Voorwoord

Quirites!
De tijd vliegt, *tempus fugit*; na tweeënveertig jaar gaat René de Groot de academische wereld en de Universiteit Maastricht verlaten. Zijn vertrek zal er lang voelbaar blijven. Een korte terugblik op de carrière van deze veelzijdige man en markante persoon.[1]

Gerard-René de Groot, voor collega's en vrienden René de Groot, begon zijn wetenschappelijke loopbaan in 1974 in Groningen nadat hij zijn rechtenstudie aan de Rijksuniversiteit Groningen en Westfälische Wilhelmsuniversität Münster had afgerond. In 1982 kwam hij naar de Universiteit Maastricht waar hij zich de resterende vierendertig jaar zichtbaar en met overtuiging verdienstelijk heeft gemaakt. In 1982, het jaar waarin de opleiding Nederlands Recht in Maastricht van start ging, was René een van de eerste docenten van een relatief kleine maar zeer gemotiveerde groep studenten. In 1988 werd hij er hoogleraar Rechtsvergelijking en Internationaal Privaatrecht. Van 1989 tot 2001 en van 2004 tot 2011 was hij voorzitter van de vakgroep privaatrecht. Sinds 2007 is René ook bijzonder hoogleraar privaatrecht aan de Universiteit van Aruba.

René heeft zich gedurende zijn lange loopbaan bezig gehouden met een breed palet aan onderwerpen binnen het recht. Niet zelden ging het daarbij om uitzonderlijke specialismen, zoals het adelsrecht, islamitisch recht en, zo leren we uit deze bundel, het appartementsrecht. Ook rechtstakken die op juridische curricula doorgaans niet of nauwelijks aanwezig waren, zoals

1 Een uitgebreidere terugblik op de carrière van René de Groot werd reeds gegeven door Ulrich Jessurun d'Oliveira in het voorwoord van de bundel die aan René werd aangeboden ter gelegenheid van zijn 25-jarig ambtsjubileum als hoogleraar aan de Universiteit Maastricht: Susan Rutten en Kees Saarloos, *Van afstamming tot nationaliteit*, Deventer: Kluwer 2013, p. 1-7.

juridisch vertalen en substantiële rechtsvergelijking, zagen mede dankzij de inzet van René, op verschillende faculteiten het licht. Jarenlang heeft René, onder meer door zijn activiteiten voor de Duits/Nederlandse Juristenvereniging en de Nederlandse Vereniging voor Rechtsvergelijking, collega's gestimuleerd zich actief te begeven op het gebied van de rechtsvergelijking. Zijn belangstelling voor en kennis van de geschiedenis is groot; met het enthousiasme waarmee René verhalen uit de Nederlandse geschiedenis reciteert, heeft hij menig student en collega voor zich weten in te nemen. Zijn studenten hebben galerieën portretten van oude meesters aan zich voorbij zien komen en weten precies in welke Maastrichtse collecties zich belangrijke historische rechtsgeleerde werken bevinden. De historici die voor deze bundel schreven verbeelden op fraaie wijze deze liefde voor het verleden. Groot is de belangstelling die René heeft getoond voor alles wat met het personeel statuut te maken heeft: van naam, nationaliteit, afstamming en verwantschap, geslacht en gender, seksuele geaardheid, adeldom, identiteit tot burgerlijke staat. Vele publicaties van zijn hand verschenen op deze gebieden; vele justitiabelen en hun raadslieden wendden zich tot René voor advies; vanuit de Commissie van advies voor de zaken betreffende de burgerlijke staat en nationaliteit werden talloze adviezen uitgebracht voor de burgerlijke stand en andere bestuursorganen. René nam deel aan vele beleidsadviserende commissies, waarvan de commissie Kalsbeek (commissie over lesbisch ouderschap en internationale adoptie) met name is te noemen. Waar het om principiële zaken gaat, zoals de openstelling van het huwelijk voor personen van gelijk geslacht of de gelijkheid naar gender, was René altijd bereid hiervoor op Europees niveau, of als het kon op internationaal niveau een lans te breken. René is een groot pleitbezorger voor verdergaande Europese harmonisatie van het recht. Meerdere bijdragen in deze bundel refereren hieraan. René is een graag geziene gast en spreker, niet alleen vanwege zijn expertise op vele gebieden maar zeker ook vanwege het aanstekelijk enthousiasme waarmee hij over zijn vak vertelt. Er gaat geen voordracht of lezing voorbij zonder dat ook een persoonlijke anekdote wordt verteld. De colleges van René genieten dan ook bij studenten en cursisten grote faam.

Naast zijn belangstelling voor en kennis van het personeel statuut, familierecht, internationaal privaatrecht, rechtsvergelijking, migratie en het goederenrecht, in het bijzonder cultuurgoederen en recht, is het ontegenzeggelijk het nationaliteitsrecht waarmee René het meest geassocieerd zal blijven worden. Zonder te overdrijven kan hij worden aangemerkt als dé autoriteit en expert op het gebied van het nationaliteitsrecht, zowel nationaal als internationaal (sinds 2008 is René bijvoorbeeld expert-consulent voor de UNHCR). Het nationaliteitsrecht werd zijn geesteskind. Talloze boeken, commentaren, annotaties, adviezen en publicaties verschenen hierover van zijn hand. Vele promovendi heeft hij weten te verleiden tot nader onderzoek

in het nationaliteitsrecht. Zij zullen straks de leemte die René achterlaat in belangrijke mate moeten gaan opvullen. Wereldwijde politiek-geografische ontwikkelingen (dekolonisatie, statenopvolging, staatloosheid et cetera) en veranderingen over het maatschappelijke en politieke belang van de nationaliteit die iemand bezit, zullen naar verwachting blijven vragen om continue en specialistische kennis van het nationaliteitsrecht.

De kring van mensen die via hun werk een bijzondere band met René hebben opgebouwd, is groot; zij bevinden zich in allerlei wetenschappelijke en niet wetenschappelijke haarvaten van de samenleving, in binnen- en buitenland. Het initiatief voor deze bundel werd genomen door de vakgroep privaatrecht waar René sinds 1982 werkzaam is. De redactie heeft ervoor gekozen om het aantal bijdragen aan de bundel beperkt te houden. De auteurs die aan deze afscheidsbundel hebben bijgedragen, vormen daarom slechts een beperkte selectie uit een veel grotere kring. Ongetwijfeld zijn er tal van personen die ook hadden willen bijdragen maar die nu hun waardering voor René op andere wijze zullen uiten.

De wetenschap, het onderwijs, de beroepspraktijk, studenten en collega's (wetenschappelijk en ondersteunend), zij allemaal zullen René en zijn bijdragen gaan missen als hij zijn activiteiten daadwerkelijk gaat beëindigen. René is de man van de positieve benadering, van het gunnen van vertrouwen (*fides facit fidem*), van de menselijke maat, van gastvrijheid, van het sparren over concrete casus en bijbehorende rechtsvragen, van de anekdotes, van de verhalen, van de documenten, van verzameldriften, van oude boeken en oude kunst en van kunst uit niet Europese gebieden, van het streven naar gelijkheid en een sterker Europa. Samen met Hildegard zijn zij levenskunstenaars. Voor de faculteit Rechtsgeleerdheid en voor de Universiteit Maastricht gaf hij een veelzeggend visitekaartje af.

Met dank voor zijn collegialiteit en vriendschap en met waardering voor de bijdrage die hij leverde aan wetenschap, onderwijs, praktijk en beleid, werd deze bundel tot stand gebracht. De titel van de bundel ligt voor de hand, niet alleen omdat de naam van de jubilaris hierin zo mooi kon worden verwerkt, maar ook omdat een naam iets kan uitdrukken: *Nomen est omen*; een naam is een voorteken, in dit geval een voorteken van het zijn van een groot man.

Maastricht, mei 2016

De redactie

Inhoudsopgave

Predicting the future of European property law

Bram Akkermans

1. Introduction

In 1994 René de Groot and Steven Bartels published an article in *Ars Aequi*, a Dutch, completely student run journal, about the future of property law in the European Union.[1] The Treaty of Maastricht had just entered into force and a new era in the European integration process was about to begin. Before any of the challenges brought with EU enlargement in 2004, the financial crisis from 2007 onwards, or the migration crisis in 2015, De Groot and Bartels devoted their attention to a thought experiment: what could the role of property law be in the European Union? Their answers are, looking at it from a 2016 perspective, very accurate, both in terms of developments and their predictions what action would be needed for these to come about.

In their contribution De Groot and Bartels focus on security rights, use rights and rules of third party protection (also known as the *bona fide* purchaser). The main core of their argument is that because property law systems are divergent, comparative research is needed before the European Union can take appropriate action. This statement holds true today and each of these themes deserves attention in the 2016 context, before I return to the main argument on the need for comparative research.

2. Property law in 2016

Property law is about long-term relations and hence the rules that govern property are not generally subject to much change. In its core, the rules of

1 G.R. de Groot & S. Bartels, 'Goederenrecht in de Europese Unie', *Ars Aequi*, 1994, p 57-66.

property law have therefore been the same for over 2000 years.[2] However, at the same time, many differences exist between legal systems. This is mostly due to the national context in which rules of property law function. Different countries, in other words, make different choices and this can lead to some major differences addressing the same need. For example, there are systems adhering to a consensual system of transfer, in which property rights transfer between the parties upon consensus between them, and abstract system of transfer, in which a further action governed by property law is needed to transfer the property right.[3] Moreover, as De Groot and Bartels already mentioned in their 1994 contribution, also the context in which property rights function differ from country to country. They provide the example of the subject matter of property security rights and the great difficulty that (still) exists in finding out which objects fall under security rights and which are perhaps protected by other rules in insolvency.[4]

Both the content of property right and their context are established in an internal national setting. Property law, perhaps even more so than other areas of private law, is reliant on other areas of law, such as contract law (with which property rights are created) and insolvency and succession law (in which property rights play a leading role). When systems of property law come into contact with each other, for example through cross-border trade, systems of property law often clash with one another.

The 2016 reality of European property law is a lot different from the 1994 reality. The EU integration process has continued and there is increasingly more movement between EU member states. This not only applies to goods, which have always crossed borders, but also to citizens, that make use of their freedom of establishment. By offering a possibility to acquire ownership of land and a building or apartment, property law now plays a central role.[5] The same, although not (yet) to such an extent, applies to the EU migration crisis. On top of that, the global financial crisis also has had considerable effect on property law. The crisis challenges our perspective on the market economy and the principles closely connected to that.[6] Property

2 See S. van Erp, 'General Issues: Setting the Scene', in: S. van Erp & B. Akkermans (eds.), *Text, Cases and Materials on Property Law Ius Commune Casebooks for the Common Law of Europe*, Oxford: Hart Publishing, 2012, p. 37 et seq.

3 See M. Hinteregger & L. van Vliet, 'Transfer', in: S. van Erp & B. Akkermans (eds.), *Text, Cases and Materials on Property Law Ius Commune Casebooks for the Common Law of Europe*, Oxford: Hart Publishing, 2012, p. 783 et seq.

4 De Groot & Bartels, *supra* note 1, p 59.

5 See on this, E. Ramaekers, *European Union Property Law. From Fragments to a System*, Antwerp: Intersentia, 2013, p. 62.

6 See T. Pickety, *Capital in the Twenty-First Century*, Cambridge, MA: The Belknap of Harvard University Press, 2014.

and market economic thinking have always been related, with the freedom of ownership and the free circulation of goods, being recognized with freedom of contract as essential ingredients for a market economy.[7]

The debate in property theory, different from the 1990s, is now much more about the purpose of property law.[8] This debate is not just theoretical, but has profound effect on the substantive rules of property. Should a bank, for example, be allowed to foreclose a mortgage when it knew or ought to have known the client was never going to be able to repay the loan (a sub-prime situation)? Moreover, the rise of sharing economy, such as car-sharing companies like the German Cambio, or apartment letting website AirBnB, fundamentally challenge property law fundamentals. After all, sharing a car or renting an AirBnB apartment does not provide any property entitlement. Especially for car-sharing, such a method actually replaces the traditional car ownership-model.

Finally, in the last years the European Union has become really active in special fields of property law. In 2012 the EU Succession Regulation was proposed, which entered into force on 17 August 2015. Although the Regulation deals mostly with private international law relating to succession, it touches upon fundamental aspects of property law. Besides the work on succession law, there are also proposed Regulations on marital property law and the property relations between registered partners. Although it has taken the EU a lot of time to get to this level, already in 1994, at least some researchers predicted this. De Groot and Bartels state in in their paper that is seems unlikely to them that the EU would not interfere in the area of persons, family and succession.[9]

All these developments raise question on reform of property law and especially at what level such reform should take place. When such reform is going to take place, a deep understanding of the way property law is structured, but also the (national) context in which it functions will be needed. It is not likely that the EU will develop a full property law and

---

7 See B. Akkermans, 'European Union Constitutional Property Law', in: B. Akkermans et al. (eds.), Who Does What? On the Allocation of Regulatory Competences in European Private Law, Antwerp: Intersentia, 2015, p. 165 et seq.

8 See J. Singer, 'Property as the Law of Democracy', 63 *Duke Law Journal*, 2014, p. 1287-1335; G. Alexander, *Property's Ends: The Publicness of Private Values*, Cornell Law School research paper No 14-13, 2014; B. Akkermans, *supra* note 8, p. 165.

9 'Ons lijkt het bijvoorbeeld onwaarschijnlijk dat gebieden als het personen-, familie- en erfrecht geheel buiten de regelgeving van de EG blijven' (De Groot & Bartels, *supra* note 1, p. 57).

therefore reliance on the national systems of property law remains crucial. Until now, most regulatory property law has made use of the *lex rei sitae* provision, according to which the national property law of the place where the object of a property right (i.e. the subject-matter of the right) is situated.[10] De Groot and Bartels' call for thorough comparative research and analysis therefore remains accurate and pressing as ever.

3. EU competence in property law?

It is worth shortly visiting one by-line from the 1994 article before looking in some more detail to the more general predictions that were made. In note 9 of their contribution De Groot and Bartels state that they do not wish to go into the question of Article 222 EC Treaty (now Art. 345 TFEU), which states that the 'Treaties shall not prejudice the rules of the member states governing the system of property ownership', but that they do not consider this an obstacle for EU interference into the areas they are dealing with. The article has been invoked in the past by some to prevent the EU from acting in the area of property law and De Groot and Bartels took a clear position on this aspect.[11]

It is worth noting in that respect that in 2013, after years of debate, the Court of Justice of the EU ruled in its *Essent* decision that indeed Article 345 TFEU does not stand in the way of making EU property legislation.[12] The way therefore remains open to further investigate the three areas of property law already mentioned (security rights, use rights and third party protection rules).

4. Security rights

Property security rights are a very good candidate for European Union legislation. Goods and claims are transferred (or assigned) on an every day basis and security rights on these goods and claims provide the backbone to

10 See, B. Akkermans & E. Ramaekers, '*Lex Rei Sitae* in perspective: National Developments of a Common Rule?', in: B. Akkermans & E. Ramaekers (eds.), *Property Law Perpectives*, Antwerp: Intersentia: 2012, p. 123.

11 See B. Akkermans & E. Ramaekers, 'Article 345 TFEU (Ex. 295 EC Treaty). Its Meanings and Interpretations, *European Law Journal*, 2010, p. 292 et seq.

12 Joined Cases C-105/12, C-106/12 & C-107/12 *Staat der Nederlanden* v. *Essent NV*, *Essent Nederland BV*, *Eneco Holding NV*, *Delta NV* (2013) ECR 2013-677.

the functioning of our economy.[13] With increased trade between EU member states, the importance of security right increases. Differences between legal systems, how small they may be, can potentially lead to distortions in the functioning of the EU's internal market. Although the Court of Justice of the European Union (CJEU) has, most likely out of fear of its consequences, been careful in accepting this connection, the evidence that differences in the law governing property security rights, is increasing.[14] The most recent very large study, carried out by the study group on a European civil code (SGECC), in this field, came to similar conclusions proposing a unitary system of property security rights modelled after Article 9 UCC to address these differences. Fragmented systems of property security rights, as exists at national level, are internally balanced systems of law. These security rights, usually divided along the lines of the objects on which they are created (immovables, movables, and claims) form a coherent system within a given legal system.[15] When property security rights come into contact with a foreign legal system, the receiving legal system decides on how to treat these rights. Most legal systems do this through operation of the traditional *lex rei sitae* rule that decides that the law applies of the place where the object is situated.[16] In the EU context, however, the functioning of the internal market is based on the country of origin principle through the principle of mutual recognition.

Through the operation of rules of private international law, the different national systems of security rights come into contact with each other. In some situations, the systems of security rights are so different that problems arise. A good example is offered by property security rights on movables. In some legal systems, such as in Dutch law and French law, non-possessory security rights exist. In other legal systems, such as German law, there are possessory security rights only.[17] When a non-possessory security right is created on a movable object, such as a car, and the car moves from one country to Germany, a complicated situation arises. If an event occurs there,

---

13 See V. Sagaert, Security Interests, in: S. van Erp & B. Akkermans (eds.), *Text, Cases and Materials on Property Law Ius Commune Casebooks for the Common Law of Europe*, Oxford: Hart Publishing, 2012, p. 425 et seq.

14 Case Krantz, although there is not supposed to be a *de minimis* requirement for the application of Art. 34 TFEU. See B. Akkermans & E. Ramaekers, 'Free Movement of Goods and Property Law', *European Law Journal*, 2013, p. 237-266.

15 B. Akkermans, 'Standardization of Property Rights in European Property Law', in: B. Akkermans, E. Marais & E. Ramaekers (eds.), *Property Law Perspectives II*, Antwerp: Intersentia, 2014, p. 221.

16 See B. Akkermans & E. Ramaekers, '*Lex Rei Sitae* in Perspective: National Developments of a Common Rule?', in: B. Akkermans & E. Ramaekers (eds.), *Property Law Perpectives*, Antwerp: Intersentia: 2012, p. 123.

17 Sagaert, *supra* note 13.

such as an accident, the property relations on the car will have to be determined. As the car is situated in Germany, German private international law points to German property law and the German (closed) system of property rights. The foreign non-possessory security right will have to be accommodated in a legal system that only accommodates possessory security rights. Instead, German law recognizes the use of the right of ownership for security purposes. To accommodate the foreign non-possessory security right would be to transform the non-possessory security right into ownership for security purposes. However, such transformation would mean the non-recognition of the ownership of the car.[18] In any case either the holder of the property security right or the owner will lose or not be able to use his property right.

Article 34 TFEU states that all quantitative restrictions on imports and all measures having equivalent effect are prohibited between member states. Would it come to a refusal to recognize a foreign property right outright, a quantity of zero, article 34 TFEU may kick-in. However, outright refusal is unlikely as rules of private international law are intended to accommodate rather than restrict trade.[19] However, even when property rights are transformed into national law equivalents, some powers relating to the property right may be lost. Already in 1974 the Court of Justice of the European Union formulated the meaning of measures having effect equivalent to quantitative restrictions. They are measures that directly, indirectly, actually or potentially hinder intra-union trade.[20] When any such measure prevents access to the market of the receiving state, Article 34 TFEU will prevent the application of these (international) property law rules unless they are deemed justified and proportional.

Member states may provide rules for justification both those mentioned in the Treaties (Article 36 provides public morality, public policy or public security, the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; and the protection of industrial and commercial property as primary grounds for justification). However, following the CJEU decision in *Cassis de Dijon* also other grounds for justification, such as the unity of the legal system or consumer protection can be used.

The challenge to justify measures that have a (actual or potential) distorting effect on the internal market is with the member state and not the private parties. It is worth considering the use of these grounds for justification in private law cases from a comparative point of view. In a

---

18 See, on this example, Akkermans & Ramaekers, *supra* note 4 p. 240-241.

19 B. Audit, *Droit international privé* (5th edition), Paris: Economica, 2008, p. 1.

20 Case 8/74, *Procureur du Roi* v. *Dassonville* [1974] ECR 837.

situation as described above, the grounds for justification are likely to come from the foundations of private law. Foundations of private law are fundamental principles underlying any system of private law. They can be reasons why there is only a limited number of property rights, such as legal certainty or protection of creditors, or the territoriality principle to explain why a member state employs the *lex rei sitae* rule. However, these are all *internal* considerations that, in the external (from a national point of view) perspective of the internal market do not always make sense. The Court of Justice is the guardian of the internal market and its concern is with the effective application of EU law, not necessarily with the internal legal-political sensitivities of a given Member State.

Public policy as a ground for justification is perhaps the most likely candidate.[21] After all, in many legal systems, such as French or Italian law, the rules of property law are of public policy. In those systems, party autonomy of private parties is limited by enforcing the rules of property law as public policy. In other legal systems, such as German and Dutch law, the same effect is achieved by making the rules of property law mandatory provisions.[22] The difference in approach however, will make that countries such as France are more likely to invoke public policy as a ground for justification than, for example, Germany or the Netherlands.

The Court of Justice will test this ground for justification on its necessity and suitability in relation to the functioning of the internal market. Whether a member state declares its property rules of public policy or not is therefore not enough to justify the existence of the combination of international property law and substantive property law rules.

Until now there have not been many cases in this area. The most famous case is a Maastricht case called *Krantz*.[23] In *Krantz* the Court of Justice of the European Union was asked to rule on the conformity of a specific power of seizure of the Dutch tax authorities with Article 34 TFEU. Unfortunately, the CJEU dodged the bullet in its decision by writing off the power of seizure as

---

21 See, on this, E.-M. Kieninger, *Mobiliarsicherheiten im Europäischen Binnenmarkt. Zum Einfluss der Warenverkehrsfreiheit auf das nationale und internationale Sachenrecht der Mitgliedstaaten*, Baden-Baden: Nomos Verlagsgesellschaft, 1996; P. von Wilmowsky, *Europäisches Kreditsicherungsrecht. Sachenrecht und Insolvenzrecht unter dem EG-Vertrag*, Tübingen: J.C.B. Mohr (Paul Siebeck), 1996; J.W. Rutgers, *International Reservation of Title Clauses. A Study of Dutch, French and German Private International Law in the Light of European Law*, The Hague: T.M.C. Asser Press, 1999.

22 See J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Staudinger BGB - Buch 1: Allgemeiner Teil §§ 134-138 (Allgemeiner Teil 4a - Gesetzliches Verbot und Sittenwidrigkeit), § 138 rn 64.

23 Case C-69/88, *H. Krantz GmbH & Co* v. *Ontvanger der Directe Belastingen en de Staat der Nederlanden* [1990] ECR I-583.

a too specific and therefore unlike to anticipate aspect of Dutch property and insolvency law. However, the lack of case law does not take away the argument that a too wide diversity of property law rules can lead to an infringement of Article 34 TFEU.[24] After all, the criterion is an actual or *potential* hindrance of trade.

A very interesting question, finally, is whether a potential or actual infringement of Article 34 TFEU can lead to a convincing argument to develop rules of EU property law on the basis of Article 114 TFEU. Article 114 TFEU has been a legal basis for many rules of EU private law, especially in the area of consumer contract law.[25] The CJEU has determined that for this article to be used as a legal basis, a mere diversity of rules between member states is not sufficient. The European Commission must show a substantial hindrance to the functioning of the internal market.[26]

An attempt can therefore be made, through comparative law, to move towards a legal basis to deal with security rights at the EU level. For the moment this area is almost left completely to member states.[27] We could then think about the creation of a European Security Right (ESR) or an Article 9 UCC/Book 9 DCFR type of unitary model of security rights.[28]

5. Use rights

A second aspect concerns property rights to use. Different from property security rights, which are likely to cross borders with the objects on which they have been created, property rights to use are much more likely to be local. Hence, the effect of EU law on property rights to use is much less obvious. When we also consider property rights that grant the use of land, the effect of EU law seems even more territorially bound. However, the

24 Ramaekers, *supra* note 5, p. 51 et seq.

25 See H. Schulte-Nölke, C. Twigg-Flessner & M. Elbers (eds.) *EC Consumer Law Compendium – Comparative Analysis*, München: Sellier European Law Publishers, 2008.

26 Case C-376/98, *Germany* v. *Parliament & Council (Tobacco Advertising I)* [2000] ECR I-8419, Case C-58/08, *Vodafone Ltd, Telefónica O2 Europe plc, T-Mobile International AG, Orange Personal Communications Services Ltd* v. *Secretary of State for Business, Enterprise and Regulatory Reform* [2010], ECR I-04999.

27 Only in Art. 4 of the Late Payments Directive (2000/35/EC) and Art. 5 of the Insolvency Regulation (1246/2000/EC), some cross-border aspects of security rights are dealt with.

28 See E.-M. Kieninger, 'European Regulation of Security Rights', in: U. Drobnig, H.J. Snijders & E.-J. Zippro (eds.), *Divergences of Property Law, an Obstacle to the Internal Market?*, München: Sellier. European Law Publishers, 2006, p. 165-174; Ramaekers, *supra* note 5, p. 268.

property entitlement to land is crucial to the exercise of the freedoms provided by the EU treaties. Every EU citizen has a right to move and reside, be it under certain conditions of work and social security, in another EU member state. To establish oneself in another country certainly must also include the acquisition of a piece of land to live on or to run a business from.[29]

To acquire ownership (or any other property right) of land is also a capital movement. In its *Westdeutsche Landesbank Girozentrale* v *Stefan* decision the Court of Justice held that the list, established by the European Commission in Directive 88/361/EEC of 24 June 1988, is leading.[30] On that list investments in real estate are mentioned.

Most of the EU case law dealing with property law therefore comes from this. In a series of decisions, the CJEU dealt with rules restricting the acquisition of land by foreigners. Some countries make the acquisition of land conditional for foreigners to prevent negative effects. For example, to prevent the rise of tourist-colonies, areas where all houses are owned by foreigners that only reside there partially, leaving a ghost-town in some parts of the year, the Salzburg local government required buyers of land to make a declaration at the local administrative court that they would establish primary residence upon acquisition.[31]

It is in this context that the Court of Justice, following a strong pro-European opinion of Dutch Advocate General Ad Geelhoed, held that such provision limiting access to acquisition of land is in violation of the free movement of capital.[32]

The case law of the Court of Justice shows a dimension to the right to use that is not usually dealt with by property lawyers. Property lawyers, following a conception of property law as the law of things, proceed from the physical world of objects. Intangible things are dealt with, but always by analogy to tangible things. Property law, in this conception deals with the rights that can be held on those things. It is in respect to this relation (object-right) that the fundamental principles of property and ground rules function.[33] Perhaps the best example of this is the principle of specificity that determines that the objects, tangible or intangible, must be ascertainable at

29 Ramaekers, *supra* note 5, p. 62.

30 Case C-464/98, *Westdeutsche Landesbank Girozentrale* v. *Friedrich Stefan* [2001] ECR I-173, para 5.

31 Joined Cases C-515/99 & C-527/99 to C-540/99, *Reisch* [2002] ECR I-2157.

32 A-G Geelhoed's Opinion in Joined Cases C-515/99 & C-527/99 to C-540/99, *Reisch*.

33 See S. van Erp, *From 'Classical' to Modern European Property Law?*, Maastricht Faculty of Law Working Paper, No. 4, 2009.

all times.[34] However, there is another relation, that between the person holding the property right and the right, that is of relevance. Without one or more persons holding a property right, the property right can generally not exist either.[35] It is in this context that the European Union law also influences property use rights. It is also in this context where, like in the case of property security rights, the fact that legal systems function on the basis of an internal balance becomes problematic in the EU context. When, on top of that, legal systems take measures to limit access to its market, the law of property is also caught by the rules of EU law.

The suggestion has been made to also create a European right of use, which would enable the same property right to exist throughout the EU internal market.[36] As De Groot and Bartels already suggest, the advantage of a common property use right is that EU citizens will be able to understand the content of the property right in another legal system.[37] The information costs, in other words, would be lower if, through standardization of the property rights would be more uniform.[38] Making a European use right would, like in case of creating a European security right, raise issues of competence and legal base, as well as difficult questions on the relationship between national and European Union property rights.[39]

6. Third party protection rules

A final aspect that De Groot and Bartels deal with are the rules protecting bona fide purchasers. This is perhaps one of the areas where legal systems diverge most. Third party protection rules are closely related to systems of transfer.[40] In causal systems, where the validity of the transfer is depending

34 Although in the area of property security rights exceptions to this rule exist. See W. Loof & A. Berlee, 'Case Study: Harmonizing Security Rights', in B. Akkermans et al. (Eds.), Who Does What? On the Allocation of Regulatory Competences in European Private Law, Antwerp: Intersentia, 2015, p. 199 et seq.

35 Especially in relation to land, usually the state will own land that is without owner. For movable objects, objects without ownership can sometimes be accepted. See B. Akkermans & W. Swadling, 'Types of Property Rights – Immovables and Movables (Goods)', in: S. van Erp & B. Akkermans (eds.), *Text, Cases and Materials on Property Law Ius Commune Casebooks for the Common Law of Europe*, Oxford: Hart Publishing, 2012, p. 213 et seq.

36 Ramaekers, *supra* note 5, p. 239 et seq.

37 De Groot & Bartels, *supra* note 1, p. 63.

38 On standardization theory in property law see T. Merill & H. Smith, 'Optimal Standardisation in the Law of Property: the Numerus Clausus Problem', *Yale Law Journal*, 2000, p. 3-70, see also B. Akkermans, 'The Numerus Clausus of Property Rights', in: L. Smith & M. Graziadei (eds.), *Research Handbook on Property Law*, Cheltenham: Edward Elgar, forthcoming.

39 See Ramaekers, *supra* note 5, p. 239 et seq.

40 Hinteregger & Van Vliet *supra* note 3, p. 783 et seq.