



W09 – Legal Aspects of Housing, Land and Planning

**Security in Real Estate Titles:  
Prerequisite for an European Housing Market**

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**ENHR 2007 International Conference ‘Sustainable Urban Areas’**

**Security in Real Estate Titles:  
Prerequisite for an European Housing Market**

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**Keywords:** Land registration; housing market; mortgage; EULIS; EuroTitle; title insurance

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**Abstract**

The European Union’s ‘four freedoms’ seem to provide a good basis for an increase of trans-border real estate transactions, and to open the mortgage markets in Europe. The Second Banking Directive in 1993 established the basis for a single market for banking. However, a real European real estate market still seems far away.

The report of the Forum Group on Mortgage Credit to the European Commission of 2004 identified the barriers to a smooth functioning of the Internal Market. In short, 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.

The first two issues are addressed by existing initiatives. A way to tackle the differences between the mortgages within the EU, and to reach the needed transparency to compare the products of bankers is the Eurohypotheec as proposed by the Eurohypotheec Research Group. EULIS (European Union Land Information Service) aims to provide a cross-border access to information about the rights on real estate, using the information in the computerized databases of the participating land registries.

The third issue, uniform level of certainty concerning rights and interests in real property, has so far remained unaddressed. How can we provide the required transparency and certainty to sellers, buyers and their bankers? In this paper we will discuss how the required transparency and certainty can be achieved through a common way of land registration in Europe. Further, we will discuss whether the development of such a common standard should be left to the private sector (by the concept of title insurance) or the public sector. In our analysis, we will take into account the situation in the US where similar issues have been dealt with by the Title Industry.

## Introduction

Citizens of the European Union are flexible to work and live anywhere they prefer in the Union. Websites such as CEI Online of the European Confederation of Real Estate Agents or European Property.com offer the possibility to search for real estate within Europe (figure 1). In the armchair one can browse the sites and search for the dream house over the border.



Figure 1: Residential and commercial property in Europe for sale on the internet.

Indeed, the European Union's 'four freedoms', the free movement of persons, capital, services and goods, seem to give a good basis for an increase in number of trans-border real estate transactions, and to open the mortgage markets in Europe. But is it really so easy?

## An European housing market?

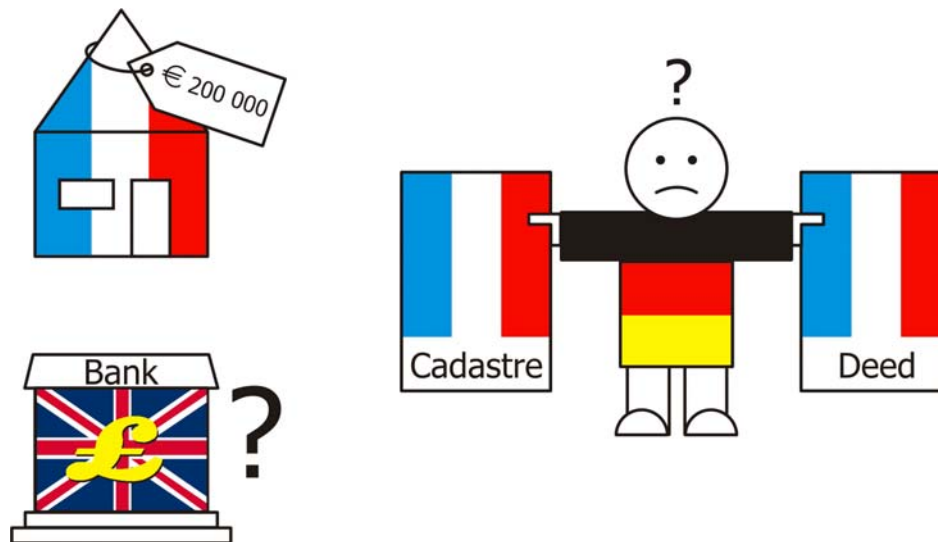
The practical question how to become the owner of a house in another country and how to finance it by a loan secured by mortgage is not so easy to answer. An example will illustrate this. André offers his house in Cherbourg (France) for sale, and Benjamin from Germany is interested in this house. He wants to fund this house by a loan offered by a banker in the UK on favourable conditions.

The buyer and his banker must at least know whether André is the lawful owner of this real estate. And if so, they want to know whether there are others with a legal interest in the real estate.

Their first question will be how to obtain legal information about the house that André is offering for sale. Benjamin has to find his way in the French system of land registry and learn how to contact its office.

Further, after he has an overview of the registered rights, what will Benjamin and his banker make from the information that André is 'proprietaire' and that a 'bail' is registered in the name of Christian? And if Benjamin understands this information, how does he know whether the registration in the French cadastre implies that this right can be disputed or not? Does Benjamin realise that there may be other relevant interests in the land (for instance servitudes, public law restrictions) that cannot be known from this file, and require an

investigation of the deeds in the French deeds registration. And finally what is the accuracy and the legal value of the cadastral map showing boundaries of the real estate of André? In general the buyer and his banker will be ignorant about the relevant rules of land law in the country concerned and if information is obtained about the owners and others with interests in the real estate, it is quite difficult to judge that information on its merits (figure 2)



*Figure 2: The development of a cross-border real estate and mortgage market within the European Union is hampered by the lack of transparency of national land registries and uncertainty about the value of the information provided.*

The case is likely to be similar in other cross-border transactions in Europe. The practical solution is that Benjamin hires a local advisor. This specialist is expected to clarify the foreign legal terminology and to provide a sufficient and reliable overview of the legal status of the real estate concerned. That is time and money consuming. The same applies to the banker in the UK. Most likely Benjamin needs to contact a French banker. Uncertainty of the legal situation and the difficulty to export the national mortgage product will have a deterring effect on non-national bankers. Indeed, however in the EU the single market for banking has been established in January 1993 by the Second Banking Directive 89/646/EEG, a real European mortgage market seems still far away. The mortgage markets are still domestic. It has been claimed that transnational mortgage lending represents not more than 1% of the whole mortgage business in Europe (Nasarre-Aznar 2004).

In 2003 the European Commission established the Forum group on Mortgage Credit with the task to identify the barriers to an integration of the mortgage market, and to make proposals to tackle those barriers (EU 2004). Taking in account these recommendations the Green Paper on Mortgage Credit by the Commission (EU COM (2005) 327 final) addresses this subject in more detail. The paper stresses the importance and impact of mortgage lending on the Union's economy. Intervention of the Commission to integrate the mortgage markets would be aimed at making them more efficient and competitive. The Green Paper is still consultative in tone. A White Paper with proposals will be published before the end of 2007.

Based on the findings in the report of the Forum Group we can conclude that a common European housing market requires:

- Transparency of mortgage products
- Transparency of information from national land registrations
- Uniform level of certainty concerning rights and interests in real property.

## **Transparency of mortgage products: Eurohypotheec**

The differences between mortgages within the European Union are addressed by initiatives to create a common mortgage for the EU; the so called Euromortgage or Eurohypotheec. Actually, this is a long discussion. The first steps were made in the 1960's (Weherens, 2004). A few years ago the Eurohypotheec Research Group proposed its model for a common mortgage ([www.eurohypotheec.com](http://www.eurohypotheec.com)).

Based on the results of the Eurohypotheec Research Group, the Mortgage Credit Foundation published the Basic Guidelines for a Eurohypotheec, sketching the outlines for Eurohypotheec as a non-accessory land charge, opposable against third parties after registration in the competent national register (Mortgage Credit Foundation, 2005). In this model the formal requirements for the registration of the security right will be the same as for other interests in real estate under national law. This model doesn't intend to replace the around 25 existing legal frameworks for mortgages and hypothecs in Europe. The Eurohypotheec is an extra tool for lenders and borrowers (Nasarre-Aznar 2005).

## **Transparency of information from national land registrations**

The importance of the transparency of information from the land registrations is emphasized in consideration 44 of the Green Paper on Mortgage Credit in the EU (EU COM (2005), section IV Mortgage Collateral, Land Registers): "an understanding of the contents and operation of land registers as well as easy access to them is crucial for cross-border mortgage credit activity of any kind within the European Union".

This is addressed by EULIS, the European Union Land Information Service (see <http://www.eulig.org>). This project brings together several European land registrations in one internet portal (Gustafsson 2003, Tiainen 2004, Ploeger & Van Loenen 2004).

Started as a project in 2002, EULIS was launched as a live service in November 2006. Currently connected to the service are the cadastres of Sweden, The Netherlands, England and Wales, Norway and Lithuania. It is expected that these jurisdictions will be joined by another 11 countries in 2007.

In the first phase the service aims at the professional users like notary public, solicitors, financial institutions, and real estate agents. Ultimately EULIS may also be open for private individuals. The user connects to the website of his national service. This website directs him to the EULIS portal, where the customer can choose to digitally access one of the other services. The 'foreign' customer gets on his computer the same screen the service uses for its native customers. In this way it provides access to cross-border information about the rights on real estate, using the existing information in the computerized databases of the participating land registrations.

The user of EULIS will also receive meta-information: e.g., a short overview of the legal description of the right of ownership of land, for example, in Sweden. Moreover, EULIS allows through the so-called 'EULIS glossary' for the translation of legal expressions from the different countries in each of the other languages.

## **Value of the information**

Although EULIS has accomplished significant improvements in accessibility of land information, it raises an important question. What is the value of the information provided?

As mentioned above EULIS as a portal gives access to the information in the computerised databases of the participating organisations. However, the legal value of that information is not at the same level in the countries. The system of land registration, and the starting point of the computerisation of the registry itself can explain this. There are within Europe major

differences in the systems as a result of historical influences (Larsson 1991). Even when the origin of the national systems is the same, e.g. the systems in Western Europe based on the principles laid down by Napoleon I, one can observe important differences from organizational, legal and technical point of view. Compare for instance the Dutch and the French system. Both are based on a registration of deeds. In the Netherlands we find a strong connection between the cadastre and the public registers (maintained by one organization, the Netherlands' Kadaster, from 1839 onwards), with a broad notion of protection of third parties relying on the registered information (it has been characterised as a "semi-positive system", and trust in the cadastral information is in practise very high). The transfer of ownership is established by registration of the deed. While in the French system the connection between the cadastre and the public registers is less distinct, the legal value of the registers is considered to be limited and the transfer of the ownership takes place by the contract of sale itself. However, registration of the deed is needed for the opposability against third-parties.

The differences within Europe even become bigger if we focus on the distinction between registrations based on title registration and those based on deeds registration. E.g. Austria has a by the Government maintained registration of title. The Hauptbuch, the main registry in Austria is fully computerised and can be queried on-line (Grundbuchdatenbank). The registration of the right is in Austria decisive. It has so called *öffentliche glauben*, almost a full guarantee. Although the registration of deeds is also part of the land registry in Austria, and is the basis of the registration in the Hauptbuch, it is of less importance.

As said, in the Netherlands we find a deed registration (public registers), which is held with the cadastral registration by one organisation. The cadastral registration can be queried on-line in the so-called AKR. Although the cadastral database is in practise considered as very important, strictly it has no value from a legal point of view. It is merely the access to the deeds registration. The deeds registration, however, cannot be accessed on-line (yet). For protection of the good faith of the buyer in case of a failure in a transfer of ownership, the establishment of limited rights, or other transactions, the information from the deed registry is decisive. In this aspect it must be stressed that the deed registry is not complete. So the new owner can be confronted with rights that are not registered in deeds.

Now for EULIS the Austrian Grundstuckdatenbank and the Dutch cadastre (AKR) will be the source of information for the user. This example shows clearly that the value of the information the user will get through EULIS differs. Most users, both layman and professionals, will probably not know this. The danger will be that they consider the offered information as complete and fully reliable. And if they know that this is not true for one or more countries, the result can be that they doubt the value of all information from (for them) unknown registries. Therefore it is necessary that the meta-information provided together with the result of the query from the databases addresses this aspect prominently.

### **Land registration: strictly national?**

We have seen the legal value of the information one may get via EULIS is not at the same level in the countries. Some Member States have a registration of title, guarantying the absence of unregistered rights, others have a registration of deeds, which may be incomplete and without any guarantees (Ploeger & Van Loenen 2004).

According to Nasarre-Aznar (2004) an excellent partner for the Eurohypothec would be a common European Land Register. The EULIS project is seen in this light as a start, an 'useful tool to increase transnational land conveyancing and charging, which should evolve to a true European e-conveyancing relating to land in future.'

If we put emphasis on the differences between national systems of land registration throughout Europe the conclusion would be that any attempt to harmonization or unification

would be useless. Discussions would be most effective if we start from recognizing the commonalities of the different systems.

### **Cadastre 2014: the surveyors point of view**

The International Federation of Surveyors (FIG) published in 1998 the booklet *Cadastre 2014, A vision for a future cadastral system* (Kaufmann & Steudler 1998). Cadastre 2014 aims to provide optimal services to the society at a lower cost than today's systems.

According to this vision of the development of land registration Cadastre 2014:

- shows the complete legal situation of land: not only private law rights, but also public restrictions are registered;
- knows only the title registration approach to land rights;
- is based on the fixed boundary system (boundaries are located by coordinates that are surveyed and not by a description of boundary features).

It certainly aims to put a international standard for the benchmarking and development of existing systems. See 'rule 1' of Cadastre 2014:

The Cadastre 2014 institution makes sure that the limits of the impact of rights and restrictions to land are fixed and registered according to the public and private laws in effect in the respective countries, and that everyone can get reliable information about the legal situation of a piece of land (Kaufmann & Steudler 1998; p. 36).

But Cadastre 2014 does not aim to change or harmonize land law as such:

Land tenure is not changed by Cadastre 2014, but it is part of it. If a legal land object is the property of an individual or juridical person, it is a form of individual land tenure. If the property right belongs to a traditional tribe or clan, it is customary tenure; if it is given to co-operative it may be called a co-operative tenure; and if the property right belongs to the state, we can call it a communist tenure (Kaufmann & Steudler 1998; p. 27).

Technically the integration of different systems of land administration into one harmonised system does not seem to be an issue. But, legally and organisationally the integration puts many challenges that need to be researched in more depth. For the feasibility of this integration we are of opinion that a choice for a technical standard and the legal basis of the land registry (very simply said: the choice between title registration or registration of deeds) is more important than the actual differences in land law among the member states of the EU. However, the choice for one system is likely to encounter severe resistance from the Member States that need to change their national system. Moreover, agreement about a preferred system may take several decades of discussion and negotiation. If in the end one general system is agreed upon, it may allow for exemptions addressing specific national situations.

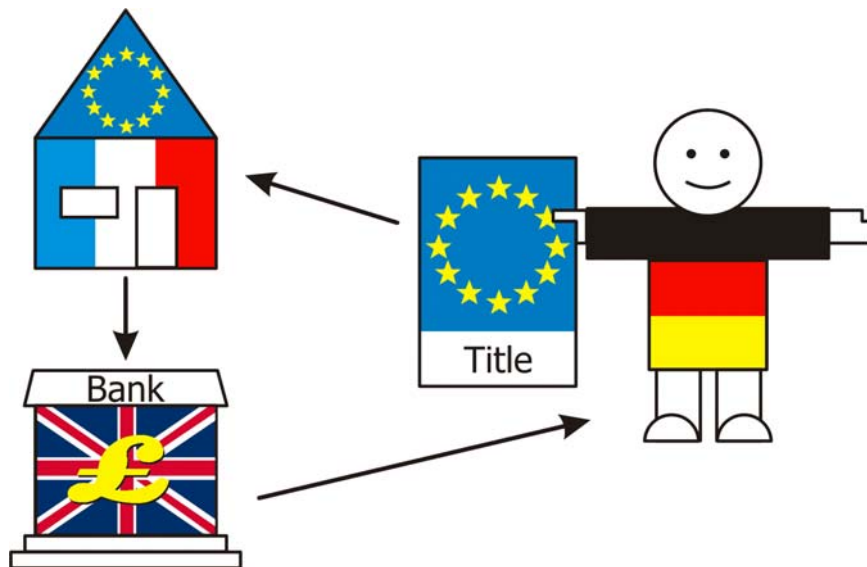
We assess that those interested in real estate in another country and their banks, would prefer a system that provides a uniform level of certainty of ownership rights. There are several ways to reach at such a system: through public guarantees or through private sector guarantees.

### **Uniform level of certainty by EuroTitle**

From the recommendations of the Forum Group on Mortgage Credit it is clear that the mortgage market highly values the transparency and certainty of rights in real estate. In short: a bank won't lend money under a Eurohypotheec if it has no certainty about the legal status of the property or properties encumbered.



As we have seen EULIS does not give a solution for this. However the requirements for both transparency and certainty can be completely met by the introduction of EuroTitle (figure 3). This concept of a common standard of land registration for Europe, has been presented in Ploeger & Van Loenen (2005) and Ploeger, Nasarre-Aznar & Van Loenen (2005) and – from the perspective of the impact on national land law – further discussed in Ploeger (2006).



*Figure 3: Registration of land under EuroTitle will provide the certainty needed by owners, buyers and bankers and therefore boosts the development of a common housing market.*

EuroTitle will be a title registration based on (newly developed) European standards. It is a common way of land registration within Europe, an alternative to the existing national land registrations, but not replacing it. Also 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 organisation that registers this title.

It is not required that all land 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, as such provide a reliable basis for e-conveyancing; the transfer of real estate by use of on-line exchange and registration of documents (Ploeger and Van Loenen 2005).

Some idea how Europe might look like in the future, with two types of registration in one land registry, offers Minnesota, US. Here Torrens title (registration of title) and Abstract title (based on the registration of deeds) are integrated in one information system (figure 4).



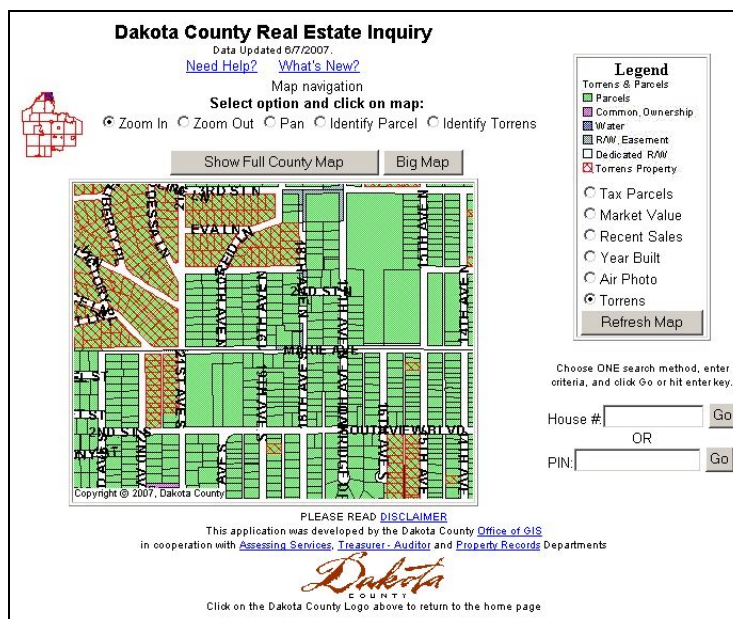


Figure 4: Information on real estate in Dakota County, Minnesota, US. Parcels registered under Torrens title (shaded) and Abstract title integrated in one Geo-Information System.

EuroTitle will 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.

To sum up, EuroTitle provides:

- a 26th 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.

Although the involvement of government in guaranteeing ownership rights in a harmonised way across Europe is recommended (Ploeger & Van Loenen 2006b), 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.

### **Certainty provided by the private sector: the title industry**

Title insurance is typically found in the US. 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).

In 1876, the first Title Insurance company was founded in Philadelphia. However, it was not until after World War II that title insurance became the standard. 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). According to Arruñada (2002) title insurance is used in 85% of residential sales transactions in the US.

### **What is Title Insurance?**

Arruñada (2002; p. 582) gives the following definition of title insurance:

Title insurance is 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.

Title insurance is based on a search of the public records, usually including daily (on-line) visits to the public deed or title registers maintained by county recorders and other public officials. (Moody 2005). Insurance companies maintain 'title plants'. These private registrations are continuously updated and contain virtually the same information as that found in public records. Johnson (1966; p. 398) illustrates the completeness of the private records by the fact that on occasion, when public records have been destroyed (e.g. by fire), the title plants are the principal mean of reconstructing the lost public records. The title plants are better organized than the public registers, the county records. 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 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 policy date. 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. 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 they are in obtaining insurance.

There are two types of title insurance:

- an owner's title insurance (an Owner's Policy), and
- 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 requires a one-time fee. The policies are fairly uniform over the country.

The title insurance policy cannot be cancelled. The company cannot cancel the contract if it later discovers a major defect in the title. Also the insured cannot cancel the policy and recover a share of his premium when he sells the property nor the can transfer his policy to the next owner of the real estate.

## **Success of the Titling insurance**

One reason for the success of title insurance is the development of the secondary mortgage market (Moody 2005). Knowing the local customer and a legal opinion by a local lawyer may be sufficient for a local lender to lend a mortgage loan. However, this will not provide the assurance for a national lender that is unfamiliar with local risks. As Johnson (1966; p. 393) remarks:

In the modern economy, the demand for capital investment is so large that the supply of funds must emerge on a national, rather than on a local, basis. This has created a demand by nationwide lenders for title insurance in areas where local lenders has long been content with uninsured evidence of title. National lending institutions have insisted on title insurance as security before they would accept a mortgage instrument.

Title insurance enables therefore a more efficient closing process for buyers, sellers and lenders, than a system merely based on the registration of deeds maintained by the public sector:

The U.S. has the most efficient real property transfer system in the world and part of that is because of liquidity available through the secondary market. Title insurance allows imperfect transactions to close, by providing coverage that writes around risks that might otherwise not be acceptable to the buyer or lender (Moody 2005, p. 58).

If we may believe the press releases issued by the title industry the title insurance is ready to conquer the world (e.g. Penrose Financial 2006). 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). Wurm (2006; p. 19) foresees a prosperous future of this product for the European market:

Title Insurance provides a private solution that allows investors, as well financial institutions, to benefit from a vast unified market.

## **Critical remarks**

*We end this analysis with some critical remarks.* The first point is that 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 will 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, according to Arruñada (2002) the international policies offer less coverage than the standard policies in the US. For example, unrecorded interests in land (overriding interests) are typically excepted from the insurance. Further, the international title insurance companies operate differently than in the US. Agents nor insurers carry out title searches, issue title reports or maintain title plants like in the US, 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.

## 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 Eurohypothec and EULIS initiatives are first steps. 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 of EuroTitle. One finds its' basis in the public sector. Member States in the EU may support registration of a uniform title in the national registry and the national land registry can issue a EuroTitle within its jurisdiction. The EuroTitle 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 access to the information. The EuroTitle concept meets the recommendations made by the Forum Group on the topics of registration of rights and insight in the legal status of land. It also fits the standards that Cadastre 2014 puts for systems of land registration in near future.

Another direction may be a guarantee of title based on the concept of private title insurance as used in the US. An analysis of the system of Titling Insurance shows several 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 US national standard for the (secondary) mortgage market: title insurance. The example from the US 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.

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