buildings may not realistically be expected in the near future (nor is there any EU competence in the field of zoning and building law). Problems have existed in parts of Spain. For example, in some cases during the housing boom houses have been built on land not zoned for building, and unauthenticated permits have been revoked by court order. In an extreme case, this could lead to demolition of the building. There are also many properties which infringe coastal zoning rules in Spain and elsewhere, the problem being a retrospective tightening of procedures without regard to the titles of purchasers who bought in good faith in accordance with the previous understanding of the law.

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

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

Many restrictions will be entered in the land register but land registers are not comprehensive as regards public rights in any European State. Many systems

have public claims that, though unregistered, nevertheless secure priority over registered interests such as mortgages. Such claims are restricted in France, Belgium and the Netherlands to the costs of the proceedings and necessary costs of administration; in Spain and Portugal property related taxes, public burdens and salary claims of employees within limits are included; and in Spain, liability may extend to service charge contributions due to the condominium. Therefore, the foreign purchaser should check before the acquisition if there are some debts on the part of the seller that can lead to the creation of a mortgage or similar interest by operation of law for the benefit of the state. This information may be obtained from the administration of the condominium or from the current owners.

A potential purchaser must know what information is available, where, how and by whom it is to be accessed, and whether there are any gaps in the provision of information. In England, compliance with relevant public requirements should be checked by a conveyancer who is responsible for inspecting necessary authorisations. Restrictions imposed by planning and environmental law are a matter for the purchaser under the *caveat emptor* (buyer beware) principle, so enquiry has to be made of the seller and this needs to be supplemented by searches and enquiries of the local authority (commonly called a 'local search'). It is up to the conveyancer to assess whether other checks are needed.

In continental systems, checks appear to be less comprehensive. In civil notary countries, the notary does not perform all checks in this matter. Notaries in several systems do not see it as their duty to advise on all public aspects of land purchase, though there is a detectable move towards a more comprehensive approach in many systems. Yet generally, notaries enquire only about selective matters pertinent to a given sale (such as development plans, past building permissions, possible pre-emption rights of the state, undisclosed burdens, outstanding inheritance and donation taxes), but the scope of enquiries may vary from country to country. What is more, provisions about informing parties may in practice be applied by notaries in a restricted manner and they may not always engage in an explanation of legal institutions understandable to national, let alone foreign, buyers. In our view, it would be desirable not only for clients but also for the quality and reputation of notarial services if they notaries offer what is called a "one stop shop", i.e., perform all checks and searches relevant to a certain land purchase.

Price: deposit, balance and costs

Because conveyancing procedures vary so widely across Europe, a citizen buying away from his or her home state will normally also have a kind of "home state bias" as regards the financial aspects of a purchase, with cash payments and mortgage financing constituting the most relevant options.

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

Transaction costs vary widely from Member State to Member State. Concerning the level of costs, our 2005 Study on Conveyancing Services Regulation for DG Competition suggests that costs are lower if fewer parties are involved in the process. For the purposes of this study, the main issue is transparency, that is awareness of the costs at the outset. A prudent buyer will require generic guidance about the structure of costs before even beginning to view properties and a detailed and itemised budget at the start of a transaction and before becoming committed to any obligation. The relevant costs include the likely ongoing costs of managing the property. As regards the administrative formalities to be met after the purchase, a single point of contact with local bureaucracy could greatly reduce the burden on buyers unfamiliar with the language of their host state.

Mortgage finance

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

foreign country, as only 1% of mortgages are cross-border. If the buyer is not able to set up (or reuse) a mortgage on another immovable, e.g. his first residence house located in his home country (as it often happens), he is then deemed to take the loan and the mortgage from a bank that he does not know and which does not know him and his financial behaviour in the past (thus, more expensive and with worse conditions). Moreover, the buyer will typically ignore the legal and economic consequences of taking them (e.g. evictions, seizure of other assets, no waiting time before enforcement, different rules for consumer protection, etc.).

In this situation, it should be welcomed that the recent Mortgage Credit Directive has focused on the provision of information in the interests of consumer protection. But this is not yet enough. To overcome the major constrains for cross-border operations with immovables, the creation of a common and unified Euro-mortgage (or "Eurohypothec") would be necessary. Indeed, various authors have developed the concept of a secure, flexible and pan-European instrument for more than 50 years. One prominent proposal has been coordinated in Spain by the co-author of the EP study, Professor Sergio Nasarre Aznar from Tarragona. Yet, with key features such as the accessoriness of the mortgage to the loan (which renders impossible rechargeable mortgages and German style *Grundschulden*) remaining controversial, the political chances to succeed of such a proposal remain uncertain.

Professional assistance

A person employed on behalf of a seller and/or a buyer to conduct the legal aspects of the transfer of residential property from seller to buyer is described here as a 'conveyancer'. The services offered by conveyancers are compartmentalised on national and regional lines. Notaries commonly enjoy a monopoly over transactions with land, for which reason the involvement of a notary is frequently mandatory. In contrast to the Latin notary systems especially, the cheapest systems in Europe are the deregulated Dutch notary system, the dual conveyancing profession involving solicitors and licensed conveyancers in the United Kingdom and Ireland, and the Scandinavian system in which land transactions are handled by licensed real estate agents without the involvement of legal professionals.

The organisation of the notarial profession is a matter for each Member State, but the EU has an interest in the legal representation of cross border purchasers. The EP study makes recommendations that would ensure that cross border buyers receive advice that is:

- independent of any developer and of the seller;
- comprehensive – covering property law, private obligations and public law aspects;
- competent – covering a knowledge of both property systems and language fluency; and
- timely – before the buyer becomes subject to any personal obligation, in particular through a preliminary contract, and before the property passes over to him.

In all states known to us, it is permissible, though often expensive, for the buyer to appoint his or her own specialized and independent lawyer to advise on the transaction in an understandable language. Doing so seems to be recommendable also in notary countries where the notary is legally obliged to act for both parties as a neutral professional but may in practice be more loyal to frequent clients such as developers or other "repeat sellers". Possibly, the EU could regulate on the status, qualifications and duties of a "cross border conveyancer" in the interests of transnational markets and proper consumer protection. In particular, it seems appropriate to protect consumers of legal services by legally requiring a conveyancer to certify that he or she is acting independently of the vendor and any developer and is otherwise free to advise the buyer. Finally, it is also necessary that there is an easy method of accessing and selecting such a suitably qualified professional.

Buying process

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

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

Variant terminology is a real problem here, in particular the words 'contract' and its qualifier 'preliminary' and also 'transfer'. A buyer needs to understand fully the manner in which his or her transaction will proceed, which is the first dimension of transparency. Transparency requires also that the buyer is alerted to crucial differences from his or her native experience.

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

- signature of a preliminary contract – in most of continental Europe (alternatively: preparation of a combined obligational contract and transfer deed with insertion of a priority notice in favour of the buyer in the land register in Germany); or
- a 'subject to contract' agreement – in the Anglo-Celtic tradition.

A preliminary contract is prepared by the agent using a standard form and signed by the purchaser, usually without legal advice. This is a potentially dangerous situation as binding commitments may already have been entered into and even the property may already have passed to the buyer under systems following the consensus principle. After the preliminary contract, the matter will be passed to a notary to prepare the purchase deed (for instance, in France, Italy, the Netherlands, Portugal and Spain). Generally, buyers of immovables are denied many consumer rights of buyers of movables, e.g. protection against unfair clauses, on the basis that people buying land receive legal advice. This, however, is not expressed in terms of conditionality. This reasoning breaks down in states adopting the preliminary contract since the buyer accepts obligations long before he or she receives legal advice. There is thus a good case for mandatory information and withdrawal rights (which might be disapplied for any obligation incurred under a contract on which the buyer has had legal advice before signing the contract).

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

When a transaction is completed, there is inevitably a period during which the register does not yet reflect the transaction that has recently taken place. Legally, it does not within reason matter how long it takes to register a title so long as the priority of the mortgage and purchase are protected through a priority notice in the register or other suitable mechanisms. However, if, as it hap-

pens in Germany, even the registration of priority notices in favour of the buyer is delayed due to the high workload of municipal registry offices (e.g. in Berlin), this may prevent banks from disbursing the loan and thus cause strong inconveniences to the buyer.

Taxation

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

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

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

Conclusions

Given the multitude of the potential hurdles for cross border purchasers, the final question arises of course what could be done to counteract them. Though our study contains quite a number of recommendations addressed to the EU legislator, it is rather unlikely that the EU will legislate in the field in the foreseeable future, given the current political climate and the unclear situation regarding EU competence. In what is probably a more realistic approach, one should be satisfied with modest solutions in which professional associations such as the notary and advocate chambers and possibly also national regulators could cooperate meaningfully.

First, an extensive information package (“cross border conveyancing protocol”) should be made available to any buyer on the Internet and by real estate agents in the major European languages, or initially at least in English. This package should describe the conveyancing process according to national law and practice and contain an explicit check list of all steps, surveys and controls to be undertaken by the buyer himself and his conveyancer (so as to enable a minimum of control by the buyer on the latter as well). Such information should include, for example, the necessity of a survey on the conditions of the

house; explain what kind of information can be gained from the register and what not; the possible existence of rights off the register and public law regulation capable of devaluating the property; the requirements and dangers of the purchase of new build property; the availability and rough cost of expert assistance by the relevant legal and technical professionals; and the extent to which the various checks are usually carried out by the different national professionals and where such control is lacking.

Second, national regulators and/or professional organisations could introduce the professional figure of a "specialised cross border conveyancer" – similar to the existing qualifications for lawyers specialised in certain fields (such as family and successions law, corporate law, banking law etc.). This specialisation would require, on top of the basic qualification as notary, lawyer, licensed conveyancer or Scandinavian style legally trained estate agent, additional legal and language knowledge. In particular, the cross border specialist should have knowledge of other systems so as to enable him to explain features and pitfalls of the national system which are particularly relevant to buyers from other States. Lawyers admitted to the bar in several states might be ideal candidates for this task. It would be ideal if the (self-) regulation of such a professional figure could be undertaken even at European level by bodies as the *Conseil des Notariats de l'Union Européenne*. This might enhance the professional reputation of notaries whose exclusive rights and privileges have come under attack from the European Commission and the European Court of Justice for quite some time now. Ultimately, the European citizen as cross border purchaser and the real estate economy as a whole might benefit most from the increased professional expertise of cross border specialists. But of course, all these ideas are only first thoughts which would need to be developed further by suitable bodies.

And now that we approach the end, back to the beginning: What are the merits, if any, of achieving small, rather technical improvements for European market citizens in the face of the current overwhelming political crisis – apart from planting Martin Luther's apple tree?

Discussing and addressing European problems such as the hurdles of transnational land transactions not only promotes a rationalisation of the regulation in the field and generates advantages for the economy as a whole. Beyond that, transnational discourses among lawyers and experts from different traditions – so precisely what we are doing here – contribute to the emergence of European epistemic communities, which may even develop into what political scientists call a sectoral European demos. Though our influence as land and housing lawyers may be small, all epistemic communities in all fields of research and professional practice taken together should make a meaningful contribution to what Joseph Weiler back in 1990 called the European civilization as opposed

to the “Eros”, which means the dark, irrational, populist, or as it is labelled today, the “post-truth” character of national politics.

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