

The European Real Estate Market – Transparency, Security and Certainty through registration by EuroTitle

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1. 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. In the armchair one can browse the sites and search for the dream house over the border.

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?

This contribution focuses on the current discussion on harmonization and other relevant developments in the area of real estate law and land registration in Europe. Partly these developments are purely European, such as the European Land Information Service (EULIS) and the INSPIRE-directive on establishing an Infrastructure for Spatial Information in the European Community. Partly harmonisation drivers are even aimed to be universal: the vision Cadastre 2014. This initiative is also an example of a technical view on the issue of land registration and interest in land, and might therefore easily be overlooked by the lawyers operating in the field of land law.

2. Terminology: cadastre, land registers, land registration

It is very important to make some remarks about the terminology used in this paper, in order to avoid misunderstandings. In general a distinction is made between cadastre, being a systematic description of the land units (parcels) within an area by maps and records, and the (legal) land registers, a public reg-

ister of deeds and rights concerning land. However, the distinction between cadastre and land registers is certainly not clear-cut, and depends on national definitions and practices (*Larson 1991*). We focus on the systems of registration of rights in land as such, sometimes referred to as land administration systems, cadastral systems or systems of land registration (*Zevenbergen 2002*). We will use the expression “land registration” or “system of land registration” to identify such systems irrespective of the actual role of institutions such as cadastres, and public registers in the respective jurisdictions.

3. A European real estate market?

Pure domestic property law such as the systems of conveyancing stay outside the scope of the European Union (EU) (Article 345 of the Treaty on the Functioning of the European Union (Part of Lisbon Treaty), former article 295 of the Treaty of Rome). This does not mean that Europe has no impact on this area. Sparkes in his analysis on “the development of an autonomous European land law” identifies the introduction of the free movement of capital in the Maastricht Treaty in 1994 as a crucial moment (*Sparkes 2007*, 109). Residents of the EU are free to move capital across the internal market. Such a movement of capital is involved in a sale and purchase of land, and when a cross-border element is involved in this the freedoms of the EU treaty comes in play. An example is the purchase of land in Tirol by a German citizen. According to Austrian law this purchase requires an authorisation by the Austrian administration. The European Court of Justice considered this requirement to be a control on land ownership that affected the free movement of capital without sufficient justification (ECJ 1999a). Not only the payments made to buy land, but also loans for the purchase of land or the construction of a building on the land, and the creation of a mortgage to secure the loan are examples of capital movements (ECJ 1999b). In the words of Sparkes “the dawn of 1994 represented the birth of European Land Law” (2007, 22).

However, 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.

3. A European real estate market?

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 obtained an overview of the registered rights, what will Benjamin and his banker make from the information that André is *propriétaire* 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 or other registers. 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 1).

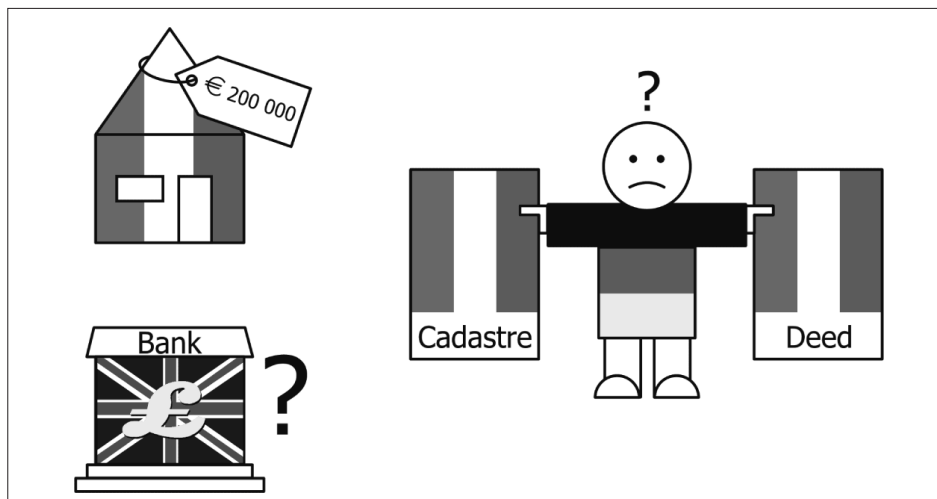


Figure 1: The development of a cross-border real estate and mortgage market within the European Union is hampered by the lack of transparency of national land registries and uncertainty about the value of the information provided.

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 deter-

ring effect on non-national bankers. Despite the EU Second Banking Directive (89/646/EEG), and – more significantly – the freedom of capital movements as introduced by the Maastricht Treaty in 1994, a single European mortgage market seems still far away. It has been claimed that transnational mortgage lending represents not more than 1 % of the whole mortgage business in Europe (*Nasarre-Aznar* 2004). According to *Aalbers* (2009, 401) in the Czech Republic, Estonia, Hungary and Luxembourg foreign credit institutions have a market share of more than 90 %. Aside from these countries, the Netherlands, the UK and Italy have seen the largest number of foreign institutions in their mortgage markets, also because of acquisition and merger with national banks. *Aalbers* concludes that the primary mortgage markets within the EU remain national. Only the secondary mortgage market has become global (*Aalbers* 2009).

4. Requirements for an European real estate market

Aalbers (2009) identifies several reasons why the European primary mortgage markets are still national. Next to facts such as the differences between tax law and repossession laws, mortgage lenders seem to have serious difficulties to enter a foreign market, because of the lack of a local branch network, the lack of knowledge of the local market and an information deficit, e.g. by lack of access to credit, collateral and land registers. This need for local knowledge, which is so important in the primary market, plays a much less important role in the secondary market (*Aalbers* 2008).

Aalbers' research supports the findings of the Forum Group on Mortgage Credit advising the European Commission in 2004, by identifying the barriers to an integration of the mortgage market, and proposing means to tackle those barriers (EU 2004). Their conclusion is that a single European real estate market requires:

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

The importance of these requirements has only been stressed by the recent mortgage crisis (*Stöcker and Stürner* 2010, 4).

4.1 Transparency of mortgage products: Eurohypothec

The differences between mortgages within the European Union are addressed by initiatives to create a common mortgage for the EU; the so called Euro-

mortgage or Eurohypothec. The first steps were made in the 1960's (*Stöcker and Stürner* 2010, 113). A few years ago the Eurohypothec Research Group proposed its model for a common mortgage (www.eurohypothec.com).

In 2005, based on the works of the Eurohypothec Research Group, the Mortgage Credit Foundation published the "Basic Guidelines for a Eurohypothec", sketching the outlines for a Eurohypothec 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 as regards 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 existing national legal frameworks for mortgages and hypothecs in Europe. The Eurohypothec is an extra tool for lenders and borrowers (*Nasarre-Aznar* 2010). Already the discussions about the Eurohypothec have contributed to the modernisation of national mortgage law in France, Spain, Poland, Serbia and Hungary (*Stöcker and Stürner* 2010, 115).

4.2 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". In 2007, the European Commission published the White Paper on the Integration of EU Mortgage Credit Markets (EU COM (2007) 807 final).

The White Paper is rather reserved with regard to the action that should be taken. For national land registries, the impact assessment mentions the following objectives (EU SEC (2007), 1683 final, p. 130):

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

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

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

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

4.2.1 European Union Land Information Service

A first step had been made by EULIS, the European Land Information Service (see <http://www.eulis.org>). This project brings together several European land registrations in one internet portal (*Gustafsson 2003; Ploeger and Van Loenen 2004*).

EULIS was launched as a live service in November 2006. Currently connected to the service are the cadastres of Sweden, Ireland, Austria, The Netherlands, England and Wales, and Lithuania. Belgium, Czech Republic, Estonia, Finland, Iceland, Italy, Latvia, Northern Ireland, Norway, Scotland, Serbia Republic, Slovak Republic, Slovenia, and Spain are preparing their systems to meet the EULIS requirements and to become a partner.

In EULIS, the 'foreign' user 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 system of land transactions and land law, a definition of terms used in the register output (e.g. the legal description of the right of ownership of land, for example, in Sweden).

From the point of view of harmonisation of European (land) law, the EULIS glossary is a very interesting part of the project. It provides a translation of expressions from one language in another. An example may be the translation of the Austrian Hypothek into the Scottish standard security, the Dutch hypotheek, or the English mortgage. In addition to this translation the user finds a short clarification (definition) of the legal expression. For mortgage that is 'a right in property granted as security for the payment of a debt'.

Next to the expressions in each of the national languages, this glossary consists of 'EULIS terms' and 'EULIS definitions'. They 'act as semantic bridges between (national) concepts used in different jurisdictions' (*Tiainen 2004*). The glossary can be considered to be the first initiative to develop a pan-European language on (land) law.

Although the registries of England and Wales, and Scotland participate in the project, and although the EULIS expression is in English, the expressions used in the glossary are not necessarily the same as the common law English terminology. For example, the English *tenant* is in the EULIS glossary described as *lessee*, *registered title* is *register unit*, and finally the English *estate* or *tenure* is in EULIS terminology *title*. This is the equivalent to *bewijs van eigendom* in Dutch, *Lagfart* in Swedish or *Eigentumstitel* for Austria.

It should be noticed that this 'glossary' has not been the subject of critical discussion by legal scholars yet.

4.2.2 EULIS 2.0, Project LINE

In September 2010, EULIS was continued in the project LINE, Land Information for Europe (see <http://eulis.eu/project-line>). This project, supported by the European Commission, aims at creating a technologically and financially-viable next generation EULIS platform (called EULIS 2.0). The project is not just aimed at technical improvements. Based on an analysis of the customers' needs, the project aims to improve the reference information (e.g. the products by the local land registries) and the legal information, including the above mentioned glossary.

4.2.3 Value of the information

EULIS has accomplished significant improvements in accessibility of land information, and will continue to do so in the LINE project. But 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. 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 and Van Loenen 2004). Most users, both layman and professionals, will probably not know this difference. 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. However, this does not improve the reliability of the registers itself (ELRA 2008).

5. INSPIRE-directive

An harmonizing effect in the area of so-called “spatial data” as such has Directive 2007/2/EC of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE, see <http://inspire.jrc.ec.europa.eu>). Spatial information has a much wider scope than legal information on land in the national systems of land registration. INSPIRE will provide a framework for exchange of geographic data and services between Member States. The directive emphasizes support of the formulation, implementation, monitoring activities and evaluation of Community policies linked with the environment at European, national and local level, and to provide this information to the public. Harmonisation requirements are developed for metadata documentation, data set specifications (e.g., what is a parcel) and harmonisation of access through on-line services. One of the so called “core spatial data theme” is the cadastral parcel, being the smallest unit of registration, that are common in all EU Member States.

Provided the objective of INSPIRE, it is likely that it may impact the way rights on real-estate and underlying (parcel) data are registered and documented from a technical perspective. It will, however, not impact land law and land registration as such.

6. Cadastre 2014

After exploring different systems of land registration worldwide the International Federation of Surveyors (FIG) published in 1998 “Cadastre 2014, A vision for a future cadastral system” (*Kaufmann and 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:

- will show the complete legal situation of land, not only private law rights, but also public rights and restrictions (all public and private rights adjudicated to a legal land object will be registered officially);
- 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 aims to put a international standard for the benchmarking and development of existing systems. However, Cadastre 2014 does not pursue a real harmonization in the field of land registration and/or land law:

7. Certainty by the private sector in the United States

“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 and Steudler 1998, 27*).

And “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 and Steudler 1998, p. 36*).

Our conclusion is that Cadastre 2014 sets standards that are useful for the development of a harmonised system of land registration, but as such does not contribute (and certainly does not aim to) to reaching an harmonization.

7. Certainty by the private sector in the United States

Due to the wide variety of registration systems across the US and therefore 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 (*Moody 2005; Sirmans & Dumm, 2006*).

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

There are two types of title insurance:

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

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

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

The American Land Titling Association (ALTA), the national trade association for the title insurance industry in the US claims that during the title search, title companies find (and fix) problems with the title in 25 percent of the transactions (ALTA 2007). This suggests that examination of title by the insurance company is more important than the insurance itself.

7.1.1 The rise of title insurance in the USA

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

The development of a secondary mortgage market was very important in this development (*Moody* 2005). For local lenders, with knowledge of their local clients, an uninsured evidence of title, based on the legal opinion of a local attorney could be sufficient. The demand for capital investment became so large that the supply of funds had to be found on a national basis. National lending institutions insisted on title insurance as security before they would accept a mortgage, because it is required by the secondary mortgage market (*Johnson* 1966, 393; *Sirmans and Dumm* 2006, 297). To put it in an other way: a title opinion from a local attorney will not provide the assurance for a national lender that is unfamiliar with local risks (ALTA 2007, 9). This explains that although several US states offer state guarantee of property rights (e.g. Torrens system), nearly all institutional lenders require title insurance to protect their interests in the collateral of loans secured by real estate (*Sirmans and Dumm* 2006).

7.1.2 Title Insurance outside the USA

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

7.1.3 Critical remarks

The title industry does not improve the transparency of rights on real estate as such. 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 per state and sometimes even per 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.

Arruñada (2002) found that international policies offer less coverage than the standard policies in the US. Unregistered interests in land (overriding interests) are typically excluded from the insurance. Further, the international title insurance companies operate in a different way than in the 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.

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

8. Uniform level of certainty by EuroTitle

According to *Nasarre-Aznar & Stöcker* (2006) an excellent partner for the Eurohypothech 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' (*Nasarre-Aznar* 2004).

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.

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 Eurohypothech 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 2). This concept of a common standard of land registration for Europe, has been presented in *Ploeger en Van Loenen* (2005) and *Ploeger, Nasarre-Aznar and Van Loenen* (2005) and – from the perspective of the impact on national land law – further discussed in *Ploeger* (2006).

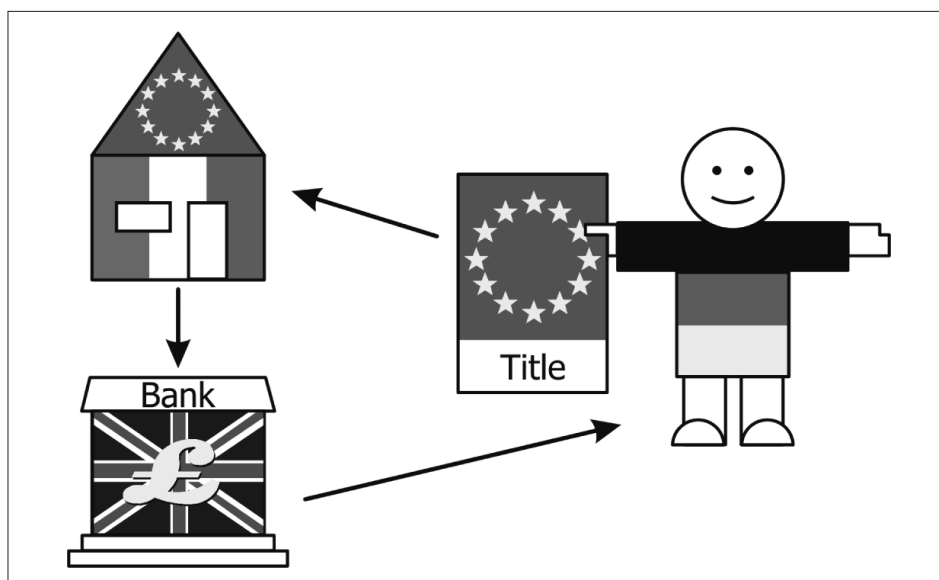


Figure 2: Registration of land under EuroTitle will provide the certainty needed by owners, buyers and bankers and therefore boosts the development of a single market.

8. Uniform level of certainty by EuroTitle

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

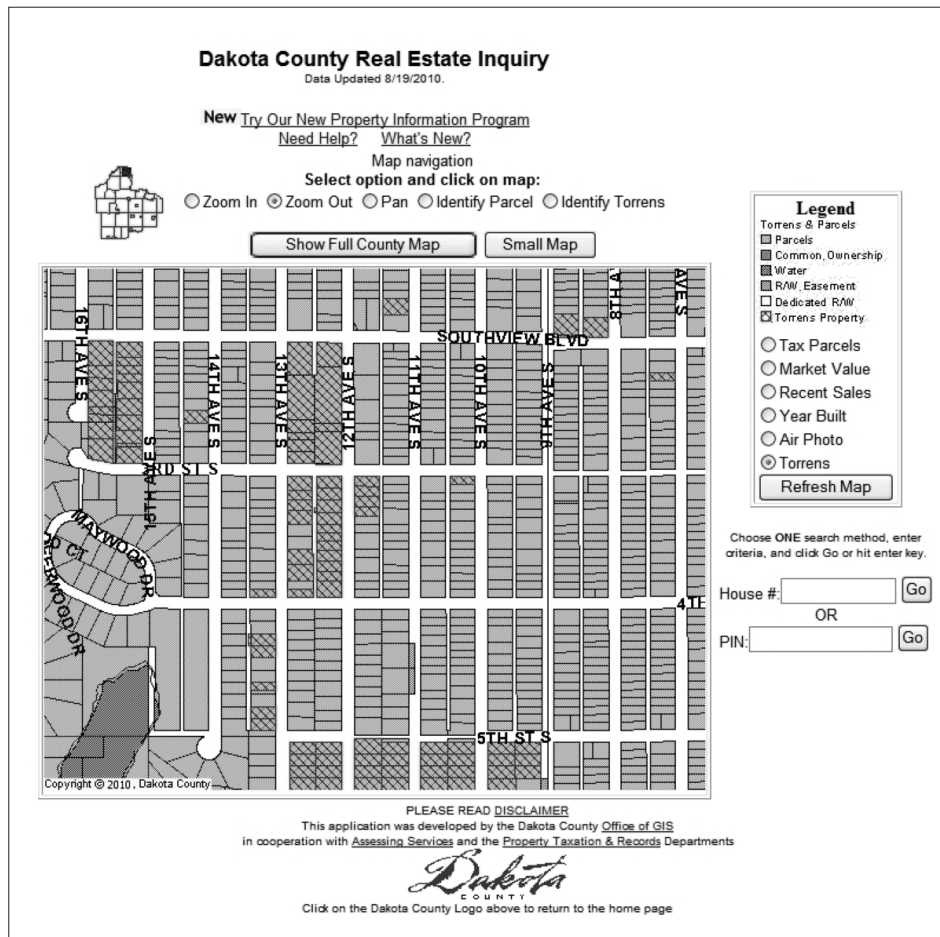


Figure 3: Information on real estate in Dakota County, Minnesota, US. Parcels registered under Torrens title (shaded) and Abstract title integrated in one Geo-Information System.

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 3).

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 summarise, EuroTitle provides:

- a common 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.

9. 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 registries of the member states. The European Land Information Service (EULIS) initiative is a major step in providing readily access to the information of the national land registries.

However, a single European real estate market requires a uniform system of land registration to promote cross-border transactions. The introduction of a common way of land registration complimentary to the existing national land registrations may bring the required uniformity of land registration in Europe. This 'EuroTitle' system does not need the introduction of a European Land Registry as such. 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 organisa-

tion that registers this title. Land registered under EuroTitle not only provides a uniform registration of rights and restrictions in land in the EU, but also easy access to the information.

In our view, land law and land registration cannot ignore and will not be ignored by the many harmonization developments in Europe and beyond. The question is not whether they will be influenced, but when they will move towards a harmonized system of land administration/registration across the European Union.

Further research in and the implementation of a EuroTitle system will support the development of a true European real estate market including the European primary and secondary mortgage market.

