Security interests: a secure start for the development of European property law

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Security interests:
A secure start for the development of European property law

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Abstract

In this paper it is examined if unification or even harmonisation of the law on security rights, both on movables, immovables and claims, is at all possible without (1) thorough analysis of the property law traditions in Europe, (2) study of the existing, albeit limited, acquis communautaire in the area of property law and (3) an overall framework of European property law, in other words: a common frame of reference, as is now being developed with regard to particularly contract law. In my Van Gerven lecture "European and national property law: Osmosis or growing antagonism?" (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995979) I answered question (1) already negatively. As to the *acquis communautaire* in the area of property law some research has been done and is now being published. It is on question (3) that I focus: the need to develop an overall framework of European property law and what the constituent elements of such a framework should be. Several policy choices are being discussed: Should more freedom of contract in the law of property be allowed? Is there a need for civil law systems to allow more flexibility with regard to their unitary concept of ownership? Should protection of ownership or protection of commerce have priority?

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I. Introduction

In 1966 the European Commission published a study called “The development of a European capital market”, written by a group of experts chaired by Claudio Segré. In this so-called “Segré report”, the experts advised to introduce a European type of mortgage to facilitate the coming into existence of a European capital market. In what may seem somewhat cryptic terms the reports states:[1]

> “The approximation or harmonization of the legal status of the real-estate sureties required in the Member States should be given priority. More flexible and less burdensome than the mortgage, the "land-charge deed" technique (...) is an instrument which might usefully be adapted to the financing of building. And arrangements should be made so that mortgage or land-charge deed registrations can be expressed in currencies other than that of the country of registration.”

The “land-charge deed” technique referred to is the German *Grundschuld*, a non-accessory mortgage on immovables. The report explains this technique as follows:[2]

> “In all the Member States, real-estate charges play an important role as security for long-term credit, despite the problems which may arise in enforcing a claim where the buildings or land mortgaged form pan of an industrial complex that is difficult to split up.”

German experience suggests a technique which may be of particular interest in international credit operations. In this country the mortgage has largely been supplanted by the land charge (*Grundschuld*) for industrial financing and for the financing of house building.

This procedure has proved simpler than that of mortgage registration, which is often both lengthy and costly. The land charge is an abstract lien on real estate, which arises or is extinguished independently of the claim it secures. Where a land charge deed is issued, it may be assigned without necessitating any new entry in the land register (*Grundbuch*). In the same way, once the loan has been repaid, the deed is again transferred to the owner of the asset and is available to secure a further credit. The land charge is divisible. It also lends itself to the securing of credit operations on current account.

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1 Segré Report, p. 169. The report can be found electronically at: <http://ec.europa.eu/economy_finance/emu_history/documentation/chapter1/19661130en382develeurocapitm_c.pdf>.

2 Segré report, p. 152 and 153.

The report also addresses the question whether a mortgage can be denominated in a foreign currency:[3]

> "A closely related question is that of denominating mortgages in currencies other than that of the country in which the asset is situated. In Italy and Luxembourg this can already be done; if similar legislation were introduced by the other member countries, the conclusion of international lending transactions backed by real-estate liens would become easier."

The latter problem was solved by the European Court of Justice (ECJ) in its *Trummer v. Mayer* ruling, in which the Court decided that it was a violation of European law (Article 73b of the EC Treaty, now Article 56 EC) if national rules required a mortgage securing a debt payable in the currency of another Member State to be registered in the national currency.[4] After the introduction of the Euro this problem has disappeared in situations where Member States within the Euro zone were involved, but it still exists in cases where a mortgage is expressed in, to give an example, British pounds sterling and registration has to take place outside the United Kingdom. A far greater and also far more difficult controversial point is what the Segré report remarked about the introduction of a uniform type of mortgage, modelled on the basis of German law. That it was a controversial point becomes clear if one realises that it took until 1988 before any follow-up initiative was taken.[5]

After publication of the Segré report the focus changed quickly to security interests on movable property and claims. In 1972 the European Commission published a study entitled "The Law of Property in the European Community", written by Wulf Gravenhorst, Trevor Hartley and Ole Lando. Gravenhorst wrote about the laws of the founding members of the European Union (Belgium, France, Germany, Italy, Luxemburg and the Netherlands), Hartley discussed the United Kingdom and Ireland and Lando examined Danish law with some commentary on Norwegian law. The purpose of the study was to prepare unification of private international law in the area of property law, focussing

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3 Segré report, p. 153.

4 European Court of Justice 16 March 1999, Case C 222-97, Trummer v. Mayer, to be found electronically at the website of the ECJ: <http://www.curia.europa.eu/en/transitpage.htm>.

5 Union Internationale du Notariat Latin/Commission des Affaires Européennes, La cédule hypothécaire suisse et la dette foncière allemande – Étude comparative, base d'une future Euro-hypothèque (Amsterdam: Stichting tot Bevordering der Notariële Wetenschap, 1988). For an overview of the developments and further references to legal literature see H.G. Wehrens, Real security regarding immovable objects – Reflections on a Euro-Mortgage, in: A. Hartkamp (et al., eds.), Towards a European Civil Code (Nijmegen: Ars Aequi Libri/ Kluwer Law International, 2004), p. 769 ff.

on security interests on movable property. The study is remarkable from several points of view. First of all, it is based on the assumption that unification of private international law in the European Communities would only be possible after a thorough comparative examination of substantive property law as it was applied in the various Member States. Secondly, a study on English, Scottish, Irish and Danish law (with some aspects of Norwegian law) was added, although the United Kingdom, Ireland and Denmark had not yet become members of the European Communities. This only happened on January 1, 1973. Nevertheless, in the minds of the authors a growing awareness must have existed that as soon as these three states would become members of the (then) European Communities, a considerable legal diversity would result, especially in the area of property law. Thirdly, the main focus was on security rights on movables.[6] Reflecting upon these three aspects of this study, it becomes apparent that already more than 45 years ago it was clear that with regard to security interests on movables initiatives to unify at least the rules of private international law were badly needed, but that any attempts to reach harmonisation were hampered by the existing legal diversity. However, unification or even harmonisation of the substantive rules of property law was out of the question. No doubt it was considered to be too complicated and it was feared that finding common ground between Civil Law, Common Law, the Scandinavian legal traditions and the mixed legal systems would prove to be too cumbersome and most likely impossible. The main reason for this fear seems to have been that property law was considered to be a national system of coherent choices, safeguarded by mandatory law while limiting the parties' freedom to create new or give shape to existing property rights. This can be detected in the introductory remarks made by Gravenhorst in his part on the laws of the six founding Member States. He writes as follows:[7]

> "A description of the types of security on movables in the legal system of different countries cannot be restricted to the portrayal in isolation of individual legal concepts such as, say, retention of title. In order to grasp the full economic and legal significance of the different types of security, it is necessary to have regard to the position they occupy in relation to the remainder of the

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6 It is not really clear whether in English it should be "right in", "right on", "right over" or "right in respect to" a movable, an immovable or a claim. The same linguistic problem arises with regard to the use of the word "interest". If the movable, immovable or claim is seen as the object of the right, then probably "right on" or "interest on" should be used. In comparative legal literature all variations can be found. In the following, unless reference is made to writings by a particular author, I have used "right on" or "interest on" a movable, an immovable or a claim.

7 The law of property in the European Community. Studies, Competition – Approximation of legislation series No. 27, Brussels, December 1972, p. 13.

civil law system in question. Thus in the case of contracts of sale, for example, the full implication of retention of title does not become apparent until one has at least glanced at the other legal relationships between seller and buyer."

This report was followed in 1974 by the publication of a study on security over corporeal movables, edited by Jean Georges Sauveplanne, which contained various papers presented to a colloquium on security over corporeal movables, organised in 1971 by the United Kingdom National Committee of Comparative Law in Edinburgh.[8] In his concluding remarks Sauveplanne, while referring to Shakespeare's Macbeth ("And you all know: security is mortals' chiefest enemy"), summarises the existing diversity in the legal systems which are being dealt with in the various national reports by, on the one hand, showing the enormous diversity at a technical level and, on the other hand, also showing the leading thought patterns underlying the various technical solutions.[9] These can be summarised as follows. (1) Ownership and limited property rights are both used to secure payment of a debt. Ownership in the hands of the creditor for security purposes (be it as the result of a retention of title by or a transfer of title to the creditor) is seen not as full, but as limited ownership, giving the owner the same rights as the holder of a security interest. In other words: formal ownership no longer implies all of the entitlements an owner has. (2) Possessory security rights are not compatible with modern financing techniques, resulting in a preference for non-possessory security arrangements. (3) Liens and preferential rights may function as quasi-property rights. Inspired by his analysis of the underlying thought patterns it can be no surprise that Sauveplanne felt strongly attracted by the uniform security interest laid down in Article 9 of the Uniform Commercial Code (UCC). Article 9 is based on a functional approach, merging the use of ownership as security and limited property rights into one unitary security interest, which is characterised further by its non-possessory nature and the requirement that, in order to be "perfect", a notice of the security interest must be registered.[10]

As was the case with mortgages on immovables, also with regard to security interests on movables nothing really happened at a European level until things began to change some 10 years ago. The deepening (as a result of growing cross border trade) and widening (following the accession of new Member

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8 J.G. Sauveplanne (ed.), Security over corporeal movables (Leyden: A.W. Sijthof, 1974).

9 Sauveplanne, Security over corporeal movables, p. 295 ff.

10 For an electronic version of Article 9 UCC see the website of the Legal Information Institute of the Cornell University Law School: <http://www.law.cornell.edu/ucc/9/overview.html>.

States) of the common and internal market is causing an increasing numbers of cases in which problems of private international law arise. This is happening to such an extent that there is now growing awareness that either private international (property) law will have to be unified or substantive harmonisation or unification of (areas of) property law will have to be considered and perhaps even both of these developments should take place. Indeed, large areas of private international law were – already before, but particularly after the Treaty of Amsterdam – unified by European law. Property law, however, was generally excluded. The exception was retention of title, but Article 4 of the Late Payment Directive does not really say much more than that each Member State should allow retention of title and that a retention of title agreed upon in another Member State should be recognised in all other Member States according to their rules on private international law.[11] This can hardly be called unification of private international law. A broader attempt with regard to retention of title was made in Article 7 of the Insolvency regulation, but again the unification effect is limited.[12] Furthermore Article 8 of the Regulation states that the

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11 Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, OJ L 200, 8.8.2000, p. 35 ff. Article 4 of the Directive states:
"1. Member States shall provide in conformity with the applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for if a retention of title clause has been expressly agreed between the buyer and the seller before the delivery of the goods.
2. Member States may adopt or retain provisions dealing with down payments already made by the debtor."

12 Council Regulation (EC) No 1346/2000 of 29 May 2000, OJ L 160, 30.6.2000, p. 1 ff. on insolvency proceedings. Article 7 reads:
"1. The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.
2. The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.
3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m)."
It should, again, be mentioned that a terminological question arises. The Late Payment Directive uses the term "retention of title" (which is more the Common Law term), whereas the Insolvency Regulation uses the term "reservation of title" (which sounds more Civil Law). No doubt, the same legal effect is intended, but terminological coherence is certainly lacking here.

"effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated" and Article 11 adds that the "effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept." In other words: the *lex rei sitae* and the *lex registrationis* rules of private international law still apply.[13]

It is, at least in part, this failed attempt to unify private international property law that led authors such as Kieninger, von Wilmowsky and Rutgers to ask the question whether European law as such and in particular the four freedoms (freedom of goods, persons, services and capital) did not demand that recognition of foreign security interests was a duty under European law.[14] It could be argued that within the European Union (EU) a security interest, validly created in a Member State, is not really a "foreign" security interest anymore and should therefore be recognised in all other Member States. The question can be asked whether decisions by the European Court of Justice in cases such as *Cassis de Dijon* may be seen as an underpinning of such a reasoning.[15] Should security interests within the European Union be mutually recognised, irrespective of whether such a security interest could be fitted into the national legal system? This may sound a far reaching conclusion, but in essence the argument is not really very different from what can be found in the "*Cassis de Dijon*" case in which the ECJ forbade the application of a national rule that did not allow this liqueur to be marketed in a different Member State than in which it had been produced.[16] Such an application was considered to be a measure

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13 See also Article 5 (third parties' rights in rem) and Article 14 (protection of third-party purchasers) of the Insolvency Regulation.

14 E.-M. Kieninger, Mobiliarsicherheiten im Europäischen Binnenmarkt. Zum Einfluss der Warenverkehrsfreiheit auf das nationale und internationale Sachenrecht der Mitgliedstaaten (Baden-Baden: Nomos, 1996); P. von Wilmowsky, Europäisches Kreditsicherungsrecht. Sachenrecht und Insolvenzrecht unter dem EG-Vertrag, 60 (Beiträge zum ausländischen und internationalen Privatrecht; 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);

15 ECJ 20 February 1979, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, Case 120/78, *"Cassis de Dijon"*, [1979] ECR 648, also to be found via Eur-Lex: <http://eur-lex.europa.eu/en/index.htm>.

16 The ECJ ruled as follows: "8. In the absence of common rules relating to the production and marketing of alcohol – a proposal for a regulation submitted to the Council by the Commission on 7 December 1976 (Official Journal C 309, p. 2) not yet having received the Council' s approval – it is for the Member States to regulate all mat-

having an effect equivalent to quantitative restrictions on imports, as meant in Article 30 EEC Treaty. What was produced in a Member State according to the rules of that Member State should be marketable in all the other Member States. Then why not accept that a security interest, lawfully created in a Member State, should be recognised ("marketable") in a different Member State? I do not intend to answer all the questions raised above, but it might be interesting to look at one particular point. Could the unity of a national system of property law perhaps be a counter argument? Could a case be made that, as a system of coherent choices protecting legal certainty and promoting predictable outcomes of legal disputes which in the area of property law with its long term relations are of high value, property law is exempt from a *Cassis de Dijon* line of reasoning? That can be doubted.

It seems, first of all, that Article 295 EC ("This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership"). does not play a major role in the development of European property law.[17] See for instance the decisions of the ECJ in *Klaus Konle v. Republic Austria* ("although the system of property ownership continues to be a matter for each Member State under Article 295 EC, that provision does not have the effect of exempting such a system from the fundamental rules of the Treaty") and the decision in the *Tobacco* case ("[t]hat provision merely recognises the power of Member States to define the rules governing the system of property ownership and does not exclude any influence whatever of Community law on the exercise of national property rights").[18] Secondly, it seems that the ECJ is

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ters relating to the production and marketing of alcohol and alcoholic beverages on their own territory.
Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer."

17 Cf. on the property provisions in the Euratom Treaty P. Mathijsen, Problems connected with the creation of Euratom, Law and Contemporary Problems 1961, p. 438 ff., 447 ff.; P. Böhm, Ownership of nuclear materials in Euratom, American Journal of Comparative Law 1962, p. 167 ff. See Articles 86 ff. Treaty establishing the European Atomic Energy Community (Euratom).

18 ECJ 1 June 1999, *Klaus Konle v Republic Austria*, Case C-302/97, [1999] ECR I-3099, recital 38 and ECJ 10 December 2002, *Tobacco case*, Case C-491/01, [2002] ECR I-11456, recital 147. All recent ECJ decisions are available electronically at: <http://curia.europa.eu/en/transitpage.htm>. See also M.W. Hesselink, J.W. Rutgers and T. de Booys, The legal basis for an optional instrument on European contract law, University of Amsterdam, Centre for the Study of European Contract Law, Short study for

moving gradually into the area of substantive property law. I refer to the *Trummer v. Mayer* case, earlier mentioned.[19] Another example of the court's growing involvement with property law questions are the so-called "golden share" cases: the holding of shares with a special status by a Member State which allow that state to control a company.[20] By not allowing golden shares, the ECJ in fact is limiting the rights of shareholders, thus limiting their property entitlements. The ECJ also decided recently that in a situation where both the contract for the sale of immovable property and the agreement on transfer of ownership of that property have been concluded before the date on which the buyer is included in a list of people suspected of terrorist activities and where the sale price has also been paid before that date, Article 2(3) of Regulation (EC) No 881/2002, as amended by Regulation No 561/2003, must be interpreted as prohibiting the final registration, in performance of that contract, of the transfer of ownership in the Land Register subsequent to that date.[21] In other words: EU anti-terrorism measures can have a direct impact on national property law. The question which is now under review by the ECJ is whether the decision to put a person on this black list can be reviewed or not in the light

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the European Parliament on the different options for a future instrument on a Common Frame of Reference (CFR) in EU contract law, in particular the legal form and the legal basis for any future optional instrument, Final report – 31 October 2007, Working Paper Series No. 2007/04, electronically available at: <http://www.ssrn.com/abstract=1091119, p. 57/58.

19 Case C-222/97.

20 Cf. ECJ 4 June 2002, *Commission v. Portugal*, Case C-367/98, *Commission v. France*, Case C-483/99 and *Commission v. Belgium*, Case C-503/99. In the latter case the Court stated:
"43. (...), it is undeniable that, depending on the circumstances, certain concerns may justify the retention by Member States of a degree of influence within undertakings that were initially public and subsequently privatised, where those undertakings are active in fields involving the provision of services in the public interest or strategic services (...).
44. However, those concerns cannot entitle Member States to plead their own systems of property ownership, referred to in Article 222 of the Treaty, by way of justification for obstacles, resulting from privileges attaching to their position as shareholder in a privatised undertaking, to the exercise of the freedoms provided for by the Treaty. As is apparent from the Court's case-law (Case C-302/97 Konle [1999] ECR I-3099, paragraph 38), that article does not have the effect of exempting the Member States' systems of property ownership from the fundamental rules of the Treaty."
See also recently the decision about the "VW Gesetz": ECJ 23 October 2007, *Commission v. Germany*, Case C- 112/05 , more in particular the opinion by the Advocate-General Ruiz-Jarabo Colomer, nrs. 48 and 49.

21 ECJ 11 October 2007, *Möllendorf* , Case C-117/06, (to be found electronically at: <http://www.curia.europa.eu>).

of, among other points, the right to property.[22] Thirdly, decisions by the ECJ concerning this same argument in the area of social security show that with regard to property law a, what might be called, European legal method is developing. Time and time again, Member States have argued that their social security system is a matter for national law, because otherwise interference by the European Union might result in severe disruption of the system as a consequence of financial imbalance. In the *Stamatelaki* case the ECJ, following earlier case law, accepted this argument in part, but also rejected it in part:[23]

> "23. Whilst it is settled case-law that Community law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions in which social security benefits are granted, when exercising that power Member States must comply with Community law, in particular the provisions on the freedom to provide services. Those provisions prohibit the Member States from introducing or maintaining unjustified restrictions on the exercise of that freedom in the healthcare sector (...)"

It could perhaps be said by analogy that also with regard to property law maintaining a balanced system is of great value and that it is within the power of the Member States to organise their own property law system and that, in absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions in which a property right is granted (included, I would like to add: how a property right is transferred as well as terminated). However, when granting property rights Member States must comply with Community law. This is precisely what can be seen in such recent property law cases as *Trummer v. Mayer* and *Möllendorf*.

A beginning has been made with the unification of substantive property law. Examples are the Directive on the return of cultural objects unlawfully removed from the territory of a Member State and the financial collateral arrangements directive.[24] In the area of immovable property law it now seems

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22 Court of First Instance 21 September 2005, *Yusuf and Al Barakaat International Foundation v Council and Commission*, Case T-306/01, [2005] ECR II-3533 and *Kadi v Council and Commission*, Case T-315/01, [2005] ECR II-3649; Court of Justice, 3 September 2008, *Kadi v Coucil and Commission, Yusuf and Al Barakaat International Foundation v Council and Commission*, Joined Cases C-402/05 P and C-415/05 P.

23 ECJ 15 April 2007, *Aikaterini Stamatelaki v. NPDD Organismos Asfaliseos Eleftheron Epangelmation (OAEE)*, Case C-444/05.

24 Council Directive 93/7/EEC of 15 March 1993, OJ L 74, 27.3.1993, p. 74 ff. (with amendments); Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, OJ L 168, 27.6.2002, p. 43 ff. Cf.

that an attempt to introduce a so-called "euromortgage", a security right, modelled upon German law (the *Grundschuld*) and Swiss law, not dependent upon the existence of an underlying debt, will not be made. It is submitted that this is quite understandable given the mortgage credit crisis that is now heavily affecting financial markets and the resulting "credit crunch". New mortgage law might cause even more instability and should therefore be avoided, at least for the time being. The credit crisis has also made apparent very serious problems concerning the protection of borrowers of money, secured by a *Grundschuld*.[25] The contract governing the loan relationship between borrower and bank/lender (the *Sicherungsvertrag*) does not seem to provide sufficient protection to the borrower vis-à-vis third parties who are the successors of the original holder of the non-accessory mortgage. The contract does not create sufficient "*Ersatzakzessorietät*" (in other words adequate connection between loan agreement and mortgage).[26] It seems that in certain cases the borrower cannot invoke the terms of this loan agreement with the original holder of the mortgage against the new holder, thus leaving him at the mercy of the new mortgagee. This clearly violates even the most basic notions of consumer protection, a key value in European law.[27]

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also the legal booklet published by the European Central Bank, European legislation on financial markets. Settlement Finality Directive, Financial Collateral Directive, Winding-up Directive for Credit Institutions (Frankfurt am Main: European Central Bank, 2007), p. 34 ff.

25 See the White Paper on the Integration of EU Mortgage Credit Markets (presented by the Commission), Brussels, 18.12.2007, COM(2007) 807 final. See also on the problems concerning borrower protection in German law: C. Clemente, Verwertung der nicht akzessorischen Grundschuld im Rahmen eines Forderungsverkaufs, Zeitschrift für Immobilienrecht 2007, p. 737 ff.

26 For the concept of "*Ersatzakzessorietät*" see S. van Erp, Surety agreements and the principle of accessority – Personal security in the light of a European property law principle, European Review of Private Law 2005, p. 309 ff., 318 ff.

27 See Article 153 EC Treaty:
"1. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests.
2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities.
3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through:
(a) measures adopted pursuant to Article 95 in the context of the completion of the internal market;
(b) measures which support, supplement and monitor the policy pursued by the Member States.

A totally different matter is, if unification or even harmonisation of the law on security rights, both on movables, immovables and claims, is at all possible without (1) thorough analysis of the property law traditions in Europe, (2) study of the existing, albeit limited, *acquis communautaire* in the area of property law and (3) an overall framework of European property law, in other words: a common frame of reference, as is now being developed with regard to particularly contract law.[28] In my Van Gerven lecture I answered question (1) already negatively.[29] My answers to questions (2) and (3) are also negative. As to the *acquis communautaire* in the area of property law some research has been done and is now being published.[30] It is on question (3) that I would like

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4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b).

5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them."

28 Cf. Chr. von Bar, E. Clive, H. Schulte-Nölke et al., Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR), Interim Outline Edition, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group), Based in part on a revised version of the Principles of European Contract Law (Munich: Sellier European law publishers, 2008). On 18 April 2008 the Council of European Union (Justice and Home Affairs) reached the following conclusions on the status of the CFR (see <http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/99991.pdf>):

"The Council endorsed a report setting up a Common Frame of Reference for European contract law. That report defines the Council's position on four fundamental aspects of the Common Frame of Reference:

(a) Purpose of the Common Frame of Reference: a tool for better lawmaking targeted at Community lawmakers;

(b) Content of the Common Frame of Reference: a set of definitions, general principles and model rules in the field of contract law to be derived from a variety of sources;

(c) Scope of the Common Frame of Reference: general contract law including consumer contract law;

(d) Legal effect of the Common Frame of Reference: a set of non-binding guidelines to be used by lawmakers at Community level on a voluntary basis as a common source of inspiration or reference in the lawmaking process.

The report will be communicated to the Commission so that it can take due account of it in its future work on the Common Frame of Reference."

29 S. van Erp, European and national property law: Osmosis or growing antagonism? Sixth Walter van Gerven Lecture (Groningen: Europa Law Publishing, 2006).

30 See J. Caramelo-Gomes, Unification in the field of property law from the perspective of European law, in: W. Faber and B. Lurger (eds.), Rules for the transfer of movables. A candidate for European harmonisation or national reforms? (Munich: Sellier

to focus: the need to develop an overall framework of European property law and what the constituent elements of such a framework should be.

It might perhaps also be good to express what not my intention is. It seems that in other areas of European private law than property law, particularly in the area of European contract law, academic debate is focussing more and more on methodology, sometimes even ideology and legislative politics. In this debate fundamental questions are raised (and they should be raised!) on whether the comparative legal method is used in a reliable way, what the role of the various actors in the process of developing a European private law is or should be and if European private law should be aimed at reaching social justice or first and foremost be aimed at creating an efficient internal market, which would be best served by a "spontaneous" legal order.[31] However, it must not be forgotten that the actual (comparative) legal work, in spite of all the dangers and pitfalls, also has to be done; otherwise nothing will happen. Again – I reiterate what I already put forward in my inaugural lecture – I would argue in favour of a more pragmatic approach, according to which comparative lawyers aim at reaching adequate (in the sense of: justifiable) results.[32] There are no good grounds for proclaiming, as I summarised the views of some authors in my inaugural lecture, a postmodern death of comparative law, or as Siems has formulated it recently the "end" of comparative law.[33] Comparative legal work will and must go on. Practising comparative lawyers are very much aware of the methodological problems they encounter. As long as this awareness exists, they will proceed in an adequate way and the outcome of their research will be valuable and, I would like to add, reliable. Comparative lawyers can, of course, hold and defend political or ideological views, but from my perspective these views should be clearly distinguished from evaluating comparative legal research as such.

European Law Publishers, 2008), p. 239 ff. and also P. Sparkes, European Land Law (Oxford: Hart Publishing, 2007).

31 Cf. Study Group on Social Justice in European Private Law, Social Justice in European contract law: a Manifesto, European Law Journal 2004, p. 653 ff.; M. Hesselink, The politics of a European Civil Code, European Law Journal 2004, p. 675 ff.; J.M. Smits, European private law: A plea for a spontaneous legal order, in: European integration and law. Four contributions on the interplay between European integration and European and national law to celebrate the 25th anniversary of Maastricht University's Faculty of Law (Antwerpen/Oxford: Intersentia, 2006), p. 55 ff.

32 S. van Erp, European private law: postmodern dilemmas and choices. Towards a Method of Adequate Comparative Legal Analysis, Vol. 3.1 Electronic Journal of Comparative Law, (August 1999), <http://www.ejcl.org/31/art31-1.html>.

33 S. van Erp, loc. cit.; M.M. Siems, The end of comparative law, Journal of Comparative Law 2007, p. 133 ff., available electronically at the website of SSRN: <http://ssrn.com/abstract=1066563>.

II. Property law as a system of coherent choices

a. Doctrinal coherence or pragmatism?

A first point for consideration, when trying to build up a European property law, is the question: are we looking for doctrinal coherence, pragmatic solutions or something in between? No doubt, civil lawyers will be inclined to stress the first, common lawyers will most likely stress the second approach. What I would like to propose is a combination of the two approaches or mentalities. To be able to decide in a rational and predictable way – rationality and predictability are two major aspects of property law! – we will need at least some basic theoretical (or doctrinal) coherence. On the other hand, given the enormous diversity between in particular Common Law and Civil Law, some accommodation with regard to one another's laws is unavoidable; otherwise no European property law can be developed. The development of a European property law is, certainly in areas such as security rights, generally seen as desirable to promote intra-European trade. In order to create a common framework the foundations of European property law systems will have to excavated and under the surface of technical diversity a search for legal policies, principles, standards, rules and concepts must start.[34] On this occasion I would like to look more into the future: Given what the various property law traditions share at the level of their foundations, how can this common basis be used as a spring board for a future European property law, especially a future European law of security rights?

Before, however, looking at the future, it may be good to summarise what the various property law systems have in common. It will be seen that the European property law systems as we know today all share certain intellectual roots stemming from the nineteenth century. I have called this the "classical model of property law".

b. The "classical" model of property law

In a well-known article entitled "Property rules, liability rules and inalienability: One view of the cathedral", published in 1972 in the Harvard Law Review, Calabresi and Melamed defended the view that the building of "models" or frameworks by legal scholars offer a different and better view of the cathedral of the law than a non-systematic analysis.[35] The image of the "cathedral" as a

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34 I have attempted to make such a start in my above mentioned Van Gerven lecture.

35 G. Calabresi and A.D. Melamed, Property rules, liability rules, and inalienability: One

representation of the legal system is based on Monet's paintings of the cathedral of Rouen, which one should see all to get a complete picture of the cathedral. According to Calabresi and Melamed

> "[f]ramework or model building has two shortcomings. The first is that models can be mistaken for the total view of phenomena, like legal relationships, which are too complex to be painted in any one picture. The second is that models generate boxes into which one then feels compelled to force situations which do not truly fit. There are, however, compensating advantages. Legal scholars, precisely because they have tended to eschew model building, have often proceeded in an ad hoc way, looking at cases and seeing what categories emerged. But this approach also affords only one view of the Cathedral. It may neglect some relationships among the problems involved in the cases which model building can perceive, precisely because it does generate boxes, or categories."[36]

Although both an ad hoc approach and model building offer only one view of the cathedral, the latter offers the opportunity to look at legal problems in an integrated way. One viewpoint of the cathedral of property law is its historical development, especially the different paths that Common Law and Civil Law went following the abolition of the feudal system on the Continent of Europe after the French Revolution. It seems, however, that in spite of these different paths the two traditions kept developing in a comparable way as a result of similar socio-political and socio-economic changes brought about by the Industrial Revolution. Based upon a description of nineteenth century contract law by, among others, the Oxford scholar Patrick Atiyah, as a "classical" model of contract law, I submit that nineteenth century property law can be qualified as a "classical" model of property law.[37]

Let me, based upon what I wrote earlier, summarise the core elements of this classical model of property law. The basis upon which the model is built is a strict separation between personal rights and real rights. Personal rights belong to the law of obligations, real rights to the law of property. In both the law

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view of the cathedral, Harvard Law Review 1972, p. 1089 ff.

36 Calabresi and Melamed, ibid., p. 1127/8.

37 P.S. Atiyah, The rise and fall of freedom of contract (Oxford: Oxford University Press, 1979, reprint, 1985), p. 681 ff.; S. van Erp, From "classical" to modern European property law?, in: N.K. Klamaris, et al. (eds.), *Festschrift* for Konstantinos D. Kerameus (*to be published in 2008*). Cf. also J. Gordley, Myths of the French Civil Code, American Journal of Comparative Law 1994, p. 459 ff. and P. Lecocq, Le Code Napoléon, un modéle conservé, in: D. Fairgrieve (ed.), The influence of the French Civil Code on the common law and beyond (London: British Institute of Internationl and Comparative law, 2007), p. 227 ff.

of obligations as well as the law of property the creation of positive burdens (i.e. a duty to act) resting on third parties is looked at with great suspicion. The essence of a real right is that a holder of such a right is entitled to respect from third parties; in other words, on third parties is resting a negative burden. Real rights are limited in two ways. They are limited, first of all, by the principle of *numerus clausus*. Only a limited number of real rights with a preset content is allowed. Secondly, real rights must be known to third parties, otherwise no justification exists for their binding nature vis-à-vis these third parties. To put it differently, transparency is required: it must be clear upon which object a real right will rest and both object and real right must be visible to the outside world. Real rights are governed by what I have called certain ground rules. The first is the *nemo dat* rule. No one can transfer more rights than one has. The second is the *prior tempore* rule. Limited rights have priority over fuller rights. The third ground rule is that real rights are given special protection, such as in the Civil Law the *reivindicatio*.

The result of this model is a static approach to property law. Objective criteria are preferred above subjective criteria. Only those rights can come into existence which have been preselected by the legislator or, depending upon the particular legal system, a court. A formal procedure has to be followed before such a right can come into existence, can be transferred and terminated. The content of the property right is also preset and only limited input by the parties is permitted. The use of special protection and the enforcement of a property right is a choice made by its titleholder; only to a very limited degree may good faith (in an objective sense) be invoked as an instrument to monitor the special protection or enforcement procedure. Good faith (in a subjective sense) is only a factor in the decision making process to resolve problems concerning the protection of third parties, who thought they had acquired for example ownership, but in fact dealt with a non-owner. With regard to its objects the classical model of property law focuses on corporeal objects, particularly land; this can also be seen when looking at the law of succession as it developed in the nineteenth century.[38] I submitted, at the end of my analysis in the Van Gerven lecture, that the

> "classical model of property law, when brought back to its leading principles and ground rules, still applies today, but without the rigour that sometimes was so characteristic of its application in the past. This trend towards relaxation and flexibility is a *conditio sine qua non* for the development of property law in an era characterised by regional and global economic integration, with

38 S. van Erp, New developments in succession law, in: K. Boele-Woelki and S. van Erp, General reports of the XVIIth congress of the International Academy of Comparative Law (Brussels/Utrecht: Bruylant and Eleven International Publishing, 2007), p. 73 ff.

its resulting osmosis between national, European and global property law."

It is characteristic of the modern approach to property law to allow the acceptance of new objects of property law and to accept new types of property rights. An example of a new object is an emission right or, in European terminology, "allowance". The definition can be found in the Directive on the greenhouse gas emission allowance trading scheme. "Allowance" means an "allowance to emit one tonne of carbon dioxide equivalent during a specified period, which shall be valid only for the purposes of meeting the requirements of this Directive and shall be transferable in accordance with the provisions of this Directive".[39] A further example is what is sometimes called, "virtual property", such as domain names, an e-mail address or wireless spectrum.[40] The question which then arises is how these new objects of property law can be given their place in the existing system of property law. Given the different nature of such new objects as, e.g., emission rights, the question can be asked if existing property rights can have the same content and the same consequences as with regard to traditional objects of property rights. Can one really "own" an emission right, as one "owns" a house? This raises the question whether new objects of property law result in new types of property rights. A further illustration can be found in the field of production, transport and sale of energy. The European Commission favours the "unbundling" of production and sale from the transport of energy. This can be done either by a split up of companies, leading to one company being the producer and seller of energy and another company owning the network, but also by putting the network into the hands of an independent system operator. Under Dutch statutory law this will lead to "economic ownership" in the hands of this operator.[41]

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39 Article 3(a) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, OJ L 275, 25.10.2003, p. 32 ff.

40 On wireless spectrum see: Ph.J. Weiser and D. Hatfield, Spectrum policy reform and the next frontier of property rights, George Mason Law Review 2008, p. 549 ff., available at the SSRN website: <http://ssrn.com/abstract=1097391>. Cf. also S. van Erp, Servitudes: The borderline between contact and (virtual) property, in: S. van Erp and B. Akkermans, Towards a unified system of land burdens? (Antwerpen and Oxford: Intersentia, 2006), p. 1 ff.

41 See Article 1(1)(aa) of the Dutch Electricity Statute, where the following defintion of economic ownership ("*economische eigendom*") can be found: "*het krachtens een rechtsverhouding gerechtigd zijn tot alle rechten en bevoegdheden ten aanzien van een goed, met uitzondering van het recht op levering, en het gehouden zijn om alle verplichtingen ten aanzien van dat goed voor zijn rekening te nemen en daarmee het volledige risico van waardeverandering of tenietgaan van het goed te dragen, zonder*

Another modern development is to draw no longer a rigid line as to whether a property right has come into existence or not and whether a property right has been terminated or not. Examples are the preliminary registration of a sales agreement (*Vormerkung*) under German law (now also accepted under Dutch law), the acceptance of expectation rights (*Anwartschaftsrechte*) under German law and the acceptance under Dutch law that a security right (a non-possessory pledge) may not be extinguished entirely when resting on a claim which is paid. In case of a preliminary registration a contract of sale is already given some proprietary effect, protecting the buyer against e.g. insolvency of the seller.[42] Expectation rights are the legal reflection of the economic interest a buyer under a retention of title clause develops in the goods delivered.[43] All these rights could be called "pre-proprietary rights", when analysed from the perspective of the traditional catalogue of property rights. Next to these pre-proprietary rights also post-proprietary rights can be found. The Netherlands Supreme Court ruled in a much debated case, which is of enormous importance for legal practice, that when debtors pay their debt and hence the debt has been extinguished, leading to the termination of the right of non-possessory pledge on that debt, still the former non-possessory pledgor has the same priority with regard to the proceeds as if he were still pledgor.[44]

A development connected with the above is the growing willingness to allow parties more freedom to shape their existing property rights and to develop new property rights, if needed. What can be seen clearly is that no legal system will allow parties the same freedom with regard to property rights as is given them generally with regard to contractual rights. Freedom of contract cannot be reciprocated in the law of property as freedom of property. Rights with third party effect, in other words: duties that affect the "whole world", cannot be created freely. These rights are of such strength that any legal system must and will limit the creation, transfer and termination of these rights. The law of obligations, particularly the law of contract, with its open textured nature, its supplementary rules, open ended norms and standards such as good faith and its freedom to shape legal relations by mutual agreement is separated everywhere from the law of property, with its rigid and mandatory rules. It is this

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dat het goed geleverd is". See also Article 1(1)(u) of the Natural Gas Statute. These statutes can be found on wetten.overheid.nl.

42 For German law see: K.H. Schwab and H. Prütting, Sachenrecht (Munich: Verlag C.H. Beck, 2006), p. 70 ff.; for Dutch law see article 7:3 Neth. C.C.

43 F. Baur, J.F. Baur and R. Stürner, Sachenrecht (Munich: C.H. Beck'sche Verlagsbuchhandlung, 1999), p. 25 ff.

44 Hoge Raad 17 February 1995, Nederlandse Jurisprudentie 1996, 471, *Mulder q.q. v. Credit Lyonnais Bank Nederland*.

basic structure of the classical model of property law, which can still be found everywhere. Nevertheless, borderline areas can be found (lease in the Civil Law is a good example), but also developments can be detected in the direction of contract law as a supplement of property law or perhaps even as a quasi-property law. A good example here is the German *Grundschuld*, already mentioned above. The *Grundschuld* itself is governed by the law of property, but the way in which these property rules are applied is limited by the *Sicherungsvertrag*, the contract between lender and borrower in which the terms and conditions of both the loan as well as the right to make use of the *Grundschuld* by the lender are laid down.[45] A clear disadvantage from the viewpoint of the borrower is that the protection which the contract gives, although it is a contract relating to the applicability of a property right, still is not binding upon third parties.The special arrangements for the financial sector in the Financial Collateral Arrangements Directive provide a further example of this tendency towards contractualisation of property law.[46] Under this directive the holder of a security right is allowed, if agreed upon and albeit under certain conditions, to keep the object that was used as security.[47] Although this so-called *lex commissoria* is not allowed generally, it is allowed here. The only justification being the desire by market parties to have this right. Yet another example is the acceptance of so-called "reverse mortgages" under which a debt is built up, instead of being paid off. Such mortgages, developed in the U.S., are used by banks to release the equity hidden in immovable property belonging to in particular older people. The bank pays a sum of money to the home owner, who gradually builds up a debt, secured by a mortgage. These mortgages ("*prêt viager hypothècaire*"), have now been regulated in statutory format in the French Consumer Code, but still remain unregulated in countries such as the Netherlands.[48] This means that, whenever a legal framework is lacking, it is up to the contracting parties (in fact: the financial institution lending the money) to give shape to their property relationship.

These developments show a trend towards more relaxation and flexibility of existing property law rules and concepts, without abandoning the basic structure upon which the classical model of property law is built. Generally, the principles of *numerus clausus* and transparency are applied everywhere. Parties can – as a matter of principle – only create a property right, that was chosen out of a limited number, having followed a formal mandatory procedure.

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45 Schwab/Prütting, Sachenrecht, p. 300 ff.

46 Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements, OJ L 168, 27.6.2002, p. 43 ff.

47 Cf. Article 4 Financial Collateral Directive.

48 Articles L-314-1 ff. Consumer Code.

An essential part of this procedure is that it must be clear to the outside world that the parties both intended to create and did create a property right (publicity) on a particular object (specificity). Again, exceptions can be found. In Germany the transfer of ownership for security purposes does not need registration to be effective, in the Netherlands non-possessory pledges are not registered in a public data base and in the Common Law registration of trusts is not always required. Nevertheless the ground structure is clear and it is present everywhere. The same applies to the above mentioned ground rules. The special protection awarded to property rights is also of general application. It is a characteristic of modern property law, however, that this ground structure is not seen as carved in stone forever. It is precisely the trend towards relaxation and flexibility which will prove vital to the further development of European property law.

c. Modern property law

The characteristics of modern property law are twofold. First of all, a gradual development can be seen towards less rigid rules and concepts and towards the development of more open and flexible standards. Secondly, more and more new objects of property law, particularly virtual property law, are being recognised. These new objects have to be fitted into (or added to) the "classical" catalogue of objects. In the following part of my contribution I will focus on the first mentioned characteristic of modern property law. Nevertheless, because the recognition of new objects of property law is sometimes functioning as a catalyst for the development of a less rigid and more flexible system of property law, it might be good to devote some attention to the acceptance of these new objects of property law.

Again, I do not want to repeat what I wrote earlier, but it might still be good to summarise.[49] A clear historical development can be seen from land as the prime and most valuable object of property law during feudal times to the growing acceptance of the value of movable property during the period of the Industrial Revolution.[50] Then "decorporealisation" followed: it was more and

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49 See S. van Erp, A Numerus quasi-clausus of property rights as a constitutive element of a future European property law?, Vol. 7.2, Electronic Journal of Comparative Law, (June 2003), <http://www.ejcl.org/72/art72-2.html> and S. van Erp, Comparative property law, in: M. Reimann and R. Zimmermann, The Oxford handbook of comparative law (Oxford: Oxford University Press, 2006), p. 1043 ff.

50 One should, of course, be very careful with the use of the term "property law" when discussing the feudal era. Property law as we know it today did not exist in that period. What I mean to say is that what we would now consider to be a "property law

more realised that not only corporeal, but also incorporeal objects (claims, but also intellectual property) should be recognised as valuable. This was followed by Reich's statement that "new" property should be developed. His theory was a recognition of, e.g., public law rights, such as licenses, as objects of property law. A recent global and European example of this latter development is the creation of emission rights, at a European level preceded by the recognition of milk quota, beet quota and pig-breeding rights. Resulting from this acceptance of new objects of property law, the question arises whether the traditional rules of property law are perhaps written only for the traditional objects of property law. Do, to give but one example, the rules on ownership also apply directly to these new objects or should new rules be developed? Or, at least, should not it be asked whether these rules only apply by analogy, as far as possible? These questions are not new. They are the same questions that were asked concerning the status of claims. Are claims part of general property law and can they, consequently, be "owned" (the French approach) or should claims be dealt with differently (one can only be "entitled" to a claim, the German approach)? Or could it be that we should look for middle ground, meaning that the applicability of general rules of property law apply, unless the nature of the object makes this impossible? A good example is the way in which claims are delivered: this is done by deed and not by way of physical transfer of power, as happens in the case of movables. It is submitted that perhaps the latter approach, looking for middle ground, is the preferred one.

In my view modern property law cannot be static. Modern economic life demands a dynamic approach, aimed at creating openness and flexibility. The recognition of new objects of property law is a good example. It is a fact of economic life that governments, albeit artificially, create markets by introducing restricted licensing systems. Wherever restrictions exist, trade will arise and a market will be created. A clear example is the trade in airport "slots" between airlines. This trade has now been accepted as legal by the European Commission in a recent communication.[51] The moment trade begins, it must be clear from a private law point of view what exactly is being traded (what is the object of the trade?) and what the rights are concerning that object. Frequency licenses, "bundles" to use a mobile telephone network (giving the holder the right to make telephone calls during a limited period of time) are

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claim" (e.g. based on being entitled to exclusive use) was a claim focussing on land and certain chattels, attached to the land.

51 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Regulation (EEC) No 95/93 on common rules for the allocation of slots at Community airports, as amended, Brussels, 30.4.2008, COM(2008) 227.

further examples of these new objects, which give rise to the questions stated. Also the classical borderline between the law of obligations and the law of property is no longer carved in stone. Let me take the "bundle" to sue a mobile telephone network as an illustration. It could be said that this is a merely contractual right, arising from the contract between a telephone provider and a customer. However, from the moment that a contractual right is standardised and made anonymous behind, e.g., a telephone SIM card, the contract is only the source of the creation of an object: the telephone network "bundle". It is this standardised and faceless right which then becomes itself an object of property law. Property law can no longer escape from answering questions such as how to qualify these new objects and which property rights (by analogy) apply.

d. Security rights in the "classical" model and in modern property law

In the classical model of property law, as applied in Civil Law jurisdictions, ownership cannot be used to secure (re)payment of a debt. Retention of title and transfer of ownership for security purposes are looked at with great suspicion, as these may result in "fragmented" ownership between a creditor ("legal owner") and a debtor ("economic owner") and are non-public (secret or "occult") forms of security rights, unknown to third parties. It is one of the achievements of the classical model that fragmentation of ownership is limited (Common Law) or abolished (Civil Law), that all property rights are public and not, as could happen in the period before the French Revolution with its feudal property law framework, sometimes completely hidden for third parties, especially creditors. This explains why a mortgage on immovable property has to be registered, why a pledge on movables can only be a possessory security right and why a pledge of claims can only be fully effective after notice of the pledge has been given to the debtor. Change began when entrepreneurs needed at the same time both credit and the continued use of their movables and claims, which gave rise to the acceptance of ownership as security and the development of non-possessory security rights.

This latter development is characteristic for modern property law. No absolute choices are being made anymore. A balance must be struck between, on the one hand, the legal values of certainty and predictability, which found their expression in the *numerus clausus* principle and the principle of transparency, and, on the other hand, the needs of modern commerce. The outcome is a more fragmented picture than when looking at the classical model. It is realised more and more that, first of all, a distinction must be made between commercial ("B2B") transactions and consumer ("B2C") transactions. Within the

group of B2B transactions a further distinction has to be made between transactions to which enterprises with a comparable bargaining power are a party and transactions between a large enterprise and a small or medium sized enterprise (so-called "SME's"). Secondly, a distinction has to be made depending upon the circle and nature of interested third parties. If large financial institutions conclude a security arrangement, less publicity is required than when an ordinary company concludes such an arrangement. The reason seems to be that within the world of large financial institutions the circle of interested third parties is limited and known; relevant third parties will be large financial institutions themselves. Furthermore, this type of transaction is usually of such a size and such an impact that private law institutions, such as a register, no longer function properly. Information is not enough to protect third parties. Private law controls should be replaced here by public law controls and government oversight.

In the following paragraphs I will sketch how a more flexible approach to property law values, principles, policy choices, the use of standards and rules may look like, focussing on the situation within the European Union. The new model must be flexible and it must be open to change and adaptation, because otherwise it will not be able to accommodate the development towards accepting new objects of property law and the corresponding new property rights. It must also be transsystemic, as it will have to encompass all the various property law traditions in Europe.[52] The result will be a dynamic European model of property law, which can replace the static classical model of property law, which can still be found in the heart of the European national property law systems.

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52 On transsystemic teaching of the law see: A. de Mestral, Guest editorial: Bisystemic law-teaching. The McGill programme and the concept of law in the EU, Common Market Law Review 2003, p. 799 ff., also to be found electronically on the website of the McGill faculty of law: <http://www.mcgill.ca/files/crdpcq/demestral-guest-mcgill programme.pdf>. De Mestral concludes (p. 807):
"Once one begins to approach the teaching of law from a transystemic or multisystemic perspective it is quickly apparent that the very nature of law is at stake. The teaching of law at McGill reflects both the coexistence of two legal cultures that meet with particular intensity in Québec but also reflects the sense that single jurisdictions no longer, if they ever did, contain within themselves a true understanding of the meaning of law. Surely something similar and even more complex is occurring in the EU. As this process accelerates, it is important that the process be understood as one of the central features of the development of the EU, not only as a legal undertaking but also as a human and political community."

III. A view on the future: towards a dynamic, transsystemic and more open model of European property law

a. Introduction

We have seen that the basic elements of the classical model of property law are a strict separation between the law of obligations and the law of property, duties with effect vis-à-vis third parties must be negative, property rights are governed by the principle of *numerus clausus* and the principle of transparency and, finally, certain ground rules apply, such as the *nemo dat* and the *prior tempore* rule. Property rights have a so-called *droit de suite* (the right follows the object upon which it rests) and a *droit de préférence* (a property right goes above any relative rights on an object). Over the years this model led to a static approach of property law. This can be seen especially in the Civil Law tradition, where the *numerus clausus* principle was strictly adhered to and hence fragmentation of ownership was no longer accepted. Allowing such fragmentation would mean the freedom to unbundle the bundle of rights, which together create full ownership, and make it possible to create any new property right the parties involved might fancy. This would jeopardise the stability of the property law system and is even in Common Law jurisdictions, which know such fragmentation especially in equity, restricted.[53] Any reintroduction of fragmented ownership was rejected outright or looked at with great suspicion. The new Dutch Civil Code with its *fiducia* ban is a prime example.[54] This also explains the rejection of the Common Law trust in Civil Law jurisdictions, as it would imply dividing ownership over a manager ("trustee") and a beneficiary.

The creation of a common and internal market demands integration of law, also of private law and also of property law. It can therefore be no surprise that in recent years, more and more European measures can be found which concern property law. Legal integration may be direct (e.g. through directives and regulations) or indirect (e.g. recommendations, codes of conduct or, of growing importance, through unification of private international law rules, resulting in forced recognition of "foreign" property rights).[55] Without being exhaustive

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53 See *Keppel v. Bailey* (1834) 2 My & K 517 and *Hill v. Tupper* (1863) 2 H & C 121.

54 Article 3:84(3) Netherlands Civil Code.

55 On the relationship between private international law and Community law see the study "The relationship between Community law and private international law", prepared by the Directorate-General Internal Policies of the Union, Policy Department C, Citizens Rights and Constitutional Affairs at the request of the European Parliament's committee on Legal Affairs (PE 393.245; Brussels, July 2007), to be found at: <http://www.europarl.europa.eu/activities/committees/studiesCom/download.do?file=

the following areas of existing European property law can be mentioned: protection of cultural property (to be re-enacted), retention of title, timeshare (to be re-enacted), insolvency, financial collateral arrangements, emission trading, unbundling of electricity and natural gas networks. Future areas of European property law may include: land information service (EULIS), trusts (unification of private international succession law; the topic will also be dealt with in the Common Frame of Reference or, abbreviated, CFR), uniform certificate of inheritance (unification of private international succession law), enforcement of maintenance obligations (unification of private international law), framework for the protection of the soil, attachment of bank accounts, debt recovery, transfer of movables (to be included in the draft CFR), security rights on movables (to be included in the draft CFR), personal security rights (already included in the draft CFR) and, finally, mortgage law. Only some areas will be covered by the Common Frame of Reference, aimed at streamlining European private law and the creation of more consistency and coherence in this legal field.[56] Most of these areas are or will be governed by their own specific rules of property law. This raises the pressing need to develop a vision on the future of European property law. Without a vision on the future the various areas will be developed in an area-autonomous way and national legal systems will, given the inconsistence and incoherence resulting from such an area-autonomous development, show more and more resistance against European

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56 Cf. S. van Erp, DCFR and property law: the need for consistency and coherence, in: R. Schulze (ed.), Common Frame of Reference and existing EC contract law (Munich: Sellier European Law Publishers, 2008), p. 249 ff. The DCFR mainly focuses on the law of obligations. The question has been raised whether the CFR could be limited to the law of obligations – in the German law sense: including transfer of claims – only. The answer must clearly be negative. See Chr. von Bar and U. Drobnig, Study on property law and non-contractual liability law as they relate to contract law, submitted to the European Commission, Health and Consumer Protection/Directorate-General, SANCO B5-1000/02/000574, to be found at: <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf>; see also F.J. Säcker, Vom deutschen Sachenrecht zu einem europäischen Vermögensrecht, in: M. Stathopoulos et al., Festschrift für Apostolos Georgiades zum 70. Geburtstag (Athens, Munich and Bern: Ant. N. Sakkoulas, C.H. Beck and Stämpfli, 2006), p. 359 ff., who writes on p. 306: „Eine isolierte Reform des Schuldrechts ohne ergänzende Reform des Sachenrechts versteinert das Abstraktionsprinzip, perpetuiert das unkoordinierte Nebeneinander schuldvertraglicher und sachenrechtlicher Binnenbeziehungen zwischen den Kontrahenten dinglicher Dauerrechtsverhältnisse (z.B. Dienstbarkeit, Nießbrauch) und belastet die Rechtsanwendung mit der Frage nach der Anwendbarkeit schuldrechtlicher Normen im Bereich des Sachenrechts zur Schließung unerwünschter Regelungslücken."

rule making. Tensions already exist between national property law and European property law, which became clear when the directive on financial collateral arrangements had to be implemented.[57] What we need is, as I already defended in my Walter van Gerven lecture, an osmosis of national and European property law, in which the two systems adapt to one another.[58] This will result if comparative legal research will show "bottom up" what the various property law systems in Europe share (and do not share!) and if European legislative measures "top down" incorporate, or at least take into account, the results of such comparative legal research.

This need to create an osmosis is my starting point for the development of a vision on the future of European property law. In this part of my contribution I will describe what I see as the emerging European model of property law, while realising that a more detailed study will be necessary before final conclusions can be drawn.[59]

b. European property law: form

Not only with regard to substance do the various European legal traditions, at least on a technical level, differ to a larger or a lesser extent, but also with regard to form. The continental legal systems are generally more inclined to regulate property law in statutory format, preferably even in all enveloping codes, whereas the Common Law tradition is characterised by development on a case by case basis. The latter also applies to mixed jurisdictions, the prime example being Scottish law. This does not mean, of course, that case law is of less relevance in the continental legal traditions or that statutes are less important in the Common Law or in mixed legal systems. I need only refer to the German case law concerning the transfer of ownership for security purposes and the so-called "expectation rights" ("*Anwartschaftsrechte*") or to the English Law of Property Act 1925, the English Land Registration Act 2002, the Scottish Abolition of Feudal Tenure etc. Scotland Act of 2000 and the draft Irish Land and Conveyancing Law Reform Bill 2006 (abolishing feudal tenure

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57 For the Netherlands see L.P.W. van Vliet, De financiëlezekerheidsovereenkomst, een tussenbalans, Nederlands Tijdschrift voor Burgerlijk Recht 2005, p. 190 ff.

58 Cf. the views on a "*differenzierte Integration*" by P. Jung, Differenzierte Integration im Gemeinschaftsprivatrecht – Eine Einführung in die Thematik, in: P. Jung and Chr. Baldus (eds.), Differenzierte Integration im Gemeinschaftsprivatrecht (Munich: Sellier European Law Publishers, 2007, p. 1 ff.

59 See also F.J. Säcker, Vom deutschen Sachenrecht zu einem europäischen Vermögensrecht, p. 373 ff.

in Ireland).[60] What would be the best form for a possible European property law: development through legislation (directives or regulations), case law or a mixture of both?

In my view, only binding regulation can and will be effective in overcoming the major obstacles to harmonisation or unification. The bridge over the gap between the various property law traditions in Europe can, therefore, only be a statutory framework. This should, however, not be a framework in the sense of the continental civil codes, i.e. a comprehensive work of legislation in which the whole area of property law is covered. What I am thinking about is an open-ended statutory framework, more in line with the idea of "principles" in the sense in which this term is used by the drafters of the Common Frame of Reference.[61] In this framework a distinction must be made between commercial transactions (B2B) and consumer transactions (B2C) and, with respect to commercial transactions, a further distinction should be made between transactions concerning only large enterprises and transactions concerning a large enterprise and a small or medium sized enterprise (SME). The overall structure could be that in a "*titre préliminaire*" the leading principles and ground rules of European property law are being restated followed by general provisions on the creation, transfer and extinguishment of property rights. In special parts rules can be given on security interests generally (e.g. the principle of accessority under which a security right lapses when the secured debt has been repaid, of course with the various exceptions allowed e.g. with regard to enterprise financing) and on security interests on immovables, movables and claims. In this way a structured set of rules can be given.

c. European property law: substance

As preliminary remarks it should be noted (1) that at the level of leading principles (principle of *numerus clausus* and the principle of transparency, i.e. specificity and publicity) the various property law traditions in Europe share all these principles. The various legal traditions also share the ground rules of property law: (1) *nemo dat* (or, as a civil lawyer would say: *nemo plus*), (2) an older property right has priority over a younger property right (*prior tempore, potior iure*), (3) creation of a limited property right with the permission of the

60 FDor the English acts, see the website of the British and Irish Legal Information Institute: <http://www.bailii.org/>; for the Scottish act see: <http://www.scotland.gov.uk/Topics/Justice/Civil/17975/Abolition> and for the Irish bill: <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2006/3106/document1.htm>.

61 Chr. von Bar, H. Beale, E. Clive and H. Schulte-Nölke, Draft Common Frame of Reference, Interim Outline Edition, Introduction, p. 8/9.

older property right holder creates priority for the holder of the limited property right and (4) property rights are given special protection. Mainly due to a different legal history, however, the technical rules of the property law traditions in Europe differ. A European property law should be built upon what is shared at the level of principles and ground rules, trying to overcome differences at a technical level, caused in part by diverging policy choices made in the several traditions. In my view the following areas can be mentioned in which policy choices are made: (1) Does a separation exist between the law of obligations (contract and tort) and the law of property? (2) Is ownership defined as a uniform right (i.e. not to be fragmented in a feudal sense or according to the will of the parties)? (3) Is ownership protected, when does commerce or the general interest prevail?

In the following sections I will, first of all, discuss how these policy choices could be made at a European level. The choices made will have a direct impact on how the leading property law principles will be applied. I will then discuss the range of flexibility which can be found within these leading property law principles. As far as the ground rules are concerned, I would like to refer to what I remarked earlier in my Van Gerven lecture.[62] Finally, I should add that the use of "standards" as can be found in contract law is not of the same importance in property law as it is in contract law. A standard is an open ended norm, the application of which depends upon policy weighing factors. An example of such a standard is the good faith requirement as a prerequisite for the protection of third parties in cases where their counterpart lacked the power to dispose. What good faith requires will depend upon a mix of subjective and objective arguments, such as: Did the third party make inquiries about the legal status of the transferor? Was the legal status of the transferor made public, for example through registration? Should the third party have become suspicious (e.g. because of a very low purchase price)? Is the protection of ownership considered to be of prime importance and a fundamental human right or is protection of commerce seen as vital?[63] Standards only begin to play their role after the leading principles, the policy choices and the ground rules have been established. Within the framework of this contribution standards are not further discussed.

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62 European and national property law: Osmosis or growing antagonism, p. 16 ff.

63 Cf. P.J. Pipková, Gutgläubiger Eigentumserwerb als gesetzliches Limit des verfassungsrechtlich gewährleisteten Rechts auf Eigentum. Die Situation in der tschechische Rechtsordnung gesehen durch die Rechtsprechung des Verfassungsgerichtes, European Review of Private Law 2008, p. 313 ff.

c. Policy choices

1. More freedom of contract in the law of property

One of the major obstacles to harmonisation of property law in Europe is the rift that came into existence between Common Law and Civil Law after the French Revolution with regard to the (dis)continuity of the feudal system. England, Wales and Ireland still have a property law system rooted in feudal history, whereas the feudal system was abolished on the continent and replaced by a system rooted in Roman law. The European model must, therefore, be so open that it creates a framework for both major European legal traditions. This will mean that, from a Civil Law perspective, certain feudal elements and a less dogmatically rigid kind of legal thinking will have to be reintroduced and that, from a Common Law perspective, certain Roman law elements and a more dogmatically coherent style of reasoning will have to be accepted.

A first and very basic element of this system is the typically continental strict separation between the law of obligations and the law of property. Perhaps German law is the legal system in which this separation has been adhered to most strictly, resulting in a, what I have called, "triple layered" theory of abstraction.[64] Not only are the law of obligations and the law of property separated, but contracts do not have any property law consequences (for such consequences a further legal act is necessary) and once a transfer has taken place invalidity of the underlying agreement becomes irrelevant. This triple layered theory of abstraction should, however, not be chosen as the basis for a European property law. First of all, English law does not make such a strict separation between the law of obligations and the law of property and in several Civil Law systems an attempt is made to contractualise property law. Property security arrangements are sometimes replaced by contractual arrangements.[65] Secondly, in a large part of Europe contracts do have property consequences. I refer to the countries with a so-called consensual system of transfer. Finally, several of the so-called tradition systems are of a causal nature, meaning that problems concerning the underlying agreement affect the transfer based upon that agreement. Perhaps a more overall approach should be taken. This could look like as follows.

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64 S. van Erp, DCFR and property law: the need for consistency and coherence, ibid., p. 250.

65 See for Dutch law R.M. Wibier, Alternatieven voor zekerheid op bankrekeningen (Deventer: Kluwer, 2007).

If one analyses the separation between the law of obligations and the law of property further one sees the following image appearing.[66] The starting point in private law – and this can already be found in the first chapter of von Savigny's "System des heutigen römischen Rechts" – are the legal relations between people.[67] These legal relations can be very open (this is the area of tort liability) or more closed (this is the area of contract). Contracts may only bind the parties ("privity of contract") or may affect third parties. This effect towards third parties may be contractual in nature (under certain conditions exemption clauses may sometimes be invoked against only a few or a limited group of third parties), or of a proprietary nature (affecting a substantial group of third parties or even "the world").[68] If parties can create rights, which bind all non-contracting parties, then a property right has been established. In other words: in this approach no separation exists between contract law and property law, but a borderline area in which "relative" personal rights are at one end of the spectrum and "absolute" property rights at the other end. A contractual right may even develop from a relative right into an absolute right. This explains what U.S. lawyers call the difference between "attachment" of an Article 9 UCC personal property security right and "perfection" of such a right. Attachment creates a personal relationship between the parties, affecting certain other third parties and consequently has a limited proprietary effect. Perfection is the final stage of 'proprietarisation' (in German: "*Verdinglichung*"), as it creates a property effect against all third parties.[69]

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66 Cf. for the Netherlands E.B. Rank-Berenschot, Over de scheidslijn tussen goederen en verbintenissenrecht (Deventer: Kluwer, 1992) and for Belgium V. Sagaert, Het goederenrecht als open systeem van verbintenissen?: poging tot een nieuwe kwalificatie van de vermogensrechten, Tijdschrift voor Privaatrecht 2005, p. 983 ff.

67 F.C. von Savigny, System des heutigen römischen Rechts, Erster Band (Berlin: Beit und Comp., 1840), p. 6 ff., to be found electronically at the website of the Max-Planck-Institute for European Legal history: <http://dlib-pr.mpier.mpg.de/index.htm.>

68 On the third party effect of certain exemption clauses (the so-called "Himalaya clauses") see *Adler v Dickson (The Himalaya)* Court of Appeal 29 October 1954, [1954] 2 Lloyd's Rep 267, [1955] 1 QB 158, to be found electronically at: <http://www.bailii.org/ew/cases/EWCA/Civ/1954/3.html> and see for U.S. law *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, U.S. Supreme Court 9 November 2004, (No. 02-1028), 543 U.S. 14 (2004), to be found electronically at the website of the Legal Information Institute of Cornell University Law School: <http://www.law.cornell.edu/supct/html/02-1028.ZS.html>.

69 The text of Article 9 UCC can be found at the website of the Legal Information Institute of the Cornell University Law School: <http://www.law.cornell.edu/ucc/9/overview.html>.

2. *Flexibilisation of the concept of ownership*

With regard to the concept of ownership and its role in a European property law two questions can be asked. Should we, at a European level, really make a sharp distinction between unitary (Civil Law) ownership and fragmented (Common Law) ownership? Does the so-called unitary concept of ownership, as can be found in Civil Law systems after the French Revolution, perhaps need rethinking in the light of modern economic developments, especially globalisation? A unitary concept of ownership means that – except for cases of co-ownership in which the co-owners share full ownership rights – only one person can be owner of an object. As such, this approach is a reaction against the feudal concept of "fragmented" ownership that prevailed before the French Revolution under which several people could claim (different kinds of) ownership with regard to land. The acceptance of fragmented ownership can still be found in the Common Law, where, although the feudal system has lost its impact as a system of governance, the feudal concept of ownership was never abandoned. A prime example is Ireland, which is considering to abolish the feudal system, while at the same time maintaining feudal legal concepts.[70] As a result under English, Irish or U.S. law various types of ownership are still possible (examples: freehold, leasehold, equitable entitlements under a trust). It is even questioned if the word "ownership" has any meaning in English land law.[71] This is a debate I will not enter into, except that my approach here is

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70 See the Land and Conveyancing Law Reform Bill 2006. Part 2 of this act is entitled "Ownership of Land". The parliamentary history can be found at: <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/bills28/bills/2006/3106/document1.htm>.
Sections 9 and 10 read in part:
"Section 9.—(1) From the commencement of this Part, ownership of land comprises the estates and interests specified in this Part.
(2) In so far as it survives, feudal tenure is abolished.
(3) Subsection (2) does not affect— (...)
(b) the concept of an estate in section 10, (...).
Section 10. – (1) The concept of an estate in land is retained and, subject to this Act, continues with the interests specified in this Part to denote the nature and extent of land ownership.
(2) Such an estate retains its pre-existing characteristics, but without any tenurial incidents. (...)".

71 Cf. J.W. Harris, Ownership of land in English law, in: N. MacCormick and P. Birks, The legal mind. Essays for Tony Honoré (Oxford: Clarendon Press, 1986), p. 143 ff. On p. 159 Harris writes:
"For many textbook writers, it is enough to establish that no one is ever owner of land to point out that, in English law, ownership of land is split and restricted. It is split by the doctrine of estates, which recognizes a temporal sequence of rights to possess, and

rather pragmatic. I consider "ownership" to be the strongest right a person can have with regard to an object, whether you call this right a freehold, title, *propriété* or *Eigentum*.[72]

Traditionally, since the French Revolution civil lawyers have rejected the re-introduction of some form of fragmented ownership. It seems as if the Civil Law is afraid to "unbundle" ownership, in order to avoid a situation in which old feudal concepts might revive. This negative Civil Law approach towards fragmented ownership creates more and more problems in cases where the most practical solution to a given problem would be to divide ownership rights between various stakeholders, without creating a limited property right, such as a usufruct or a pledge. From a comparative viewpoint various techniques could be used to reach this result. In several Civil Law systems trust-like devices have been developed to create a situation in which, although unitary ownership rests with the trustee/manager, this ownership is limited by the purpose for which the trustee became owner. A recent example is the introduction of the "*fiducie*" in French law.[73] These trust-like devices create a new type of ownership, which is purpose-limited, sometimes called the "Civil Law trust".[74] A

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it is restricted both by a host of use and security rights vested in someone other than the alleged owner and by rules of private and public law banning various kinds of exploitation of the land. In such discussions, what is presupposed is what may be called a totality conception of ownership. One begins with the idea that an 'owner' could do absolutely anything with or to his land, and demonstrates that no such totality of privileges is admitted. If that is what ownership means, it is not a conception internal to English law or to any other system of law. (…) I would suggest that the terminology of totality ownership is legitimate, provided its proper juristic significance is borne in mind. It is a concept employed, not within any system of law, but within the legal science as a base-line for setting out and comparing the import of particular provisions."

72 Of course awareness should exist with regard to the differences between these concepts at a technical level, but still from a pragmatic (one could also say: functional) viewpoint these rights have a comparable effect. The base line is that a holder of such right can enforce that right against all others, unless someone else has a property right which is given preference. A pledgee can seize and sell property which belongs to the pledgor in case of failure to repay, e.g., a loan. See for a debate in English law on whether ownership is a legal concept or not: J.W. Harris, Ownership of land in English law, already referred to above.

73 Loi n° 2007-211 du 19 février 2007 instituant la fiducie, J.O n° 44 du 21 février 2007 page 3052. The fiducie is defined as (article 2011 French Civil Code*) "l'opération par laquelle un ou plusieurs constituants transfèrent des biens, des droits ou des sûretés, ou un ensemble de biens, de droits ou de sûretés, présents ou futurs, à un ou plusieurs fiduciaires qui, les tenant séparés de leur patrimoine propre, agissent dans un but déterminé au profit d'un ou plusieurs bénéficiaires."*

74 See D.J. Hayton and S.C.J.J. Kortmann, Principles of European trust law (The Hague and Deventer: Kluwer Law International and W.E.J. Tjeenk Willink, 1999).

further example of techniques to unbundle ownership are financial collateral arrangements. These arrangements, which secure financial transactions between in particular large financial institutions, have now been regulated Europe-wide as a result of European legislation. Financial collateral arrangements have strong proprietary aspects and may result in a transfer of ownership or in a special type of pledge. In the Netherlands it has been debated whether the introduction of this type of arrangement *de facto* meant that ownership for security purposes was re-introduced, after it was banned when the new Civil Code entered into force (the so-called "*fiducia* ban"). Financial collateral arrangements are also an illustration of purpose-limited ownership.[75] A further example, showing economic pressure to re-introduce some form of divided ownership, can be found outside the financial world. In order to create an internal European energy market, there is growing pressure by the European Commission on Member States to separate, on the one hand, transmission and transportation of energy from, on the other hand, production and supply of energy. The infrastructure (physical network) and the use of the infrastructure (supply of electricity and gas) have to be "unbundled". This is laid down in European legislation: the first and second electricity and gas directives.[76] In this way, national or regional monopolies of energy suppliers, which usually at the same time both own and exploit the network, can be broken down into infrastructure and use of the infrastructure. The infrastructure, consisting of, among other elements, the physical networks (cables, pipes), should be accessible to all energy providers, thus allowing the entering of new market participants in formerly closed national markets. The way this is done is left to the Member States. Unbundling does not have to take place through a full transfer of ownership. Compelling the Member States to a transfer of ownership would, furthermore, not be possible under European law. Article 295 EC does not allow the European Community to interfere in the property law systems of the Member States in as far as this would have an impact on who owns the network.

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75 Cf. on financial collateral arrangements Th.R.M.P. Keijser, Financial collateral arrangements: the European collateral directive considered from a property and insolvency law perspective (Deventer: Kluwer, 2006).

76 Cf. the latest directives: Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ 2003, L 176/37; Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, OJ 2003, L 176/57.

Why do civil lawyers feel so hostile towards accepting fragmented ownership? Property law as it developed on the continent of Europe after the French Revolution has two major general characteristics.[77] It is, first of all, a reaction against the pre-existing law, which was still rooted in the feudal system. Secondly, it is heavily influenced by Roman legal thinking as further developed by in particular academic lawyers. Feudalism had developed in large parts of Western Europe as a system of administration, jurisdiction, military service and land tenure. Gradually, the first three elements became less important, but the system remained influential with regard to land tenure. Feudalism had created a situation in which several people at the same time could be entitled to the use of land, all of them claiming some form of ownership. Ownership was divided – and already the terminology shows how Roman legal thinking began to influence the interpretation of feudal property law concepts – into *dominium directum* (formal ownership) and *dominium utile* (actual ownership). After the French Revolution those who had *dominium utile* became sole owner.[78] Ownership became unqualified *dominium* or, to put it differently, *dominium* outright. The same happened recently (2004) in Scotland as a result of the Abolition of Feudal Tenure etc. (Scotland) Act.[79] Given the ideals of freedom and equality no class distinctions were made anymore. Property law should henceforth apply to all and should forbid that one person would be obliged to do something for another against his or her will. This is why property law to a large degree restricts the possibility to create a duty to act (positive duties), which can particularly be seen in the law of servitudes.

Given the growing acceptance of, for example, trust-like arrangements, such as the French *fiducie*, and the "unbundling" process that can be seen in the European energy market, the question could be raised whether Civil Law systems are perhaps returning to acceptance of fragmented ownership, thus reverting to a pre-existing feudal "Ius Commune" all over Europe. This has been done by the Belgian legal historian Heirbaut and by the leading French prop-

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77 B. Terrat, Du régime de la propriété dans le Code Civil, in: Le Code Civil 1804 – 1904, Livre du centenaire, publié par la Société d'Études Législatives, Tome Premier, Généralités – Études spéciales (Paris: Arthur Rousseau, 1904), p. 329 ff.; R. Libchaber, La recodification du droit des biens, in: Le Code civil 1804 – 2004, Livre du bicentenaire (Paris: Dalloz and Litec, 2004), p. 297 ff.

78 Cf. the Decree abolishing the feudal system of 11 August, 1789.

79 2000 asp 5. Section 2 (1) states: "An estate of dominium utile of land shall, on the appointed day, cease to exist as a feudal estate but shall forthwith become the ownership of the land and, in so far as is consistent with the provisions of this Act, the land shall be subject to the same subordinate real rights and other encumbrances as was the estate of dominium utile." Cf. K.G.C. Reid, Vassals no more: Feudalism and post-feudalism in Scotland, European Review of Private Law 2003, p. 282 ff.

erty lawyer Crocq.[80] Heirbaut's answer is positive, Crocq in his book *Propriété et Garantie* is more negative. [81] Crocq asks himself the question whether the French legal distinction between "*propriété juridique*" and "*propriété économique*" means something more than expressing an economic reality. In his own words: "*Peut-on au regard du droit civil (et non plus seulement du droit fiscal ou du droit comptable) parler de 'propriété de la valeur' et de 'propriété de l'utilité, d'une* 'nouvelle relation aux biens'?" He then refers to the "*propriétés simultanées*" under the "*ancien régime*". By "*propriété simultanées*" he means the "*pluralité de propriétés différentes portant chacune sur une utilité distincte du fonds*".[82] In his view the recognition of a new type of simultaneous ownership would violate public policy, as it would imply a return to pre-revolutionary law and it would violate the unitary conception of ownership. Recognition of simultaneous ownership would also be problematic in the light of the *numerus clausus* principle. Nevertheless, French law does provide a further example, next to the *fiducie*, that perhaps the fear of pre-revolutionary property law is diminishing. Reference can be made to the introduction of "*mulitpropriété*" or timeshare in the Code de la Consommation. Article L. 121-60 gives the following definition: "*Est soumis aux dispositions de la présente section tout contrat ou groupe de contrats, conclu à titre onéreux, par lequel un professionnel confère à un consommateur, directement ou indirectement, la jouissance d'un ou plusieurs biens immobiliers à usage d'habitation, par périodes déterminées ou déterminables, pour au moins trois années ou pour une durée indéterminée.*" Such a type of ownership makes it possible to provide the exclusive use of an apartment or house to several acquirers for a returning limited period.[83] As such this contradicts the traditional unitary concept of

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80 D. Heirbaut, Feudal law: the real Ius Commune of property in Europe, or: should we reintroduce duplex dominium?, European Review of Private Law 2003, p. 301 ff.; P. Crocq, Propriété et Garantie (Paris: L.G.D.J., 1995).

81 D. Heirbaut, Feudal Law : the real Ius Commune of property in Europe, p. 318 ff.; P. Crocq, Propriété et Garantie, p. 192 ff.

82 P. Crocq, Propriété et Garantie, p. 147, quoting A.-M. Patault, Introduction historique au droit des biens (Paris: Presses Universitaires de France, 1989), p. 15. Patault also speaks about "maîtrise" when she discusses the division of powers inherent in the feudal system; see Introduction historique, p. 37 ff. For a further analysis of the "*propriétés simultanées*" see also A.-M. Patault, La propriété non exclusive au XIXe siècle: histoire de la dissociation juridique de l'immeuble, Revue Historique de Droit Français et Étranger, 1983, p. 217 ff. See further D. Aubin, S. Nahrath and F. Varone, Paysage et propriété : un retour vers la *pluria domina*?, published electronically on the website "Property Rights, Economics and Environment" (French language version): <http://www.environnement-propriete.org/francais/index.htm>.

83 Cf. Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating

ownership under which only one person can be the owner of an object for unlimited duration.

Finally, reference should be made to what Bergel writes in his general report on "*nouveaux biens*" in the volume *La Propriété*, published by the Association Henri Capitant.[84] New objects of property law may need new property law rules, as the existing rules are written from a nineteenth century perspective according to which the most important object of property law was the corporeal object of land and certainly not any incorporeal objects. The rise of new objects, such as emission rights, makes rethinking of the unitary concept of ownership in the Civil Law – again – unavoidable. Flexibilisation of that concept would result in an alignment with the Common Law and thus promote the creation of a European system of property law.

3. Protection of ownership, commerce and the general interest

With regard to the third policy choice, it can be observed that everywhere the interest of an owner that he will not lose his right of ownership involuntarily is weighed against the interest of an innocent third party, who dealt with a party *a non domino* in good faith assuming he would acquire ownership, and against the state, who claims property in the general interest. The starting point in any European legal system will be the protection of ownership, which fits within the classical model of property law and results from international and/or constitutional law. I need only refer to Article 1 of Protocol 1 to the European Convention on Human Rights. This balance will have to be decided upon before any technical harmonisation or unification can begin. In my view, it is exactly this policy choice that will have to be considered before a decision can made on a European model for transfer systems with regard to, for example, movables. Causal transfer systems tend to protect owners, abstract transfer systems tend to protect third parties in the interest of commerce. Each transfer system will need a counterbalance to prevent that one particular interest is overprotected. In the case of causal systems these are the third party protection rules, in the case of an abstract system this could be a doctrine, as can be found in German law, on *Fehleridentität*, protecting the original owner in situations

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to the purchase of the right to use immovable properties on a timeshare basis, OJ L 280, 29.10.1994, p. 83 ff. For an overview of how the directive has been implemented in the Member States see the Consumer Law Compendium (prepared under the auspices of the European Commission): <http://www.eu-consumer-law.org/index.html>.

84 La Propriété. Journées Vietnamiennes. Travaux de l'Association Henri Capitant des Amis de la Culture Juridique Française. Tome LIII, 2003 (Paris: Société de Législation Comparée, 2006), p. 203 ff., 220.

of grave defects of consent.[85]

d. Leading principles

1. Towards a numerus quasi-clausus of property rights

According to the *numerus clausus* doctrine, the number and content of property rights is restricted by mandatory law; also the way limited property rights are created, transferred and terminated is laid down in mandatory (procedural) rules.[86] In Civil Law systems the starting point is that the list of existing property rights can only be extended by the legislature, although also some highly interesting examples can be found in which the judiciary added property rights the list. I refer to the acceptance under German law (and under Dutch law before the enactment of the new Civil Code) of the transfer of ownership for security purposes.[87] Although the *numerus clausus* principle seems to be more a Civil Law than a Common Law notion, it can still also be found in the Common Law.[88] In the Common Law, however, the judiciary's role is leading. Reference can be made to the acceptance of the floating charge (a general security interest) in the famous *Re Panama* case.[89] Goode has called the floating charge "one of equity's most brilliant creations."[90] I already defended the idea that if Civil Law systems would become more open towards accepting new

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85 For a comparative study of transfer systems see L.P.W. van Vliet, Transfer of movables in German, French, English and Dutch law (Nijmegen: Ars Aequi Libri, 2000); V. Sagaert, Consensual v. Delivery systems in European private law – Consensus about tradition?, in: W. Faber and B. Lurger (eds.), Rules for the transfer of movables, p. 9 ff.; S. Bartels, An abstract or a causal system, in: W. Faber and B. Lurger (eds.), Rules for the transfer of movables, p. 59 ff. On the policy choices involved see: A. Salomons, How to draft new rules on the bona fide acquisition of movables for Europe. Some remarks on method and content, in: W. Faber and B. Lurger (eds.), Rules for the transfer of movables, p. 141 ff. With regard to the doctrine of *Fehleridentität* see J.Th. Füller, Eigenständiges Sachenrecht (Tübingen: Mohr Siebeck, 2006), p. 129 ff.

86 S. van Erp, A Numerus quasi-clausus of property rights as a constitutive element of a future European property law?, Vol. 7.2, Electronic Journal of Comparative Law, (June 2003), <http://www.ejcl.org/72/art72-2.html>.

87 For German law see Baur/Stürner, p. 706; for Dutch law see Hoge Raad 25 January 1929, Nederlandse Jurisprudentie 1929, 616.

88 See *Keppel v. Bailey* (1834) 2 My & K 517 and *Hill v. Tupper* (1863) 2 H & C 121, already referred to above.

89 *Re Panama, New Zealand and Australian Royal Mail Co.* (1870) 5 Ch App 318.

90 R. Goode, The case for the abolition of the floating charge, in: J. Getzler and J. Payne, Company charges. Spectrum and beyond (Oxford: Oxford University Press, 2006), p. 11 ff., 11.

property rights – and, I would like to add, Common Law systems more open towards the importance of standardising such rights – also here common ground could be found upon which a European property law could be built. Furthermore, a connection exists with another policy choice mentioned earlier: the acceptance of more freedom of contract in property law, although I would not go as far as Säcker who has stated: "*Das eher an archaische Rechtskulturen als eine moderne Kodifikation erinnernde Numerus-clausus-Prinzip sollte aufgegeben werden zugunsten einer Zulassung privatautonomer Gestaltungsfreiheit.*"[91] I would argue in favour of retaining the numerus clausus, not a s a hard and fast rule, but as a leading principle and therefore I would argue in favour of a "*numerus quasi-clausus*" of property rights.

2 A more relaxed approach with regard to the principle of transparency: publicity and specificity

Next to the principle of *numerus clausus* all property law traditions in Europe know the principle of specificity (it has to be clear as to which object a property right exists) and the principle of publicity (the justification for the binding effect of a property right vis-à-vis third parties is that information on such a right is publicly available). Together these two principles can be subsumed under the principle of transparency. What can be seen everywhere is that specificity, particularly in the area of security interests on movables and claims, is no longer applied in a very strict manner. I refer to the floating charge, the *Globalzession* under German law and the *cession Dailly* under French law, all of them resulting in an overall security interest on claims.[92] What can also be observed as a general tendency is that information requirements are tailored more and more according to the relevant circle of third parties, which may be affected by a property right. If this circle is not the general public or creditors generally, but only specific creditors it will not always be necessary to make information available through, e.g., public registries. An example of the latter tendency is the Financial Collateral Directive.[93] A further example is the growing acceptance of claim assignments without any requirement to inform the debtor. This makes informal bulk transfers of claims possible; such transfers take place, for example, as part of a securitisation arrangement. Not informing debtors provokes, of course, the need to give special protection to a debtor who in good faith pays the assignor instead of the assignee and hence pays the

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91 Säcker, Vom deutschen Sachenrecht zu einem europäischen Vermögensrecht, p. 367.

92 For German law cf. Schwab/Prütting, Sachenrecht, p. 329 ff.; for French law see Articles L-313-23 ff. Code Monétaire et Finacier.

93 See Article 3 (1) of the Financial Collateral Directive.

"wrong" creditor. Such protection is not given on a property level, but on the level of the law of obligations.[94] Protection on a property level would require the debtor to be informed about an assignment, so that he knows whom to pay. As the debtor is not informed, payment in good faith to the assignor results in a protection on the level of the law of obligations. The debtor is considered as having performed his obligation to pay and hence as being discharged.

If third parties are not performed through public registries, this may provoke the creation of private registries. Examples are agencies which register an rate credit. Although such an agency does not register whether and, if so, how such a credit is secured, still it might be clear to for example a credit institution that in practice no such credit will have been given without security. In that sense a transfer of ownership for security purposes or a non-possessory pledge might not be so "silent" or secret after all. The result of the latter development is, what might be called, a privatization of publicity.[95]

3. Towards a less rigid application of principles?

All these developments show that, when looking at both national as well as European property law, leading principles of property law are more and more applied in a less rigid and more tailored way. Leaving behind rigidity, would enable the development towards a truly European property law.

IV. Concluding remarks

A more flexible and less rigid approach to property law will create an atmosphere (or perhaps I should say: an attitude) which makes a more consistent and coherent European property law possible.[96] A *condition sine qua non* will be that all major property law traditions will have to be able to recognise themselves in the new European property law. The framework will have to be laid down in statutory format, to accommodate the Civil Law systems. Within the statutory framework, however, considerable freedom will have to be given to courts, allowing further development through case law, in order to accommo-

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94 A.F. Salomons, Deformalisation of assignment law and the position of the debtor in European property law, European Review of Private Law 2007, p. 639 ff.

95 S. van Erp, Personal and real security, in: J.M. Smits, Elgar Encyclopedia of Comparative Law (Cheltenham and Northampton: Edward Elgar, 2006), p. 517 ff.

96 An interesting analysis on the attitude of French, German and English lawyers can be found in C. Valcke, Comparative history and internal view of French, German and English private law, Canadian Journal of Law and Jurisprudence 2006, p. 133 ff.

date the Common Law. For civil lawyers the role of the legislature will be less than strong what they are used to, whereas for common lawyers the role of the courts may be less than what that role is traditionally.

Security interests are often seen as the nucleus of an emerging European property law. In this legal area consensus is building up that legal diversity is a hindrance to the further development of the internal market. So we do know where to begin (security interests), but do we also know where we will end? The creation of a security interest is in many legal systems inextricably linked to the general rules on transfer, particularly with regard to the formal requirements. Part of these formal requirements is, when for example a hypothec is created, public registration. Should, as a consequence, public registration systems also be unified? So far, the EULIS project is merely aimed at connecting the land registries on a technical basis, but the next stage in this process could go further.

When we as European private lawyers analyse the direction in which European private law is moving, we should always bear in mind that by such analysis we also contribute to the making of European private law. We are not completely outside the process, but we are also inside. In my view this demands that we reflect upon how to proceed with the development of European property law. What is needed are signposts or, to put it in more idealistic terms, a vision. That vision should always be built upon the values and freedoms laid down in the European treaties. For property law it is of enormous importance to realise that these treaties create, what German lawyers call, an economic constitution. One of the cornerstones of this economic constitution is freedom of ownership and the resulting protection of ownership. Formulating a vision also requires *Partiturtreue*, if I may use a term from classical music. Although interpretations of a score may differ, it should never be forgotten that we are all interpreting the same European treaties. To put it differently: Every model of European property law that is developed shows a different view of the cathedral, to refer to a series of paintings of the façade of Rouen cathedral by Claude Monet, an image used by Calabresi and Melamed in their famous article on property and liability rules, published in the Harvard Law Review of 1972.[97] European property law cannot be developed, if we remain thinking as national lawyers arguing according to choices made in our national legal systems. Particularly in property law, we need to understand the leading principles, underlying policy choices and ground rules, as can be found in the various European legal traditions. These are the signposts we need. Based upon

97 G. Calabresi and A.D. Melamed, Property rules, liability rules and inalienability: One view of the cathedral, Harvard Law Review 1972, p. 1089 ff.

these principles, policies and rules various choices at a more technical level can be made.[98] The future will show if ground breaking initiatives in this area of the law at the end of the day were taken by academic working groups, such as the Study Group on a European Civil Code, the European legislator or the European judiciary: national courts sitting as European courts and the ECJ.[99] What we need now is a good starting point from which we can really begin to build a European property law. Security interests are certainly a secure start.

98 Cf. the contributions in H.C. Sigman and E.-M. Kieninger (eds.), Cross-border security over tangibles (Munich: Sellier European Law Publishers, 2007) and the various contributions to W. Faber and B. Lurger (eds.), Rules for the transfer of movables. A candidate for European harmonisation or national reform? (Munich: Sellier, European Law Publishers, 2008).

99 See the draft report on the role of the national judge in the European judicial system (2007/2027(INI)), Committee on Legal Affairs, Rapporteur: Diana Wallis, MEP and Vice-President of the European Parliament: <http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/712/712384/712384en.pdf.>

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