THE LAW OF REAL PROPERTY IN THE EUROPEAN COMMUNITY

A COMPARATIVE STUDY

By

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"The end of law is, not to abolish or restrain, but to preserve and enlarge freedom"

John Locke, *Second Treatise of Civil Government* (1690)

To my wife and sons: Cris, Diogo and Francisco

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Abbreviations

Am. J. Comp. L	American Journal of Comparative Law
BCE	Before Christian Era
BENELUX	Belgium, Netherlands and Luxembourg
BGB	Bürgerliches Gesetzbuch, German Civil Code
C. civ.	Belgium Civil Code
CE	Christian Era
CN	Portuguese Notary Code
EC	European Community
ECJ	European Court of Justice
ECR	European Court of Justice Recueil
ECSC	European Coal and Steel Community
Ed	Editor
Edn	Edition
EEA	European Economic Area
EEC	European Economic Community
EGBGB	Introductory act to the German Civil Code
EU	European Union
Euratom	European Atomic Energy Community
Hastings Int'l & Comp. L. Rev	Hastings International & Comparative Law Review
ICLQ	International and Comparative Law Quarterly
LS	Legal Studies
MLR	Monthly Labour Review
N.	Number
OJ C	Official Journal of The European Community, Series C
OJ L	Official Journal of The European Community, Series L
PCC	Portuguese Civil Code
PECL	Principles of European Contract Law
RAU	Portuguese Lease Law
RIDC	Rivista Internazionale di Diritto Comune
SEA	Single European Act
Sec.	Section
TGVG	Tiroler LGBl. 82/1993 Tyrol Law on the Transfer of Land

UNIDROIT	International Institute for the Unification of Private Law
UPICC	Principles of International Commercial Contracts
CRP	Portuguese Land Register Code

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Finally my wife Cris. You know too well...

Declaration

The present dissertation embodies the results of my own course of study and research and has been composed by myself. No portion of the work covered by the dissertation has been submitted in support of any application for another degree or qualification at this or other university or institution of learning.

José Caramelo Gomes

Abstract

This research is a response to suggestions by the various European Community (EC) institutions that differences between the property law regimes of the various member states represent an obstacle to further European integration.

The EC is itself a legal entity having legislative powers. Within its areas of competence it legislates on many social and economic issues and its legislation is binding in the legal systems of its fifteen member states.

However, EC legislative powers are said to be 'attributive' in that sovereignty ultimately resides with the members states. The EC is therefore only competent to legislate in areas where the member states have invested it with the necessary powers.

Specifically, in the context of this research, the EC has no competence to legislate on matters related to property law. Article 295 of the EC treaty (former Article 222) states that law-making powers in these areas remain with the member-states.

The research examines the suggestion that certain features of some national property law regimes are in conflict with the social and economic aspirations of further European integration and investigates the regimes of the fifteen member states in this context.

It adopts a comparative law methodology and seeks to identify similarities and differences between the various regimes. The methodology utilises an

expert from each of the states to produce a collection of national reports which are then analysed within the thesis.

Chapter 1 – Introduction

1.1. Overview

1.1.1 The European integration

The European Community (EC) is an organization of European countries dedicated to increasing economic integration and strengthening cooperation among its members. The members of the EC are Belgium, Britain, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Austria, Finland, and Sweden. The EC has a number of objectives. Primarily, it works to promote and expand cooperation among its members in several areas, including economics and trade, social issues, foreign policy, security, and judicial matters. (Fontaine 1998)

The EC has legislative powers conferred by Member-states through the founding treaties. At the same time, the EC has an organic structure enabled to exercise them. EC legislative powers are not of the same nature as the ones of a sovereign state. EC's powers have an attributive nature and, consequently, its existence is limited to subjects appointed in the institutional treaty. Ultimately, this means that there is a division of legislative powers between the Member-states and the EC.

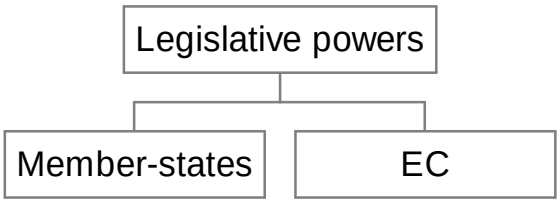

Diagram 1 - Legislative powers sharing in the EC

The EC legislative powers have a second characteristic: there is a strict regulation on the intensity and *modus operandi* of its use. This means that a clearly defined institutional framework is established in the founding treaties and the EC organs or Institutions and their interactions are clearly defined.

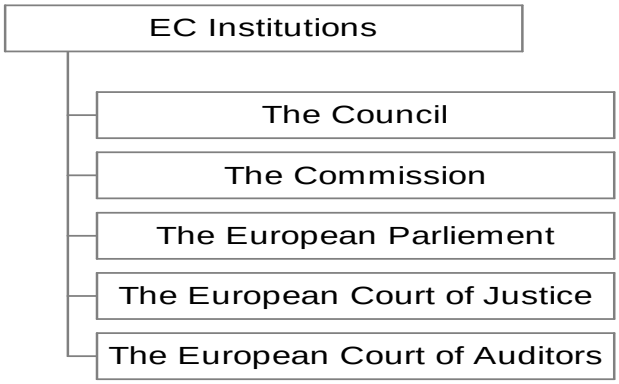

Diagram 2 - EC Institutions

Whenever EC owns the law making power in a subject, Member-states lose the ability to legislate in that matter, especially if they intend to legislate in breach of their European Community obligations. The EC organs are called Institutions and one amongst them is the European Community Court of Justice (ECJ) who has exclusive powers to interpret EC law, which implies that sometimes it may act as a Constitutional Court. Exercising this competence, the ECJ is often called to rule about Member-states legislation compatibility with their European obligations. (Campos 1998)

Some fundamental principles of EC Law were laid down by the ECJ in this matter to complete the applicable basic framework included in the treaties (the principle of cooperation). The main principles laid down by ECJ were the principle of direct effect and the principle of community law supremacy. The two principles together mean that where a violation of community law is detected, natural and legal persons have the right to ask for judicial remedies within the judicial system of the Member-state concerned. The national court must then apply the community law and set aside the national law, thus protecting the rights or interests of the claimers. (Caramelo-Gomes 1998)

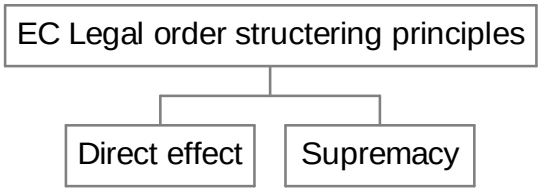

Diagram 3 - EC legal order structuring principles

1.1.2 European integration and private law

The European Commission and the European Parliament have, back in 1998, called for reports about the "European Civil Code". The European Community Council has stressed its interest in this project in 1999 – European Council of Tampere. This concern was not at all new, as in 1989 the European Parliament adopted a Resolution – Resolution of 26 May 1989 on action to bring into line the private law of the Member-states (OJ C 158, 28-6-1989, p. 400), aiming that a start be made on the necessary preparatory work for the drawing up of a Common European Code of Private Law. Latter, in 1994, the European Parliament adopted a new resolution, asking the Lando Commission to draft a set of Principles of European Contract Law (hereinafter PECL). This commission embodies the first effort aiming to harmonize civil law within the EC and was created in 1982 by Ole Lando. It is a non-governmental body of lawyers and academics and it started by drafting a set of Principles of European Contract Law - PECL. These principles are divided in three parts. Part 1 was published in 1995 (Lando 1995) and republished along with part II in 1999 (Lando 1999). Part I deals with performance, non-performance and remedies, part II with the core rules of contract, formation, authority of agents, validity, interpretation and contents and part III deals with compound interest, conditions and the effect of illegality, and rules on subjects which are common to contracts, torts and unjust enrichment, such as plurality of creditors and debtors, assignment of debts and claims, set-off, and prescription. The principles have the main purpose to serve as a first draft of a part of a European Civil Code and are largely inspired in the work of the International Institute for the Unification of Private Law (hereinafter UNIDROIT), Principles of International Commercial Contracts (hereinafter UPICC). These principles intend to set forth "general rules for international commercial contracts" (UNIDROIT 1994).

The idea of a European Civil Code grounds the existence of the "Study group on a European Civil Code". The study group constituted itself in 1998, following the international conference entitled 'Towards a European Civil Code' which was organized by the Dutch Ministry of Justice and took place in The Hague in 1997. The group now comprises about 50 professors from all Member-states of the EC plus some

observers from applicant countries, namely the Czech Republic, Hungary and Poland. Its ultimate aim is to produce a draft of a first basic statute on the law of property in the EC and is considered the successor of the Lando Commission.

Both projects are EC funded, and their basic assumption is that there are significant differences between the national legal systems and that those differences have a negative impact in the European integration. Thus, their goal is to create principles that shall replace the existing national legislation on the long term, following the traditional successive approach methodology, i.e., pursuit a wide objective in the long term by small steps – (von Bar 2000). The methodology used in both projects – PECL and European Civil Code - is quite similar and is more a legislative procedure than a comparative law study. It is not a matter of researching the law within the EC Member-states, but to prepare propositions of law to replace the existing law in the Member-states. In this sense, both projects are not studies about 'what is'. They are studies about "what should be".

The efforts of the academic community related to the harmonisation of private law in the EC also include two other important projects: The 'Pavia group' and the 'Trento group'. The latter runs the project 'The Common Core of European Private Law', under the direction of Ugo Mattei and Mauro Bussani, at the University of Trento. This project aims to find the common core of the bulk of European private law and uses Schlesinger's dynamic comparative law methodology, developed at Cornell in the sixties and reshaped by Sacco.

The 'Pavia Group' has recently published its "European Contract Code – Preliminary draft", (Gandolfi 2001) based on the work of the Academy of European Private Lawyers. This code contains a body of rules and solutions based on the laws of members of the European Community and Switzerland and covers the areas of contractual formation, content and form, contractual interpretation and effect, execution and non-execution of a contract, cessation and extinction, other contractual anomalies and remedies.

The beliefs of the European Community institutions are also clear from official documents other than the above mentioned ones. The European Commission has consistently included in some of its official documents the statement that the differences in private law, property law included, in the member states are an obstacle to the European integration and thus harmonization is required – *see*, for instance, "Study on the application of Value Added Tax to the property sector", N XXI/96/CB-3021 (European Commission 1996) and the Commission Communications about Private Law in the EC.

Moreover, EC Commission has included these views in the proposals for the First Council Directive to approximate the laws of the Member-states relating to trade marks (89/104/EEC), Regulation (EC) No 40/94 on the Community trade mark, Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, Directives 85/374/EEC (product liability), 85/577/EEC (contracts negotiated away from business premises), 87/102/EEC (consumer credit), 93/13/EEC (unfair terms in consumer contracts), 99/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member-states concerning consumer credit, Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, Council Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member-states relating to self-employed commercial agents, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, Directive 97/5/EC of the European Parliament and the Council of 27 January1997 on cross-border credit transfers and 94/47/EEC (time-sharing). A non-exhaustive overview of the EC legislation related to

private law, especially contract law is included in Annex I – List of EC legislation and a similar list of international instruments is included in Annex II – List of International instruments.

The European Parliament and the European Council appear to subscribe the EC Commission's view, as all of those proposals were adopted and became secondary legislation. The European Parliament in particular is keen about promoting harmonization in Private Law in the EC. Its Resolution of 16 March 2000 concerning the Commission's work programme 2000 pledge that greater harmonisation of civil law has become essential in the internal market. The Resolution of 15 November 2001 on the approximation of the civil and commercial law of the Member-states proclaimed the approximation of private law as a political goal and regreted the fact that the Commission had restricted its communication to private contract law. This resolution also takes the view that directives which are not aimed at complete harmonisation but pursue specific objectives such as consumer protection, product safety or product liability, should continue to be drafted not based on any particular legal system, so that they can readily be incorporated into the various national legal systems. Last, but not least, the resolution proposes the creation of an 'European Legal Institute'.

The First Council Directive to approximate the laws of the Member-states relating to trade marks (89/104/EEC), the Regulation (EC) No 40/94 on the Community trade mark, the Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and the Directive 94/47/EC of The European Parliament and The Council of 26 October 1994 are particularly important for this research, as all of them are somehow related to the property legal framework – the latter directly with a right over immovable property and the others with incorporeal property. The fact is that the exclusion in Article 295 does not specify if it concerns a particular specie of property, so one must assume that it includes property in general and thus incorporeal property must be considered within its scope.

The time-share Directive is probably the best example of the EC's believes. Its objective is to harmonize national legislation concerning the acquisition of immovable property in a timeshare basis. Recital 1 includes the following statement:

"1. Whereas the disparities between national legislations on contracts relating to the purchase of the right to use one or more immovable properties on a timeshare basis are likely to create barriers to the proper operation of the internal market and distortions of competition and lead to the compartmentalization of national markets;"

Recital 3 is as follow: "3. Whereas the legal nature of the rights which are the subject of the contracts covered by this Directive varies considerably from one Member-state to another; whereas reference should therefore be made in summary form to those variations, giving a sufficiently broad definition of such contracts, without thereby implying harmonization within the Community of the legal nature of the rights in question;"

Article 1 establishes: "The purpose of this Directive shall be to approximate the laws, regulations and administrative provisions of the Member-states on the protection of purchasers in respect of certain aspects of contracts relating directly or indirectly to the purchase of the right to use one or more immovable properties on a timeshare basis."

This Directive deals only with some aspects of contracts but the significant aspect of it is that those contracts relate to what is obviously a right over an immovable thing and therefore relate to the national property law excluded from the EC competence in Article 295 EC.

Also relevant to the subject of European integration and private law are the Rome Convention of 1980 on Law Applicable to Contractual Obligations and the Brussels convention on jurisdiction. Both conventions deal with contract disputes: the first deals with the governing law, and the second with the choice of jurisdiction and enforcement of judgments. The Brussels convention has inspired the Council regulation (EC) N. 44/2000 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This Regulation has replaced the Brussels

convention in all its scope except for the relations between Denmark and all other member-states, as Denmark choose not to be bind to the above mentioned regulation.

1.1.3 European integration and property law

Article 295 the EC Treaty excludes the property legal framework from the EC competence. This means that such matters are the exclusive competence of the member states. In fact, Private Law is generally excluded. There are, however, signs that the EC's desires to change this situation and most probably will do so using the successive approach technique, starting by regulating other aspects of civil law rather than property law, as shown above.

Even so, property law has not completely escaped of the EC law influence and jurisdiction. The ECJ has ruled in several cases that there are some aspects of the national property law that may conflict with the European integration and thus be incompatible with the EC law. That was found to be true in Case C-302/97 Konle [1999] ECR and in Case C-423/98, Alfredo Albore, [2000] ECJ, amongst others.

These cases are related to what I may call national constraints to real estate ownership on the grounds of nationality. Member-states known to apply, or have applied, such constraints are Austria, Denmark and Italy.

The Austrian situation is reported in several cases lodged before the ECJ, the first of which was the Konle case (Case C-302/97 Konle [1999] ECR, available at http://curia.eu.int). In the context of a procedure for compulsory sale by auction, the Bezirksgericht Lienz (Lienz District Court) allocated on 11 August 1994 a plot of land in the Tyrol to Mr Konle, a German national, on condition that he obtained an administrative authorisation required under the TGVG 1993 (Tiroler LGBl. 82/1993; Tyrol Law on the Transfer of Land, 'the TGVG 1993').

According to Sections 9(1)(a) and 12(1)(a) of the TGVG 1993, the acquisition of the ownership of building land was subject to authorisation by the authority responsible for land transactions. Section 14(1) of the TGVG 1993 provided that the authorisation

should be refused, in particular where the acquirer failed to show that the planned acquisition would not be used to establish a secondary residence. Section 10(2) of the TGVG 1993 stated that the authorisation was not required where the right acquired related to land that was built on and the acquirer had Austrian nationality. Under Section 13(1) of the TGVG 1993, the foreigner could only be granted the authorisation if the intended purchase did not conflict with the policy interests of the State and there was an economic, cultural or social interest in the acquisition.

The Danish situation is quite clear, as there is a protocol, annexed to the EC Treaty, dealing with it. Danish legislation precludes persons who are not resident in Denmark, and who have not previously been resident in Denmark for a minimum of 5 years, from acquiring real estate there without permission from the Ministry of Justice. This situation, though contrary to the EC law, benefits from an exception included in the EC Treaty.

The Italian situation was reported in the case Albore (Case C-423/98, Alfredo Albore, ECJ, 13 June 2000). Article 1 of the Italian Law No 1095 of 3 June 1935 (GURI No 154 of 4 July 1935), as amended by Law No 2207 of 22 December 1939 (GURI No 53 of 2 March 1939), provided that all instruments transferring wholly or in part ownership of immovable property situated in areas of provinces adjacent to land frontiers should be subject to approval by the Prefect of the province. Article 2 of the same Law prevented public registers of entering transfer instruments unless evidence was produced that the Prefect had given his approval.

Article 18 of Law No 898 of 24 of December 1976 (GURI No 8 of 11 January 1977), as amended by Law No 104 of 2 May 1990 (GURI No 105 of 8 May 1990) provided that those provisions would not apply when the purchaser was an Italian national.

Two properties at Barano d'Ischia, in an area of Italy designated as being of military importance, were purchased on 14 January 1998 by two German nationals, Uwe Rudolf Heller and Rolf Adolf Kraas, who did not apply for authorisation. In the absence of such authorisation, the Naples Registrar of Property refused to register the sale of the

properties. Mr Albore, the notary before whom the transaction was concluded, appealed against that refusal to the Tribunale Civile e Penale di Napoli, claiming that the sale at issue, concluded for the benefit of nationals of a Member-state of the Community, should not be subject to the national legislation which required only foreigners to obtain authorisation.

There are several EC freedoms and rights setting the Community requirements that national legal systems must comply with in this specific subject. The most important is the principle of non-discrimination, sometimes called the principle of the national treatment, in those matters related to the EC fundamental freedoms: the free movement of persons, services and capital.

The principle of non-discrimination is laid down in Article 12 of the EC Treaty and outlaws any discrimination on the grounds of nationality. Some exceptions on grounds of public policy, security and health are accepted based in objective criteria determined by the EC law.

The acquisition of real property is normally associated with one of two main goals: residence or investment.

The first goal, residence, implies with the free movement of persons, Article 18 and 14 EC Treaty, especially the right of residence. The first beneficiaries of this right are the workers and their right of residence is linked to the right to take up a job and so should not be exercised simply in order to look for work. The right of residence for persons other than workers is regulated in three Council Directives. The Directive 90/365 regulates the right of residence for employees and self-employed persons who have ceased their occupational activity (retired persons). The Directive 90/364 regulates the right of residence governing all persons who do not already enjoy a right of residence under Community law and Directive 90/366 on the right of residence for students exercising the right to vocational training. These directives require Member-states to grant the right of residence to those persons and to certain of their family members, if they have adequate resources so as not to become a burden on the social assistance

schemes of the Member-states and are all covered by sickness insurance. (Campos 1998)

The second goal of real property acquisition, investment, may be related with at least one of the following two fundamental freedoms: the right of establishment, Article 43 EC Treaty and the freedom of movement of capital, Article 56 of the EC Treaty. The right of establishment ensure that the self-employed, whether working in commercial, industrial or craft occupations or the liberal professions, are free to exercise their profession throughout the Community, either in a liberal profession form or in a corporate one. The free movement of capital aimed to remove all restrictions on capital movements between Member-states, thus encouraging the other freedoms (the movement of persons, goods and services) and allowing the investment, by all EC nationals, in other EC Member-state in the same conditions of their nationals.

These situations show that there is an impact of EC law in the national property legal framework, even if by no other reason, at least because of the principle of the national treatment.

This may well be the reason why the European institutions consider that there are differences in the property law in the Member-states that have a negative impact on the European integration. Nonetheless, no studies were commissioned about the property law. The views of the EC institutions, though expressed in official documents and even legislation, present no groundings. Instead, the argument itself was used to ground legislative measures. In fact, no supporting quantitative or qualitative data or doctrinal studies could be found in this subject.

The argument that the differences in the national property laws are an obstacle to the European integration starts with a basic assumption: that there are significant differences in those national regulations. This is not yet demonstrated, as I could not find any pan European study about the national property law. In the absence of scientific groundings for the EC belief, I strongly feel that its *raison d'etre* is the reported conflicts between EC law and the national property law as described above.

The problem, in my view, is that those situations do not report differences between the laws of the Member-states. They report conflicts between the laws of some Member-states and the EC law: there may be national constraints to the immovable property ownership in breach of EC law, such as the ones described above. If not, the only - wrongfully - sustaining evidence of the EC's views will disappear and the argument that the differences in property law between the Member-states are an obstacle to the European integration will shift from a poorly and wrongfully justified statement to a non-justified statement.

In addition, if it is true that any conflict between national law and EC law, is by definition, an obstacle to European integration, it is also true that the legal history of the EC is full of examples of conflicts of law that were solved not by harmonization but through the individual action of the member-states in question. This is the case of the direct tax law, indirect tax law (except for the VAT), procedural rules, jurisdictional competence rules, member-state liability and so many others. It is a fact that in most cases member-states did not, at first, willingly comply to their EC obligations and thus forced to the intervention of the ECJ, mostly called to rule under the preliminary rulings mecanism; but it is also a fact that the majority of the conflicts was solved without EC harmonization (Caramelo-Gomes 1998).

There are many comparative legal studies that include some aspects of property law, but, as far as I could review, those research projects are essentially legal systems comparisons rather than specific legal institutes comparison: they are macro comparative law, in the sense that their goal is to compare legal systems as whole, whereas micro comparative law aims to compare specific legal institutions across different legal orders. And, as Professor Hans Heyman (2002) writes, "Comparative property law, as explained, is new and at the frontiers of private and European legal research. At the current stage there needs to be done an extensive amount of comparative study, as an important preliminary stage before i.e. model laws or principles are formulated.". Moreover, after the work of Jayme (1995), Legrand (1996), Erp (1999), Minda (1995) (1995a) and many others, the traditional methodology of comparative law is in crisis, as I will show in the methodology section of this Chapter.

Altogether, in my view, the first question a researcher must raise in this subject is if there are significant differences between the various national property laws, especially, the ones related to immovable property. This, itself, is an enormous research question. Property law includes movable property, immovable property, intangible property, securities, conveyancing, land administration law and systems, contracts law and so many others. If, after successfully answering that question in a clearly focused subject, significant differences are to be found, then a second research question arises: do those differences have an impact, positive or negative, in the European integration?

The first research question is a comparative law one, whereas the second is a Comparative Law and Economics, or even purely economic, research question. It is so as European integration is, above all and in the first place, an economic integration and the impact, positive or negative, of alleged differences in law will always be an economic one. This means that once it is established that there are differences, the study of its impact in the market must be performed under the economics methodologies, or, even better, using the novel approach of Comparative law and economics.

Comparative Law and economics is a recent discipline that combines the already traditional approach of Law and Economics, i.e., the discipline that studies the economic consequences of the law using economic models (Prichard 1998) and combines it with the legal comparative approach. We tend not to embrace this approach to law for philosophical reasons and thus consider the law and economics and the comparative law and economics ultimate aim to be unacceptable. In fact, one of the European academics leading research in this area, Ugo Mattei (1999) writes that "The change of focus proposed by law and economics goes right to the heart of the legal discourse. Its agenda is as simple as it is revolutionary: rather than focusing on justice, legal analysis should focus on efficiency." What I cannot accept is that the choice be made in the light of efficiency rather than justice. This, however, does not prevent us of recognizing the usefulness of the methodology: the awareness of the economic impact of legislative measures is something good in itself.

1.1.4 Concept and forms of property

The legal concept of property and its contents are basic understandings to this research.

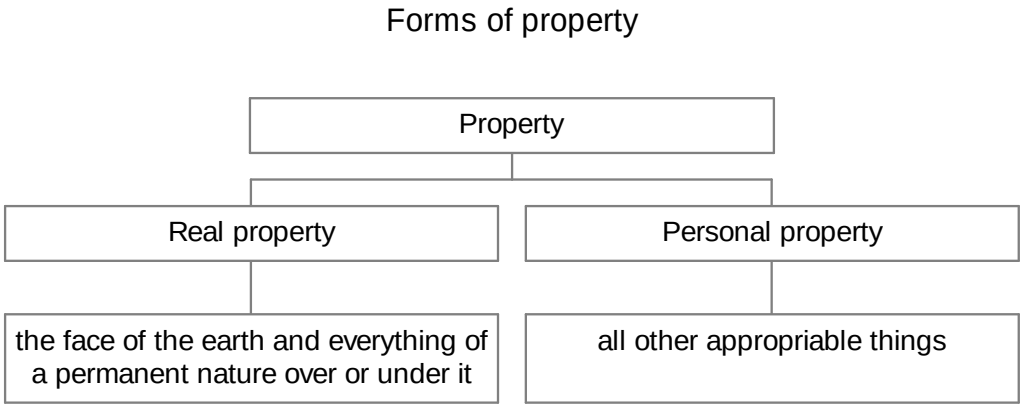

Diagram 4 - Basic forms of property

One of the most basic dividing lines between the different forms of property is that between real property and personal property. Real property refers to land including the face of the earth and everything of a permanent nature over or under it, including structures and minerals and personal property refers to all other appropriable things. Property can be divided into tangible or corporeal and intangible or incorporeal property. Tangible property exists physically; an example is a book. Intangible personal property has no physical existence but can be legally owned; an example is patent rights. Certain things, such as the atmosphere and the high seas, are viewed as neither real nor personal property. These criterions are somehow common to the western legal orders, though some differences may be appointed in different legal systems.

The expressions land property, or real property, are somehow equivalent to part of the expression real estate. A broad definition of Real Estate is land and everything made permanently a part thereof, and the nature and extent of one's interest therein. In law, the word real, as it relates to property, means land as distinguished from personal property; and estate is defined as the interest one has in property.

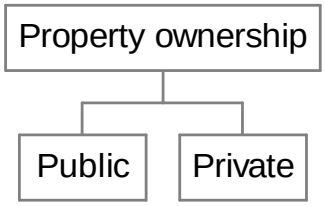

Diagram 5 - Property ownership

Property ownership may be public or private. Public ownership exists when the good belongs to a public authority and private ownership when the goods belong to an individual, a group of individuals, a corporation, or some other form of organization. Real estate may be acquired, owned, and conveyed (or transferred) by individuals; business corporations; charitable, religious, educational, fraternal, and various other non-profit corporations; fiduciaries, such as trustees and executors; partnerships; and generally by any legal entity as determined and defined by the laws of the country. Real property is generally acquired by purchase, by descent and devise, or by gift. When acquired by purchase, the seller, or grantor, gives a deed to the purchaser or grantee. The deed contains a legal description of the property conveyed; it must be drawn, executed, and acknowledged in proper form to be entitled to record. This procedure exists in all Member-states but it may present significant differences.

The above paragraphs illustrate some of what may be called legal relations between a person (physical or moral) and a thing, especially land or constructed objects permanently sitting on land.

1.2 Aims and objectives

This research embodies a Comparative Property Law research with a European Community Law and national law conflict of law question. It aims to compare the enjoyment rights over immovable property in the EC Member-states and the way those rights are conveyed, so to answer the first question raised when analysing the EC argument that the differences in the national property law are obstacles to the European integration, as far as the enjoyment rights are concerned. Furthermore, I intend to learn if there are other nationality or residence based constraints to immovable property

ownership in the EC Member-states and, if so, if those legal constraints are compatible with the EC law.

The latter question is justified within this research project as, as described above, some reported situations of discrimination on the grounds of nationality may well be the reason for the EC Institution's believe that the differences in national property law are obstacles to European Integration. In fact, the European Parliament published a working paper generically named "The private law systems in the EU: discrimination on grounds of nationality and the need for a European Civil Code" (1999). The first Chapter of the study develops under the heading "Summary of the main differences between the various systems of property law and civil procedural law in the European Union and their common features".

One of the elements one must use when analysing any scientific study, either a working paper or a research paper, is its structure and headings. From it, one may find a lot about the views and opinions of its author. The fact that the European Parliament decided to include in the title of the working paper a reference to the discrimination on the grounds of nationality and another to the need for a European Civil Code points the reader in the direction of: *i)* the European Parliament considers that there are discriminations on the grounds of nationality within the private law systems in the Member-states; *ii)* these discriminations ground the need for a European Civil Code and, looking at the heading of Chapter one, *iii)* these differences arise mainly in property law and civil procedural law.

This working paper is probably the best example of my argument that no evidence is produced about the differences between the national property law of the Member-states, much less that there is a negative impact in the European integration. Under Chapter one heading, "Summary of the main differences between the various systems of property law and civil procedural law in the European Union and their common features", I find the following sections: "Salient features of European contract law"; "The law governing service contracts"; "The law governing insurance contracts"; "Non-contractual obligations, especially the law of tort"; "The law governing credit security"

and “Harmonisation of the law of civil procedure in the European Union in the context of the creation of a European Civil Code”. None of the six sections covers property law, one covers procedural law, one deals with torts and four with contracts. The very content of the Chapter dismisses its title, but the general idea remains: discriminations on the grounds of nationality in property law are an obstacle to European integration and this is an unquestionable statement. As introduced above, the ECJ considers that a national provision precluding the access to real estate ownership on the grounds of nationality if applicable to EC nationals is a breach of the EC Treaty.

The outcome of this research and its contribution to knowledge is, in the first place, a novel comparative law research methodology and, in the second place, a contribution to an introduction to what may in future be an “European legal theory of the rights *in rem*”. Which of these contributions is to be considered the main contribution to knowledge, that is something that the future and its readers will decide.

This research will lead to better understanding of the application of European Community law to the Real Estate domain. The outcome of this research will include an EC wide study about the concept, contents and conveyance of the real property right, as well as an in depth analysis of the species and contents of the enjoyment rights over real estate. This, I think, is of capital importance to real estate investors in Europe, especially because it includes a focus on the international component of real property ownership.

1.3 Research Methodology

Before any methodology consideration, I must address a formal issue: the referencing system. The purpose of referencing and citation is to enable the reader to identify and find sources relied upon by the writer. Standards and guidelines have been established to assist writers to reference and cite in a form that allows a reader to easily find a source. The Harvard System is not adequate to legal citation. Legal citation and referencing has specific requirements:

- A citation needs to provide all the information the reader can need to locate the information the writer used. Whatever the type of information used, the citation needs to be complete enough to allow the information to be located.

- Legal research requires the use of primary sources - cases and legislation - whenever possible.

- Authorised version of materials is preferable to unauthorised sources. Cases and legislation may have two versions - the authorised version (this version has the approval of the court or is published by the legislature) and the unauthorised version (every other published version).

- Pinpoint citation leading the reader to the exact point within material that he/she reached is required. This means that a reference to a page may not be sufficient and the reference may, when the materials have smaller sections, such as legislation or materials with paragraph numbering, the reference should be to the smallest possible section.

- The form of the citation, particularly in the legal area, is that all the information needed should be in one place with no need to move around the document to find the complete set of information. To this end, the footnote has become the standard referencing tool with the content of the footnote containing the complete information needed.

- The citation should be elegant, in the sense that it should be the shortest possible while giving all the information needed.

- The reference to cases should follow the rules laid by the authority itself.

The above-mentioned specific requirements were acknowledged in the Harvard Law Review Association's *The Blue Book: A Uniform System of Citation* (Cambridge: Harvard Law Review Association), today in its 17th edition. For this reason, I choose to reference and cite using the Blue Book system and the case referencing rules applied by the ECJ itself.

1.3.1 Methodology

The core material of this research is Law: ancient, as to the origins of key concepts such as property and modern as to the present national concepts of property and EC competences.

There are two basic different research methods: qualitative and quantitative. To study natural phenomena natural sciences developed quantitative methods, such as survey, laboratory experiments, formal and numerical methods; some of these were accepted in social sciences. Quantitative methods are not adequate to the current research project. Understanding a phenomenon in its institutional context is impossible when text data is quantified (Kaplan and Maxwell 1994).

Social sciences developed the qualitative methods to enable researchers to study social and cultural phenomena. Qualitative methods include action research, case study research, ethnography and grounded theory, among others. Qualitative data sources include observation and fieldwork, interviews and questionnaires, documents and texts and the researcher's impressions and reactions. None of these methodologies appeared adequate to this research.

1.3.1.1 Legal research

Legal research may be divided into two different proceedings. The first is the search for the relevant legal provisions within a given legal system and the second is the interpretation of those provisions. Both proceedings are necessary in any legal research project. Finding the relevant legal rules is getting easier, in a sense, as IT are an effective tool, and harder, as legislative bodies have increased significantly the amount of the existing statutes. Finding, within the law, the relevant provisions may already require some interpretation and somehow fall in the scope of the second proceeding. This means, ultimately, that this proceeding may result in the exclusion of some rules due to its irrelevancy to the subject matter (Neves 1993).

Legal research may have one of three goals: scientific, legislative or judgment. The scientific goal is the one present in what I may call legal doctrine, i. e., the writings of academics and lawyers about a specific aspect of law, regardless of included in textbooks, articles, annotations to law or case-law; it somehow returns to the concept of jurisprudence as defined in the Osborn's Concise Law Dictionary (1993).

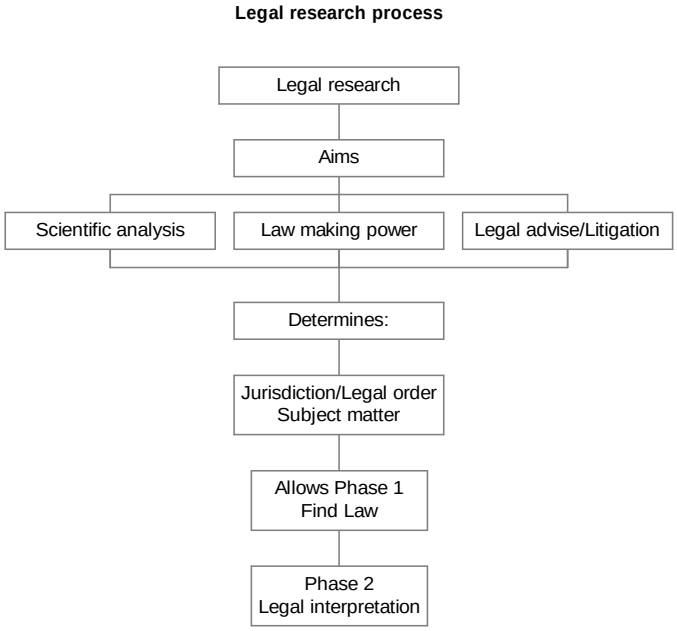

Diagram 6 - Legal research process

The determination of the Jurisdiction or Legal order is essential to narrow the search for the law: there is national law, EC law and International Law, when applicable. This information is also relevant to determine what are the sources of law the researcher is likely to find; the jurisdiction itself determines, amongst the several sources of law that legal theory defines, which are relevant and biding within its territory.

Diagram 7 - Searching for the law

Knowing in what legal order to look for the law and what species of law sources that jurisdiction considers biding, the subject matter plays an essential role. It narrows the search to specific areas of the law.

After finding the law its time for phase two: legal interpretation. The interpretation of the law follows well-established rules and the first notion that the interpreter must have in mind is that of the nature and elements of the legal rule. Legal rules have a normative character and attempt to prescribe future conduct (Chynoweth 1999). To do so, legal rules generally have two elements: an abstract factual description and a command (Neves 1993). When a person (physical or moral) founds himself within the scope of the legal rule, that person may expect the legal consequence. Legal interpretation aims to clarify the range of the factual situations and of the consequences included.

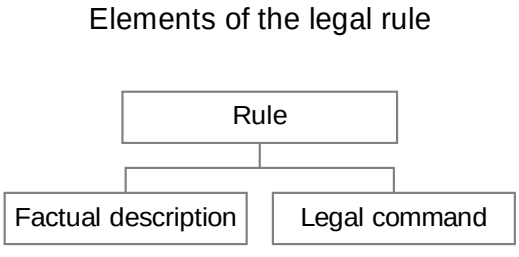

Diagram 8 - Elements of the legal rule

Legal interpretation uses several elements. The first is the literal or grammatical element, i.e., the text of the law. The second element is the systematic element, i.e., the

place, in a given legal order, where the rule is included; this element is particularly useful to broaden or narrow the range of the rule: if a rule determines that a contract must be concluded in writting and this rule is included in a law applying to the lease contract, one cannot conclude that all contracts must be conclude in writing; the command shall apply only to the foreseen contracts. The third element is the teleological one, which is used to correct the results of the application of the previous elements in light of the aims and goals of the rule and of its very existence. There is a fourth element, the historical, that places the law in the context of the moment when it was written, through the readings of any ancillary or preparatory materials (Neves 1993).

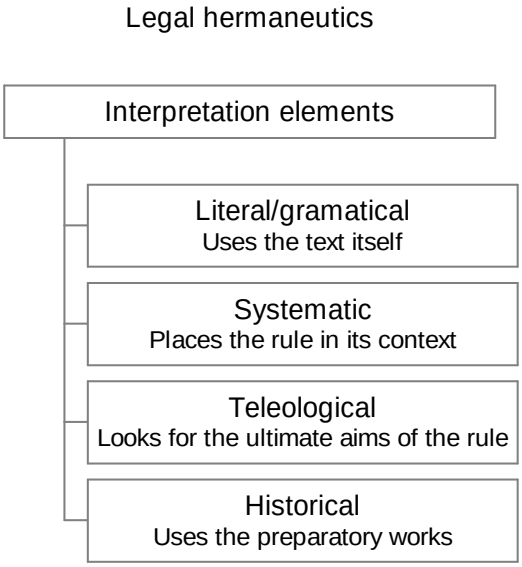

Diagram 9 - Legal hermeneutics

Legal interpretation is also used to answer legal omissions. The result is that legal interpretation may be analogical or extensive. The first happens when a general rule is applied to a similar uncovered factual situation and the second when a special rule is applied to a similar uncovered factual situation. Some rules however, such as some criminal rules, must be subject of restrictive interpretation, thus preventing the two previously described situations (Neves 1993).

Analogical and extensive interpretation deal with three concepts: legal omission, generic rule and special rule. Legal omission happens when the law does not foresee a given factual situation. In such a situation, the interpreter may search for a general rule with a similar factual description and apply it analogically. General rules, however, may be limited in scope by a special rule, i. e., when a small change in the facts will determine a different solution. In such case, if the facts are closer to the description in this special rule, then the interpreter may apply the special rule by extensive interpretation.

1.3.1.2 Comparative law research

"Comparative law presupposes the existence of a plurality of legal rules and institutions. It studies them in order to establish to what extent they are identical or different" (Sacco, 1991, p. 5). The traditional comparative methodology focus on formal rules that are compared independently of the culture that constitutes and surrounds them (Legrand 1996). To do so, the comparativist defined the *tertium comparationis*, i.e., what to compare, defined the legal orders involved, where to compare, searched for the relevant legal rules, interpreted them according to the rules of legal interpretation and compared the results of both of the rule elements: the factual description and the command.

This methodology presents several problems and limitations, the first being the language obstacle. As David (1982) points out, to translate legal terms is not at all accurate, as law is essentially made out of abstract concepts: it is easy to find the equivalent word for chair in all languages; just point a chair to a native and the answer is there. When I talk about law things are quite different. There is no way to point to the property right and get the equivalent word for it: the contents of the concept may vary significantly.

Moreover, postmodernist approaches to the comparative law methodology, such as the ones of Legrand and Jayme (1995), evidence the need to rethink it by including the cultural, social and economic environment of the law and of the researcher in order to

obtain valid conclusions from the comparison. The problem is that Jayme does not present a solution to do it and Legrand simply does not consider it possible (Erp 1999).

The criticism that Legrand and Jayme rise to the comparative methodology may split in two different aspects: the context of the researcher and the context of the law, whereas context is defined as the whole of the cultural, social, economic and legal environment. Ultimately, these requirements imply that the comparatist must *i)* be mother tongue level proficient in the language the several laws under comparison are written; *ii)* have immersive high education in law in all the legal orders under comparison. This idea of requirement for sound comparative methodology is present even in some Case law of the European Community Court of Justice (Cilfit case, as to the *act claire* doctrine).

The Cilfit case (Case 283/81 Cilfit and Others [1982] ECR, available at http://curia.eu.int) consisted of a reference to the ECJ under the former Article 177 of the EC Treaty by the first civil division of the Corte Suprema di Cassazione (Supreme Court of Cassation) for a preliminary ruling, on the interpretation of the third paragraph of the same Article, i. e., the obligation for national courts to address preliminary rulings in interpretation of EC law to the ECJ.

The question of the Corte Suprema di Cassazione was “does the third paragraph of Article 177 of the EC Treaty, which provides that where any question of the same kind as those listed in the first paragraph of that Article is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law that court or tribunal must bring the matter before the ECJ, lay down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or does it , and if so within what limits, make that obligation conditional on the prior finding of a reasonable interpretative doubt?”

The link between this question and Comparative Law is that the ECJ’s answer follows the postmodernist criticism to the comparative method and does so in especially favourable circumstances: the rule under analysis was included in a EC Regulation, thus

with presumably similar contents across the EC. It was a matter of comparing the same law in different linguistic versions.

Referring to the process of determining the correct interpretation of the EC regulation, the ECJ pointed out that it implies the analysis of the different linguist versions of the same rule keeping in mind that each of those versions is to be interpreted by jurists with a specific legal education in a specific social, cultural and economical context:

"16. Finally, the correct application of community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

17. However, the existence of such a possibility must be assessed on the basis of the characteristic features of community law and the particular difficulties to which its interpretation gives rise.

18. To begin with, it must be borne in mind that community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of community law thus involves a comparison of the different language versions.

19. It must also be borne in mind, even where the different language versions are entirely in accord with one another, that community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in community law and in the law of the various member states."

This criticism is somehow overcome by The Cornell project, run by R. Schlesinger in the 1960's. The initial problem that Schlesinger had to resolve was how to obtain comparable answers to the questions about the different legal systems. The answers had

to refer to identical questions interpreted as identically as possible by all those replying. Schlesinger (1998) formulated each question to take account of any relevant circumstance in any of the legal systems analysed so these circumstances would be considered in - and therefore comparable with - the analysis of every other system. Thus, the special feature of the work done at Cornell was that it made jurists think explicitly about the circumstances that matter, by forcing them to answer identically formulated questions. To obtain consistency, each question was formulated by presenting a case that respondents should solve (Schlesinger 1998).

There are two main problems with Schlesinger's methodology. The first is, as Sacco (1991) points out, that a list, even exhaustive, of all the reasons given for the decisions made by the courts is not the entire law, the statutes are not the entire law, neither are the definitions of legal doctrines given by scholars. In order to know what the law is, it is necessary to analyse the entire complex relationship between the "legal formants" of a system, whereas legal formants are all those formative elements that make any given legal rule amidst statutes, general propositions, particular definitions, reasons, holdings, etc.

The second problem with Schlesinger's methodology is that is conceived in a using what I may call a pathological technology: respondents are asked to solve a legal problem, a conflict. This means that this methodology is hardly adequate to try to find convergence or divergence between comparable legal institutes.

Zweigert and Kötz (1996) developed a functional method of legal comparison and Jansen (1998) applied it to ascertain if it exists a European building contract law. To do so, he created from scratch, his own terminology in English. This solution presented a major problem, as Erp (1999) points out, as no correspondence may be found between it and any of the legal orders under comparison.

1.3.3.3 Adopted methodology

The first obstacle to overcome in establishing a research methodology for this research is the undeniable validity of the postmodernist criticism to the traditional comparative

method. This means in the first place that an optimistic approach has to be present and Legrand's conclusions must be set aside and so must his pessimism.

The concrete problems to solve are the need to free the researcher of his own legal, social, cultural and economic environment and the need to, at the same time, get as much immersed in the other realities in comparison. That is to say that the researcher must lose all his original knowledge and gain an equivalent knowledge in each of the other systems in comparison. If, as in the present case, the different systems correspond to different countries with different languages, the first step is to acquire a motherly knowledge of all the languages involved - eleven languages in the European Community… The second, is to get uninfluenced legal, social, cultural and economic knowledge of all the countries involved – fifteen countries in the EC…

Considering that, to be able to complete such research in one country, one legal order, the researcher must have completed at least fifteen years of educational studies and that life expectancy is probably, in an optimistic approach, eighty years, one life time would be enough to be prepared to start comparing law in one third of the Member-states.

It is obviously impossible. There is only one solution to this problem: to involve at least one researcher in each country. This could be achieved in two different ways: either through workshops and seminars or through questionnaires. The first way proved to be impossibile due to finantial constraints, so there was only one option: the questionnaires, if possible presented to more than one respondent in each Member-state.

This solution has one problem. Those people will have to communicate in a common language with a common terminology. For the first part of the problem there is no perfect solution. The chosen language will always be a foreigner language for most of them and, in that aspect, a pragmatic approach is mandatory. As to the terminology, the research leader must try to find, through legal history research, a common root and build the terminology from there. This will minimize the valid criticism that Erp (1999) produced to Jansen (1998) .

In this research, where the basic concepts are property, real estate, conveyance, rights, rights *in rem*, European Community, EC law and principles, the first step is literature review. Materials used early in this stage included secondary sources, such as encyclopaedias, reference books, manuals and articles. These readings have indicated that some of the key concepts involved could share a common root, probably the Roman Law or even some more ancient frameworks and this awareness made us search for studies about Ancient Law. We never expected to find Ancient Law primary sources and I must acknowledge my surprise and appreciation for the magnificent work included in The Avalon Project of the University of Yale Law School. Thanks to it, scholars, researchers and practitioners can nowadays read Ancient Law Texts such as the *Corpus Iuris Civilis* and The Code of Hamurabi, conveniently translated into modern English and, if they have the necessary language skills, even compare it with a transcription of the original document in the original language. The Avalon Project has reinforced and sustained my conviction that some of the present days legal institutes relevant to this research have, in fact, the oldest roots human civilization can confer, and I could do this based in the actual primary source. Further secondary materials literature review has determined that, though there is a lot of previous research about the key concepts within the scope of this project, no identical or similar cross referenced analytic research was found. Much of the knowledge gathered is, nonetheless, included in this dissertation, either as direct quotations or references or, at the very least, when useful, in the selected bibliography.

Finding the common root in Roman Law was a predictable and fortunate circumstance, as Latin, used in legal pleadings and doctrinal studies, even today, in most European countries provided the common terminology, somehow familiar to all the prospective fellow researchers.

The theoretical framework thus obtained grounded an advanced legal research where I found that three Member-states appear to have suffered and maintained a strong Roman Law influence: Portugal, Spain and Italy. This conclusion allowed the development of the terminology into a conceptual framework.

This framework could then be included and ground a questionnaire (Annex III. Questionnaire number 1) that Colleagues, fellow researchers would answer. The questionnaire covers the aspects of the concept of immovable thing, the enjoyment rights *in rem* and conveyancing. The respondents were asked to read the conceptual framework so they understand the "standard" rights and then put in the tables whatever legal institution in their legal order that share the generic characteristics defined in the conceptual framework. Respondents were also asked to clearly include in their answers any significant divergences that they have found between the conceptual framework and their legal institute. Pedro Bettencourt, my colleague at the Universidade Moderna Law School, was kind enough to proof read and comment the questionnaire and the conceptual framework.

Drafting the profile of the respondents was fairly easy. This research does not aim to be a pure jurisprudence study. It is my conviction that more than the justification of the law, it is relevant its application. More than the theoretical aspects of property law, suitable to a traditional legal study, the focus here goes to the practical aspects of the application of property law. For this reason, the respondents should be involved in practice – lawyers if possible, with a strong academic record. Finding experts willing to respond was far more difficult, especially because I had to rely on their goodwill.

Mr João Paulo Teixeira de Matos, my good friend, distinguished scholar and honourable lawyer, transformed the impossible task into a possible one. When, in an early stage of the research, I shared with him my concerns about this, he kindly volunteered to assist. As senior partner of the Portuguese branch of Andersen Legal, he asked to the national branches of Andersen Legal to answer a questionnaire with the relevant issues. I must acknowledge once again the tremendous and kind collaboration of all of those offices and esteemed colleagues without whom this research would not have been possible. In so far as I know, more than one colleague worked in each office to the final result and all of them did it for pure intellectual pleasure and professional solidarity, most probably sacrificing part of their free and leisure time.

Each of the responses constituted a national framework report and the data thus gathered was horizontally ordered and comparative tables were created. Data validation was an issue for two main reasons: finding experts willing to do so and not to hurt the responts' professional and scientific pride. The way out of this dilemma was to perform a limited data validation: Mr. Pedro Bettencourt validated the Portuguese report and Mr. Paul Chynoweth the English one.

Further legal research created a conceptual framework for the national constraints to real estate ownership and the EC law and allowed a second questionnaire about this specific issue. Again, the co-operation of Mr. João Paulo Matos and the Andersen Legal group was invaluable.

The following diagram illustrates the research process:

Research process

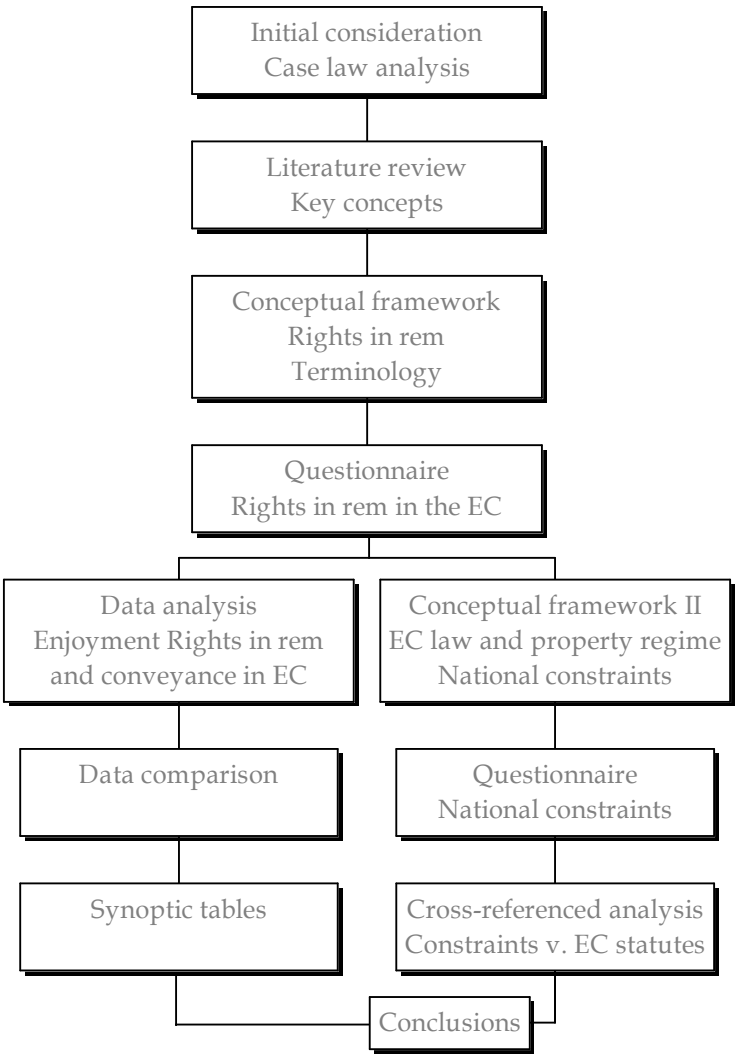

Diagram 10 -Research process

1.4. Structure of the thesis

This dissertation includes seven chapters. The present Chapter introduces the core research problem, the structure of the thesis, its aims and objectives, and the research methodology. The second chapter discusses the relation between EC law and national property law. Chapter 3 will build a conceptual framework for a comparative analysis

of the enjoyment rights *in rem* in the Member-states. Chapter 4 will present the concept and contents of the rights *in rem* in the various Member-states, chapter 5 includes a comparative analysis of the rights *in rem*, chapter 6 will discuss the coveyance procedure in the Member-states and chapter 7 presents the conclusions.

1.5 Summary of the chapter

The European Community (EC) is an organization of European countries dedicated to increasing economic integration and strengthening cooperation among its members. It has legislative powers conferred by Member-states through the founding treaties. Whenever this power exist, Member-states lose the ability to legislate. The EC organs are called Institutions and one amongst them is the European Community Court of Justice (ECJ) who has exclusive powers to interpret EC law, which implies that sometimes it may act as a Constitutional Court. Exercising this competence, the ECJ is often called to rule about Member-states legislation compatibility with their European obligations. The main principles laid down by ECJ were the principle of direct effect and the principle of community law supremacy.

The European Community is interested in harmonizing Civil Law in the Member-states and this interest has produced a number of documents and is expressed in several EC acts. The Lando Commission has draft a set of Principles of European Contract Law. This commission embodies the first effort aiming to harmonize civil law within the EC and was created in 1982 by Ole Lando. It is a non-governmental body of lawyers and academics and it started by drafting a set of Principles of European Contract Law - PECL. The idea of a European Civil Code grounds the existence of the "Study group on a European Civil Code". The study group constituted itself in 1998, following the international conference entitled *Towards a European Civil Code* which was organized by the Dutch Ministry of Justice and took place in The Hague in 1997.

Both projects are EC funded, and their basic assumption is that there are significant differences between the national legal systems and that those differences have a negative impact in the European integration. The methodology used in both projects –

PECL and European Civil Code - is quite similar and is more a legislative procedure than a comparative law study. It is not a matter of researching the law within the EC Member-states, but to prepare propositions of law to replace the existing law in the Member-states.

There are two other important projects: The Pavia group and the Trento group. The latter runs the project The Common Core of European Private Law, under the direction of Ugo Mattei and Mauro Bussani, at the University of Trento. The "Pavia Group" has recently published its "*European Contract Code – Preliminary draft*" containing a body of rules and solutions based on the laws of members of the European Community and Switzerland and covers the areas of contractual formation, content and form, contractual interpretation and effect, execution and non-execution of a contract, cessation and extinction, other contractual anomalies and remedies.

The European Commission has consistently included in some of its official documents the statement that the differences in private law, property law included, in the Member-states are obstacles to the European integration and thus harmonization is required. Moreover, EC Commission has included these views in the proposals for several Directives and regulations.

The First Council Directive to approximate the laws of the Member-states relating to trade marks (89/104/EEC), the Regulation (EC) No 40/94 on the Community trade mark, the Regulation (EEC) No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs and the Directive 94/47/EC of The European Parliament and The Council of 26 October 1994 are particularly important for this research, as all of them are somehow related to the property legal framework – the latter directly with a right over immovable property and the others with incorporeal property.

Article 295 EC Treaty excludes the property legal framework from the EC competence. Even so, property law has not completely escaped of the EC law influence and jurisdiction. The ECJ has ruled in several cases that there are some aspects of the

national property law that may conflict with the European integration and thus be incompatible with the EC law. There are several EC freedoms and rights setting the Community requirements that national legal systems must comply with in this specific subject. The most important is the principle of non-discrimination.

This may well be the reason why the European institutions consider that there are differences in the property law in the Member-states that have a negative impact on the European integration. Nonetheless, no studies were commissioned about the property law.

The argument that the differences in the national property laws are an obstacle to the European integration starts with a basic assumption: that there are significant differences in those national regulations. This is not yet demonstrated and I strongly feel that its *raison d'etre* is the reported conflicts between EC law and the national property law. In fact, Comparative property law is a new subject of research that requires methodological development, as the traditional methodology of comparative law is in crisis.

The first question a researcher must raise in this subject is if there are really significant differences between the various national property laws, especially, the ones related to immovable property. If, after successfully answering that question in a clearly focused subject, significant differences are to be found, then a second research question arises: do those differences have an impact, positive or negative, in the European integration?

The first research question is a comparative law one, whereas the second is a Comparative Law and Economics, or even purely economic, research question.

This research embodies a Comparative Property Law research with a European Community Law conflict question. It aims to compare the enjoyment rights over immovable property in the EC Member-states and the way those rights are conveyed, so to answer the first question raised when analysing the EC argument that the differences in the national property law are obstacles to the European integration. Furthermore, I

intend to learn if there are nationality or residence based constraints to immovable property ownership in the EC Member-states and, if so, if those legal constraints are compatible with the EC law.

The outcome of this research and its contribution to knowledge is, in the first place, a novel comparative law research methodology and, in the second place, a contribute to an introduction to what may in future be an "European legal theory of the rights *in rem*".

The core material of this research is Law: ancient, as to the origins of key concepts such as property and modern as to the present national concepts of property and EC competences. Legal research may be divided into two different proceedings. The first is the search for the relevant legal provisions within a given legal system and the second is the interpretation of those provisions.

The determination of the Jurisdiction or Legal order is essential to narrow the search for the law: there is national law, EC law and International Law, when applicable. After finding the law its time for phase two: legal interpretation. The interpretation of the law follows well-established rules and the first notion that the interpreter must have in mind is that of the nature and elements of the legal rule.

The traditional comparative methodology focus on formal rules that are compared independently of the culture that constitutes and surrounds them. To do so, the comparativist defined the *tertium comparationis*. This methodology presents several problems and limitations and the various propositions for a new methodology are not adequate to this research. A novel methodology was required.

The methodology used starts with literature review to learn as much as possible about the roots of the various jurisdictions in the EC. The findings allowed the creation of a conceptual framework that grounded a questionnaire to be answered by one legal expert in each jurisdiction.

The questions covered several areas. The first was the concept of immovable thing, the second was the inventory of the existing enjoyment rights *in rem* and respective contents, object, limits, obligations to the owner and duration. The third area was conveyance, in particular, the form of the contracts, the participating subjects, the conveyance procedure, especially the existence of a national register and the obligation, or not, of the registry. Additionally, the respondents were asked to include brief taxation information related to the conveyance process.

Each of the responses constituted a national framework report and the data thus gathered was horizontally ordered and comparative tables were created.

Further legal research created a conceptual framework for the national constraints to real estate ownership and the EC law and allowed a second questionnaire about this specific issue.

Chapter 2 – EC law and national property law

2.1 Aims of the Chapter

This chapter discusses the relation between EC law and national property law

2.2 Background

The dream of a united Europe is almost as old as Europe itself. The Roman Empire and the early 9th century empire of Charlemagne covered much of Western Europe. In the early 19th century, Napoleon I encompassed almost the entire Europe. During World War II (1939-1945), Adolf Hitler nearly succeeded in uniting Europe under Nazi domination, but all these efforts failed because they relied on forcibly subjugating other nations rather than cooperating with them. In the 20th century, some attempts to create cooperative organizations have failed. European countries strongly opposed all attempts to infringe on their powers and were unwilling to give up any control over their policies and only after WW II proposals for some kind of supranational organization in Europe became increasingly frequent. These proposals had political and economical motives. The political motives were based on the reasoning that only a supranational organization could eliminate the threat of war between European countries and that for Europe to resume its dominant role in the world affairs would have to have resources comparable to those of the United States. The economical motives rested on the argument that larger markets would promote increased competition and thus lead to higher productivity and standards of living. The first major step toward European integration took place in 1950, when the French foreign minister Robert Schuman, advised by Jean Monnet, proposed the integration of the French and German coal and steel industries and invited other nations to join in the project. The Schuman Plan created a supranational agency to oversee aspects of national coal and steel policy such as the levels of production and prices. West Germany immediately signed on and was soon joined by the Benelux countries (Belgium, The Netherlands and Luxembourg) and Italy. The United Kingdom declined to join. (Fontaine 1998)

The treaty establishing the ECSC (European Coal and Steel Community), signed in 1951, provided for the elimination of tariffs and quotas on iron, ore, coal and steel trade within the Community, a common external tariff on imports relating to the coal and steel industries from other countries and the control on production and sales. The treaty established several supranational bodies: a High Authority with executive powers, a Council of Ministers to safeguard the interests of the Member-states, an assembly with advisory authority, and a Court of Justice to settle disputes. (Campos 1998)

The participants in the ECSC signed, in 1957, two more treaties, creating the European Atomic Energy Community (Euratom) for the development of peaceful uses of atomic energy and the European Economic Community (EEC). The EC Treaty provided for the gradual elimination of import duties and quotas on all trade between Member-states and for the institution of a common external tariff. Member-states agreed to implement common policies regarding transportation, agriculture, and social insurance, and to allow the free movement of workers, goods, services, establishment and funds within the boundaries of the Community. Both the EEC and the Euratom treaties created separate Commissions to oversee their operations and it was agreed that the ECSC, EEC, and Euratom would share the Council of Ministers, the Assembly, and the Court of Justice. This organizational structure changed in 1965 with the Merge treaty, when all European Communities started to share all the different organs or Institutions. (Campos 1998)

The United Kingdom, Ireland, and Denmark joined the European Communities in the 1st of January 1973, followed by Greece in 1981 and Portugal and Spain in 1986. In addition, in 1986, the Single European Act (SEA) entered into force. This treaty was a package of amendments and additions to the EC treaties and, only seven years latter, the Maastricht treaty came into force, in November 1993, introducing the idea of a European Union with reinforced powers when compared with the European Communities. In January 1995 Austria, Finland and Sweden joined the European Community (Campos 1998). Later, in May 1999, the Amsterdam Treaty entered into force and in February 2001, the Treaty of Nice was signed.

2.3 EC Powers and competence

The European Community enjoys very wide competences in a variety of economic and social fields and the demarcation of competences is not static. As the Community has developed over the years, its competences have grown, partly through Treaty amendments and partly through an evolution process performed under the support of the ECJ. The first provision one must address when analysing the EC powers and competence is the Article 5 of the EC Treaty:

"Article 5 (ex Article 3b)

The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member-states and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty."

The first paragraph determines the attributive nature of the EC's competence establishing a principle of limited competences. As the ECJ said, the Community "only has those powers which have been conferred upon it" (Opinion 2/94 European Convention on Human Rights, available at http://curia.eu.int/jurisp) and "the Treaty rests on a derogation of sovereignty consented by the Member-states to supranational jurisdiction for an object strictly determined. The legal principle at the basis of the Treaty is a principle of limited competence. The Community is a legal person of public law and to this effect it has the necessary legal capacity to exercise its functions but only those." (Joined Cases 7/56 & 3-7/57 available at http://curia.eu.int/jurisp)

The principle of limited competence implies that some competence is transferred to the EC and some remains with the Member-states. The demarcation line is drawn using the commonly agreed techniques: through the explicit grant of powers in the Treaty and through the implicit powers doctrine (Case 22/70 ERTA [1970] ECR available at http://curia.eu.int). (Caramelo-Gomes 1998)

The second paragraph of Article 5 EC Treaty establishes the subsidiarity principle and the third paragraph establishes the proportionality principle.

Whenever the EC is competent, its powers shall be exercise by its organs, in respect of the relevant rules included in the EC Treaty. The main EC organs are the European Parliament, the Council, the European Commission and the European Court of Justice – Article 7 EC Treaty:

"Article 7 (ex Article 4)
1. The tasks entrusted to the Community shall be carried out by the following institutions:
- European Parliament,
- Council,
- Commission,
- Court of Justice,
- Court of Auditors.
Each institution shall act within the limits of the powers conferred upon it by this Treaty.
2. The Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity."

The European Parliament is the expression of the democratic will of the citizens – Article 189 EC Treaty: "The European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty." It has three main functions: shares with the Council the power to legislate - Article 192: "Insofar as provided in this

Treaty, the European Parliament shall participate in the process leading up to the adoption of Community acts by exercising its powers under the procedures laid down in Articles 251 and 252 and by giving its assent or delivering advisory opinions." it shares budgetary authority with the Council – Articles 268 EC onwards, and it exercises democratic supervision over the European Commission – Article 201 EC. It approves the nomination of Commissioners and has the right to censure the Commission. It also exercises political supervision over all the institutions.

The Council is the EC's main decision-making body. It is the embodiment of the Member-states, bringing together its representatives at ministerial level. The Council has a number of key responsibilities: It is the EC's legislative body, in some matters in co-decision with the European Parliament; it coordinates the broad economic policies of the Member-states; it concludes, on behalf of the EC, international agreements with one or more States or international organisations; it shares budgetary authority with the European Parliament.

The European Commission embodies and upholds the general interest of the EC. Its President and Members are appointed by the Member-states after they have been approved by the European Parliament. The Commission has the right to initiate draft legislation, is responsible for implementing the European legislation (directives, regulations, decisions), budget and programmes adopted by Parliament and the Council, acts as guardian of the Treaties and, together with the Court of Justice, ensures that Community law is properly applied, represents the EC on the international stage and negotiates international agreements, chiefly in the field of trade and cooperation.

The Court of Justice ensures that Community law is uniformly interpreted and effectively applied, having jurisdiction in disputes involving Member-states, the EC institutions, businesses and individuals.

The EC legislative process operates on four main levels, with different procedures applying at each of them: for instruments of general validity (regulations and directives), there is the consultation procedure, the cooperation procedure, the co-

decision procedure and the approval procedure. The criterion to establish this classification is the participation of the European Parliament.

2.4 EC Treaty Article 295 (former Article 222)

In the light of what was written about the EC competence, Article 295 of the EC Treaty gains a particular relevance to this research, as it clearly states "This Treaty shall in no way prejudice the rules in Member-states governing the system of property ownership."

However apparently very clear and concise, Article 295 must be interpreted within the hole of the EC legal order, and the first issue to address is if this is completely true, having in mind the very foundations of the EC legal order.

For years, there was little discussion about the existence of entry requirements for a state to enter the EC. Some countries saw their submission delayed, some saw it rushed. Commentators and jurisprudence noted that this could be because of the EC nature, that would preclude the accession of countries with different economic systems, as the EC is based in the market system and countries where the rule of law was uncertain. I discussed this matter in detail in a previous study (Caramelo-Gomes 1998) and concluded that there are essential accession requirements.

The first requirement is the market system, as it is not conceivable the existence of the economic freedoms included in the treaties within economic systems other than the market. For this reason alone, Article 295 must be restrictively interpreted: no prejudice as long as the market system remains untouched, which means that private property must exist.

The existence of private property was recognized as an essential and fundamental principal of law by the ECJ in the Nold case (Case 4/73 Nold [1974] ECR, available at http://curia.eu.int), where the Court, referring to the property right, said: "As the court has already stated, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. In safeguarding these rights, the court is bound to draw inspiration from constitutional traditions common to the member states, and it

cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states."

"If rights of ownership are protected by the constitutional laws of all the Member-states, and if similar guarantees are given in respect of their right freely to choose and practise their trade or profession, the rights thereby guaranteed, far from constituting unfettered prerogatives, must be viewed in the light of the social function of the property and activities protected there under.

For this reason, rights of this nature are protected by law subject always to limitations laid down in accordance with the public interest."

In Hauer, (Case 44/79 Hauer [1979] ECR, available at http://curia.eu.int) the Court carried out a more detailed analysis of the inferences to be drawn from the First Protocol to the European Convention on Human Rights and from the constitutions of the Member-states. The Court reaffirmed that the right of property does not constitute an absolute prerogative. It may, on the contrary, in view of its social function, be subject to appreciable restrictions, it being understood that these cannot, with respect to the aim pursued by the authority applying them, constitute "a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right of property".

2.4.1 Boundaries to Article 295 EC

The property national legal framework must be interpreted in the light of the EC obligations. In Commission v Hellenic Republic, (Case 305/87 Commission v Hellenic Republic [1989] ECR, available at http://curia.eu.int), the ECJ declared that, by maintaining in force and applying a national provision aiming to preclude the acquisition by nationals of other Member-states of immovable property situated in its border regions, the Hellenic Republic has failed to fulfil its obligations under the former Articles 48, 52 and 59 of the EC Treaty.

The facts in this Case relate to the existence of a national provision, the sole Article of the Presidential Decree of 22 to 24 June 1927, establishing that the acquisition by foreign natural or legal persons of ownership of immovable property, or other real rights therein, with the exception of mortgages, situated in border regions of the country was prohibited on pain of absolute nullity of the legal act in question, criminal sanctions and the removal from office of any notary who infringed that prohibition. The Greek Government argued that the rules at issue were justified as a measure adopted under the former Article 224 of the EC Treaty.

The grounds the European Commission brought action against Greece were the infringement of the former Articles 48, 52 and 59 of the EC Treaty: the freedom of movement for workers, the freedom of establishment and the freedom to provide services. The freedom of movement for workers infringement was alleged as it "entails the right «to stay in a Member-state for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action». It follows that access to housing and ownership of property, provided for in Article 9 of Regulation No 1612/68, is the corollary of freedom of movement for workers and is for that reason covered by the prohibition of discrimination against a national of a Member-state who wishes to take employment in another Member-state, laid down in Article 48 of the Treaty".

The infringement of the freedom of establishment was alleged as "Article 52 of the Treaty guarantees the right of nationals of a Member-state who wish to work as self-employed persons in another Member-state to be treated in the same way as nationals of that Member-state and prohibits all discrimination on grounds of nationality arising under the legislation of the Member-states and hindering access to or exercise of such activities" and "the said prohibition is concerned not solely with the specific rules on the pursuit of an occupation but also with the rules relating to the various general facilities which are of assistance in the pursuit of that occupation" and "the right to acquire, use or dispose of immovable property on the territory of a Member-state is the corollary of freedom of establishment".

The infringement of the freedom to provide services was alleged as access to ownership and the use of immovable property is guaranteed by the former Article 59 of the EC Treaty in so far as such access is appropriate to enable that freedom to be exercised effectively.

The ECJ subscribed all the European Commission arguments and considered that a national constraint to the ownership of immovable property is contrary to the fundamental freedoms established in the EC Treaty.

2.4.2 The EC fundamental freedoms

The existence of a European space without barriers to the circulation of the goods, services, people and capitals, composed by the economies and the territories of the members-states is, from the very beginning, the founding principle of the EC. This space, called at first as the Common Market, changed its designation in 1986, with the European Single Act to the Internal Market. The expression internal market, by itself, does not have very defined contours, nor it corresponds to an unequivocal concept. A first approach with view to the materialization of the concept of internal market will necessarily have as starting point the problem of economic integration, understood as a process of combination of national economies in that the barriers to the free change of goods, services, people and capitals are eliminated and are established cooperation and coordination mechanisms as to the economic politics.

We can find several species of economic integration, distinguished one from the other with a qualitative criterion. The less integrated is the free trade zone, where barriers are eliminated but there is no common foreign policy. The costumes union represents more a step in the sense of the integration of the economies. Here, besides the characteristics pointed to the zone of free trade, it still exists a common position third countries. The following stadium, the common market, introduces some difficulties. In conceptual terms, the common market requires both economic freedoms, such as movement of goods, work and capital, and the matching of the economic policies.

The EC concept of internal market is included in the second paragraph of the no. 1 of the former Article 7-A EC Treaty: "The internal market is a space without internal borders in which the free circulation of goods, people, services and capitals are assured in the terms of the dispositions of the present Treaty". Apparently, this provision seems to limit the internal market to a space of freedom of movement. This is not true, as its final expression, "in the terms of the dispositions of the present Treaty" must be followed and the rest of the Treaty (or some of it) probably included in the concept; and the fact is that spread along the Treaty I find a number of measures either attributing powers to the EC in matters of economic policy coordination, either attributing to the EC itself powers to legislate. This must be completed with the basic principle of the national treatment, sometimes called the non-discrimination principle, established in the EC Treaty in Article 12, that determines that "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

a) The free movement of persons

The basic framework for the free movement of persons is established in articles 12, 14, 18, 39 and 61 of the EC Treaty. In the last section of its judgment in *Martínez Sala* (Case C-85/96 Martínez Sala, [1998] ECR, available at http://curia.eu.int) the Court examined whether a citizen who is lawfully residing in the territory of a host Member-state can rely on the principle of non-discrimination enshrined in Article 12 EC Treaty. The Court stated that such a citizen might rely on that Article in all situations falling within the substantive scope of Community law. That is the case of the freedom of movement of persons, as determined in Article 18 EC Treaty: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member-states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." Advocate General Cosmas in his Opinion in the Wijsenbeek case (Case C-378/97 Wijsenbeek [1999] ECR, available at http://curia.eu.int) defended the direct effect of that Article with two main arguments. First, the literal formulation of Article 18 EC Treaty militated in favour of direct effect. The right of every citizen of the Union to move and reside freely within the territory of

the Member-states was expressly recognised. He further pointed to the particular feature of Article 18 EC Treaty which introduces into the Community legal order a purely individual right mirrored in the right to freedom of movement which is constitutionally guaranteed in the legal systems of the Member-states. On those grounds it produced direct effect by obliging Community and national authorities to observe the rights of European citizens to move and reside freely and to refrain from adopting restrictive rules which would substantively impinge on those rights. In fact, "Union citizenship is destined to be the fundamental status of nationals of the Member-states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for." (Case C-184/99, Grzelczyk, [2001] ECR, available at http://curia.eu.int).

b) The right of establishment and the freedom to provide services

The freedom of establishment and the freedom to provide services are usually included under the same heading in the EC Law manuals and books. Nonetheless, there is a clear distinction between them. The first is concerned with the freedom to permanently exercise a non-employed economic activity – "Since the Luxembourg company is involved on a stable and continuous basis in the economic life of Italy, that situation falls within the provisions of the chapter on freedom of establishment, namely Articles 52 to 58, and not those of the chapter concerning services (see, to that effect, Case 2/74 Reyners v Belgian State [1974] ECR, available at http://curia.eu.int, paragraph 21, and Case C-55/94 Gebhard [1995] ECR, available at http://curia.eu.int, paragraph 25).", Case Sodemare (Case C-70/95 Sodemare [1997] ECR, available at http://curia.eu.int). The second is concerned with the possibility of exercising that same activity in a non-permanent base.

The right of establishment is foreseen in Article 43 EC Treaty and the freedom to provide services in Article 49 EC Treaty. Article 43 defines right of establishment as "the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by

the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital." This right applies equally to natural and legal persons, as the ECJ stressed in Sodemare (Case C-70/95 Sodemare [1997] ECR, available at http://curia.eu.int): "As regards Article 52 (now Article 43) of the Treaty, read in conjunction with Article 58 (now Article 48) thereof (third question), it must be borne in mind that the right of establishment with which those provisions are concerned is granted both to natural persons who are nationals of a Member-state of the Community and to legal persons within the meaning of Article 58. Subject to the exceptions and conditions laid down, it allows all types of self-employed activity to be taken up and pursued on the territory of any other Member-state, undertakings to be formed and operated and agencies, branches or subsidiaries to be set up (Case C-55/94 Gebhard [1995] ECR, available at http://curia.eu.int)."

The right of establishment includes in itself the principle of the non-discrimination: "As the Court found in its judgment in Factortame and Others, cited above, at paragraph 25, freedom of establishment includes, in the case of nationals of a Member-state, 'the right to take-up and pursue activities as self-employed persons … under the conditions laid down for its own nationals by the law of the country where such establishment is effected …'." (Case C-62/96 Commission v Greece [1997] ECR, available at http://curia.eu.int)

There are a number of corollaries of the right of establishment: entry and residence (Case C-62/96 Commission v Greece [1997] ECR, available at http://curia.eu.int) (Case C-151/96 Commission v Ireland [1997] ECR, available at http://curia.eu.int) (Case C-334/94 Commission v France [1996] ECR, available at http://curia.eu.int), the right to reside after ceasing an activity (Case C-62/96 Commission v Greece [1997] ECR, available at http://curia.eu.int) (Case C-151/96 Commission v Ireland [1997] ECR, available at http://curia.eu.int) (Case C-334/94 Commission v France [1996] ECR, available at http://curia.eu.int) the right to access general facilities which are of assistance in the pursuit of that occupation (Case C-305/87 Commission v Greece [1989] ECR, available at http://curia.eu.int) and the right to acquire, use or dispose of

immovable property: "In particular as is apparent from Article 54(3)(e) of the Treaty and the General programme for the abolition of restrictions on freedom of establishment of 18 December 1961 (Official Journal, English Special Edition, Second Series IX, p.7), the right to acquire, use or dispose of immovable property on the territory of a Member-state is the corollary of freedom of establishment." (Case C-305/87 Commission v Greece [1989] ECR, available at http://curia.eu.int).

The rule in Article 43 is "by its essence, capable of being directly invoked by nationals of all the other Member-states." (Case 2/74 Reyners [1974] ECR, available at http://curia.eu.int)

c) The freedom of capitals

Amongst the economic freedoms provided in the EC Treaty there is the capitals freedom of movement, foreseen in Article 56 EC Treaty: "Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member-states and between Member-states and third countries shall be prohibited."

This freedom is ancillary to other freedoms determined by the Treaty. Should there be restrictions to the payments circulation, this would stop all other freedoms. But capital's freedom is important *per se*, being the core issue to the freedom to provide financial services, i. e., when the capitals circulate for investment proposes and not for the satisfaction of a debt: "thus the free movement of capital constitutes, alongside that of persons and services, one of the fundamental freedoms of the community" (Case 203/80, Casati, [1981] ECR, available at http://curia.eu.int) and "the movements of capital covered by Article 67 are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service" (Case 286/82, Luisi & Carbonne, [1984] ECR, available at http://curia.eu.int).

The core of the freedom of capital circulation was enforced in the Directive 88/361/EC (available at http://www.europa.eu.int):

"Article 1

1. Without prejudice to the following provisions, Member-states shall abolish restrictions on movements of capital taking place between persons resident in Member-states. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I."

"Annex I.

I - DIRECT INVESTMENTS

1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.

2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.

3. Long-term loans with a view to establishing or maintaining lasting economic links.

4. Reinvestment of profits with a view to maintaining lasting economic links.

A - Direct investments on national territory by non-residents

B - Direct investments abroad by residents

II - INVESTMENTS IN REAL ESTATE (not included under I)

A - Investments in real estate on national territory by non-residents

B - Investments in real estate abroad by residents"

The 1988 Directive includes an exceptional regime for the acquisition of secondary residence. The existing national legislation, limiting this type of investment, was exceptionally accepted: "Existing national legislation regulating purchases of secondary residences may be upheld until the Council adopts further provisions in this area in accordance with Article 69 of the Treaty. This provision does not affect the applicability of other provisions of Community law." (Directive 88/361/EC available at http://www.europa.eu.int). The second phrase in the quoting is perhaps the most significant. It imply that those national provisions will not be prejudiced by the Directive, provided that they are not contrary to other provisions of Community law. Again, one of the critical principles that expression may refer to is the principle of the non-discrimination or of the national treatment.

2.4.3 Principle of non-discrimination (the principle of the national treatment)

The Article 12 EC Treaty includes the principle of the non-discrimination. The full understanding of its contents must include the ECJ interpretation, especially where it applies the principle in matters apparently excluded of the EC competence, as the interpretation is likely to have the same nature as the one applying the principle to the national property regime, which is a core issue in this research.

The place to find those interpretations is the ECJ case law, especially that in the preliminary rulings. Amongst those judgments, the ECJ held, in Martinez Sala (Case C-85/96, Martinez Sala, [1998] ECR, available at http://curia.eu.int), the "Article 8(2) of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty."

Furthermore, in Grzelczyk, (Case C-184/99, Grzelczyk, [2001] ECR, available at http://curia.eu.int) the ECJ clarified the previous judgment: "As the Court held in paragraph 63 of its judgment in *Martínez Sala*, cited above, a citizen of the European Union, lawfully resident in the territory of a host Member-State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law"

"Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member-state, as conferred by Article 8a of the Treaty"

In Bickel, (Case C-274/96 Bickel [1998] ECR, available at http://curia.eu.int), the Court declared that "… by prohibiting 'any discrimination on grounds of nationality', Article 6 of the Treaty requires that persons in a situation governed by Community law be placed entirely on an equal footing with nationals of the Member-state". In Saldanha, (Case C-122/96 Saldanha and MTS v Hiross [1997] ECR, available at http://curia.eu.int), the ECJ held that "By prohibiting 'any discrimination on grounds of nationality', Article 6

of the Treaty requires, in the Member-states, complete equality of treatment between persons in a situation governed by Community law and nationals of the Member-state in question."

Again, these declarations are no more then a clarification of what the Court had said early in 1989 in Cowan, (Case 186/87 Cowan [1989] ECR, available at http://curia.eu.int): "By prohibiting "any discrimination on grounds of nationality" Article 7 of the Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member-state. In so far as this principle is applicable it therefore precludes a Member-state from making the grant of a right to such a person subject to the condition that he reside on the territory of that State - that condition is not imposed on the State' s own nationals".

a) The principle of the non-discrimination and the residential aspects of the EC freedoms

The ECJ applied consistently the principle of the non-discrimination to residential aspects of the EC freedoms in several cases over the years. A list of the more recent is included in Annex VIII.

2.5 The need for harmonization of property law in EC

The European Commission seems to consider that there is a need to harmonize the national property law. It does so as it considers that the differences between those laws are an obstacle to the European integration.

In the absence of scientific groundings for the EC believe, I strongly feel that its *raison d'etre* is the reported conflicts between EC law and the national property law as described above. The problem, in my view, is that those situations do not report differences between the laws of the Member-states. They report conflicts between the laws of some Member-states and the EC law, under review by the ECJ.

It is common sense that a conflict between national law and EC law is a barrier to the European integration. There is not, however, a direct link between the existence of legal

divergence between the member-states and conflicts of law: there may be differences in law and yet no conflicts arise. There are many examples of differences in law between the member-states that are quite obvious, such as direct and indirect taxation, and that fact has not, until now lead the EC to consider that there are barriers to the European integration.

Some of the most obvious examples are the indirect automobile, the fuel, the tobacco products and the alcoholic beverages taxation laws. Any European traveller will learn very quickly that there are differences in those national laws and yet, though many situations of conflict have been found over the years, no harmonization was asked for. In fact, most of those conflicts were solved by the ECJ and the member-states.

The traditional proceeding for conflict solving relies basically in the mechanism of jurisdictional warranty that EC law has been developing over the years and the principle of cooperation include in Article 10 EC treaty: "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community."

The system of jurisdictional warranty of the EC relies in two basic principles. The first is the direct effect of the EC Law and the second is the EC Law supremacy. Over these two basic principles there are several others, the first of which is the principle of the uniform interpretation and application of EC law.

The principle of the direct effect of the EC Law integrates the "*acquis formel*" (Pescatore 1981) and is fundamental to the relations between the national and European legal orders. Because of it, national jurisdictions are charged of enforcing EC law based rights or interests (Caramelo-Gomes 1998). Direct effect, together with the principle of supremacy of the EC Law sets a clear obligation to the national jurisdictions: the obligation to enforce the full effectiveness of EC Law (Campos 1998).

According to its source, EC Law is divided in primary provisions, the ones in the treaties and secondary provisions, the ones included in the EC legislative acts. The

direct effect of the first kind of provisions is today peacefully accepted but this was not the case 40 years ago. At that time, it was not clear that the provisions of the treaties creating the European Communities had direct effect, in the sense of being able to create national jurisdictions enforceable subjective rights to moral or physical persons (Hartley 1994).

Secondary legislation had a clearer standing, as former Article 189 (today Article 249) of the EC treaty determined that the EC Regulations were applicable in all member-states and that Directives were only mandatory for their addressees, i.e., the member-states.

The case law of the ECJ has changed the situation. In fact, first with Van Gend en Loos case and later with the Van Duyn case (Case 41/74 Van Duyn [1974] ECR, and later, Case 148/78, Ratti [1979] ECR, available at http://curia.eu.int ; Case 36/75 Rutili, [1975] ECR, available at http://curia.eu.int;, Case 30/77, Boucherau [1977] ECR, available at http://curia.eu.int) amongst many other, EC Law provisions have gained direct effect (Waelbroeck 1974).

The subject of direct effect is complex and its analysis cannot be separated from the concept of primary and secondary legislation and the effects and nature of the acts where the relevant provisions are included.

The first the ECJ interpreted the EC Law about its direct effect was with Van Gend en Loos case (Case 26/62, Van Gend en Loos [1963] ECR, available at http://curia.eu.int). From then on, whenever a provision of the treaty is sufficiently clear and unconditioned so a national jurisdiction can understand what sort of rights or interests it envisages to create or protect, it must be interpreted in the sense it can be enforced for such jurisdictions (Lewis).

Van Gend en Loos case precedent is limited to those situations where the ex parties are a moral or physical person and the member-state. It does not include situations where both ex parties are moral or physical persons and the member-state is not demanded or demanding part of the proceedings (Caramelo Gomes 1998). This means that Van Gend

en Loos case only established a precedent of vertical direct effect. The precedent for horizontal direct effect of the provisions of the treaties appeared with the Walrave case (Case 37/74, Walrave, [1974] ECR, available at http://curia.eu.int) and the Defrenne case (Case 43/75, Defrenne, [1976] ECR, available at http://curia.eu.int) (Hartley 1994).

The cases quoted above form the precedent base for the present direct effect legal framework. Based upon those precedents, national jurisdictions addressed hundreds of preliminary rulings to the ECJ, to clarify the content and nature of their jurisdictional powers has EC jurisdictions (Campos 1998).

Many Authors believed that the Simmenthal case (Case 106/77, Simmenthal [1978] ECR, available at http://curia.eu.int) exhausted the subject of the direct effect of the EC Law (Caramelo-Gomes 1998). This was hardly true, as the eighties have shown. Caramelo-Gomes (1998), Lewis, Barav, Hazard and Bonichot, among others, demonstrated that based on the direct effect principle, the ECJ built the principles of the member state liability for breach of the EC Law, the principle of the indirect effect, the principle of the interim protection, the principle of restitution and the principle of the "droit au juge".

The principle of the direct effect implies the principle of supremacy (Louis) and is a condition for the very existence of the EC Law (Pescatore 1981). It was established by the ECJ for the first time in the Costa/ENEL case (Case 6/64 *Costa/ENEL*, [1964] ECR, available at http://curia.eu.int) and means that the EC Law cannot be override in national courts by a national provision of any source. National jurisdictions are obliged to apply EC Law even if that means, and very often it does, to set aside a national legal provision (Caramelo-Gomes 1998).

The Costa/ENEL precedent was followed in hundreds of cases lodged before the ECJ until ECJ's opinion 1/91, where the Court ruled that: "The characteristics of the community legal order are especially its supremacy over the member-states legal orders, as well as the direct effect of its provisions applicable to the member states and their citizens". This has clarified the former precedent and is presently in use.

Because of its direct effect, EC Law is enforced in national courts. This may cause some uniformity problems, as there is no hierarchy links between national courts and the ECJ and, consequently, no appeal from the judgments of the former can be made before the later (Campos 1998). To solve these problems the treaties created the preliminary rulings mechanism (Article 234 EC)

The preliminary ruling is a mechanism of jurisdictional cooperation between the national court and the ECJ, by which the first may, or is obliged to, under certain circumstances, ask the later the correct interpretation of a EC provision, or the survey of the validity of a EC act or provision (Caramelo-Gomes 1998). This is an objective proceeding linking two jurisdictions each exercising its respective powers to solve a law suite (Kovar) in such a manner applicable in all member-states (Case 16/65, Firma Schwarze, [1965] ECR, available at http://curia.eu.int). Article 234º EC includes two different objects for the preliminary rulings: the interpretation of an EC provision and the appreciation of the validity of the EC provision.

The effects of the two different species of preliminary rulings are not the same. The interpretative preliminary ruling is a public interest procedure and delivers an abstract interpretation. This interpretation is not considered authentic, as if it was, then the ECJ itself would have to bend to the absolute effect of the case (Caramelo-Gomes 1998). Nevertheless, it is mandatory to the referring court - Case 52/76, Benedetti, [1977] ECR, available at http://curia.eu.int, p. 163 and precludes the obligation for any other to place a preliminary ruling, about the same subject, if it accepts the existing ruling - Case 28-39/62, Da Costa, [1963] ECR, available at http://curia.eu.int, p. 64. *see also* Case 112/76, Manzoni, [1977] ECR, available at http://curia.eu.int. These rulings produce *ex tunc* effects, as the ECJ ruled consistently in Case 61/79 Denkavit, [1980] ECR, available at http://curia.eu.int; Case 66, 127 & 128/79, Salumi, [1980] ECR, available at http://curia.eu.int; Case 811/79, Ariete [1980] ECR, available at http://curia.eu.int and, Case 142 & 143/80 Essevi & Salengo, [1981] ECR, available at http://curia.eu.int. This rule has been sometimes overruled by the ECJ, in very special conditions: that was the situation in Case 43/75, Defrenne, [1976] ECR, available at http://curia.eu.int. The exception, however, is, as Kovar has showed, undesirable as it equals to a conflicting or

at least different application of EC law in time. The ECJ does not seem to have accepted the criticism, and has continued to time limit its rulings under some special circumstances – *see* Case C-262/88, Barber, [1990] ECR, available at http://curia.eu.int.

This justifies, in my view, some research about the national constraints to real estate ownership and its compatibility with the EC Law. This will be the subject of the next section.

2.5.1 Concept of National constraint to real estate ownership

There are two areas of legal requirements to real estate ownership that are relevant to the EC law: the nationality of the acquirer and it/his/her residence. A given legal order may restrict the access to the ownership of a right *in rem* either to its national or, regardless of the nationality, to their residents or even use both criteria in conjunction: requiring a given nationality and imposing a residence. Thus, a broad concept of national constraint of real estate ownership must be drawn:

> It constitutes a national constraint to real estate ownership, for the propose of this research, any special legal requirement, for the purchase of immovable property, applying to natural or legal persons who do not have the nationality of, or seat in, the Member-state where the immovable is located.

That sort of legal requirements are, if applicable to natural or legal persons national of a Member-state, as laid above, incompatible with the EC law, especially with the principle of the non-discrimination in regard of the fundamental freedoms established by the EC Treaty.

The enforcement of such requirements is most probably committed to the national immovable property register, as this department was found to be an essential player in the conveyance process across the Member-states, especially in those where the purchase agreement is not a notary act.

In those countries where the purchase agreement is a notary act, the enforcement of the above mentioned special requirements might be committed to the notary himself or to the register or to both.

2.5.2 Situation in the Member-states

a) Austria

(Contribution of Preslmayr & Partners)

All nine Austrian provinces have established regulations, under which the acquisition of real estate and certain rights *in rem* by foreigners (in some cases also by Austrians) is subject to approval by the Land Transfer Authorities (Grundverkehrsbehörden). The restrictions imposed vary from province to province. These restrictions don't apply to EEA and EC citizens, who now have equal status with Austrian citizens if they purchase real estate in exercising a freedom granted by the EEA Agreement or the EC Treaty, i.e. to establish their principal residence or an undertaking. The acquisition of real estate not to be used as principal residence or to establish an undertaking is, in some provinces with substantial tourist industries, restricted for both foreigners and Austrians. The discrimination between Austrians and EC citizens under the Tyrol Act on the Acquisition and Sale of Land was held to breach the EC Treaty in a preliminary ruling by the European Court of Justice in June 1999 (Case C-302/97 Konle [1999] ECR, available at http://curia.eu.int). As a result, provisions discriminatory for EEA and EC citizens with regard to real estate not to be used as principal residence or to establish an undertaking have been abolished.

b) Belgium

(Contribution of Pascale Lecocq, Université de Liège)

There no reported constraints in Belgium.

c) Denmark

(Contribution of Kasper D. Blangsted Henriksen)

Persons who are not resident in Denmark, and who have not previously been resident in Denmark for a minimum of 5 years, cannot acquire real estate in Denmark without permission from the Ministry of Justice. Lease contracts with the purpose of circumvention of this prohibition are considered void.

d) Finland

(Contribution of the Andersen Legal Real Estate Group)

There are no reported constraints in Finland.

e) France

(Contribution of Antoine Allez)

There are no reported constraints to the acquisition of real property by foreigners.

f) Germany

(Contribution of Detlev Stoecker & Amel Al-Shajlawi)

In principle there is no limitation to foreigners acquiring real estate in Germany. However, Art. 86 of the Introductory Act to the German Civil Code ("EGBGB") provides that the Federal Government of Germany may require that a permit be obtained as a statutory precondition for the acquisition of property by foreigners and foreign legal entities. The limitations do not apply to nationals of EC member states or to legal entities established under the laws of an EC member state.

g) Greece

(Contribution of Andersen Legal Real Estate Group)

Greek laws authorise foreigners to own properties in most areas of Greece. Restrictions apply for Non European Community citizens who wish to purchase property in border areas (East Aegean, Dodecanese islands, regions of Northern Greece, Crete, Rhodes). No restrictions applying to EC nationals were detected.

h) Ireland

(Contribution of Andersen Legal Real Estate Group)

There are no reported constraints in Ireland.

i) Italy

(Contribution of Ugo A. Milazzo)

Article 1 of the Italian Law N. 1095 of 3 June 1935 (GURI N. 154 of 4 July 1935), as amended by Law N. 2207 of 22 December 1939 (GURI N. 53 of 2 March 1939), provided that all instruments transferring wholly or in part ownership of immovable property situated in areas of provinces adjacent to land frontiers should be subject to approval by the Prefect of the province. Article 2 of the same Law prevented public registers of entering transfer instruments unless evidence was produced that the Prefect had given his approval.

Article 18 of Law N. 898 of 24 of December 1976 (GURI N. 8 of 11 January 1977), as amended by Law N. 104 of 2 May 1990 (GURI N. 105 of 8 May 1990) provided that those provisions would not apply when the purchaser was an Italian national. This law is no longer applicable to EC nationals.

Apart from this, there are nationality based constraints. Reciprocity condition shall be verified according to the different bilateral conventions Italy is a party in. In a sense that, for instance, Iranian Citizen are not allowed to acquire any immovable properties

in Italy insofar as Italian Citizens are not allowed to acquire any immovable properties in Iran. None of these constraints applies to EC citizens.

j) Luxembourg

(Contribution of Andersen Legal Real Estate Group)

There are no reported constraints.

k) The Netherlands

(Contribution of Marieke Enneman & Leon Hoppenbrouwers)

There are no restrictions to the acquisition of immovable property by foreigners in the Netherlands

l) Portugal

There are no restrictions to the acquisition of immovable property by foreigners in Portugal.

m) Spain

(Contribution of Oscar de Santiago)

There are constraints to the acquisition of immovable property by foreigners in Spain. Reciprocity condition shall be verified according to the different bilateral conventions Spain is a party in. The constraints itself depend on the nationality of the foreigner. No restrictions apply to EC nationals.

n) Sweden

(Contribution of Per Månsson)

There are no restrictions to the acquisition of immovable property by foreigners in Sweden.

o) UK (England and Wales)

(Contribution of Andrew Lewry)

There are no restrictions to the acquisition of immovable property by foreigners in England and Wales.

p) Synoptic table

Country	Constraints	Applicable to EC nationals
Austria	Yes	No
Belgium	No	-
Denmark	Yes	Yes
Finland	No	-
France	No	-
Germany	Yes	No
Greece	Yes	No
Ireland	No	-
Italy	Yes	No
Luxembourg	No	-
Netherlands	No	-
Portugal	No	-
Spain	Yes	No
Sweden	No	-
United Kingdom (England and Wales)	No	-

Table 1 - Synoptic table - national reports, constraints

q) Data analysis

It results from the overall of the national reports that there are nine member states that do not have reported national constraints to the acquisition of immovable property by foreigners, in the meaning outlined in the previous section of this study and six Member-states that do have such special requirements or even interdictions.

The six positive reports can be divided in two groups: the one where the constraints do not apply to EC nationals and the one where the constraints apply to EC nationals. At this moment, Austria, Germany, Greece, Italy and Spain are included in the first group

and Denmark stands alone in the second group. This is a quantitative change due to the intervention of the ECJ by condemning the existing legal regimes in Austria, Greece and Italy. The inaplication of the first group constraints to EC nationals makes' them compatible with EC law.

The Danish situation could be far more complicated, as those constraints apply to EC nationals and thus are a violation of the principle of the non-discrimination, as outlined in the previous chapter. However, the existence of an exceptional rule in the EC Treaty allowing Denmark to maintain its regulation in this matter eliminates the incompatibility and makes it lawful for Denmark to enforce such requirements against EC nationals.

2.6 Summary of the chapter

The dream of a united Europe is almost as old as Europe itself. The first successful major step toward European integration took place in 1950, and resulted in the creation of the ECSC (European Coal and Steel Community), the European Atomic Energy Community (Euratom) and the European Economic Community (EEC). The European Community enjoys very wide competences in a variety of economic and social fields and the demarcation of competences is not static. As the Community has developed over the years its competences have grown, partly through Treaty amendments and partly through an evolution process performed under the support of the ECJ. The first provision one must address when analysing the EC powers and competence is the Article 5 of the EC Treaty.

The first paragraph establishes a principle of limited competences implying that some competence is transferred to the EC and some remains with the Member-states. Whenever the EC is competent, its powers shall be exercise by its organs, in respect of the relevant rules included in the EC Treaty. The main EC organs are the European Parliament, the Council, the European Commission and the European Court of Justice.

Article 295 of the EC Treaty states that “This Treaty shall in no way prejudice the rules in Member-states governing the system of property ownership.” This must, however, be

interpreted within the hole of the EC legal order especially the fundamental entry requirements: the market system and the respect for private property, as well as the Member-states EC obligations: the respect for the fundamental freedoms – the freedom of people, the freedom of capitals and the right of establishment and freedom of services.

The free movement of persons was defined as: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member-states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect."

The freedom of establishment and the freedom to provide services are usually included under the same heading in the EC Law manuals and books. Nonetheless, there is a clear distinction between them. The first is concerned with the freedom to permanently exercise a non-employed economic activity and the second is concerned with the possibility of exercising that same activity in a non-permanent base.

The capitals freedom of movement, is foreseen in Article 56 EC Treaty: "Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member-states and between Member-states and third countries shall be prohibited."

The Article 12 EC Treaty includes the principle of the non-discrimination. The full understanding of its contents must include the ECJ interpretation, especially where it applies the principle in matters apparently excluded of the EC competence, as the interpretation is likely to have the same nature as the one applying the principle to the national property regime, which is a core issue in this research.

There are two areas of legal requirements to real estate ownership that are relevant to the EC law: the nationality of the acquirer and it/his/her residence. A given legal order may restrict the access to the ownership of a right *in rem* either to its national or, regardless of the nationality, to their residents or even use both criteria in conjunction:

requiring a given nationality and imposing a residence. Thus, a broad concept of national constraint of real estate ownership must be drawn:

It constitutes a national constraint to real estate ownership, for the propose of this research, any special legal requirement, for the purchase of immovable property, applying to natural or legal persons who do not have the nationality of, or seat in, the Member-state where the immovable is located.

That sort of legal requirements are, if applicable to natural or legal persons national of a Member-state, as laid above, incompatible with the EC law, especially with the principle of the non-discrimination in regard of the fundamental freedoms established by the EC Treaty.

It results from the overall of the national reports that there are nine Member-states that do not have reported national constraints to the acquisition of immovable property by foreigners and six Member-states that do have such special requirements or even interdictions. The six positive reports can be divided in two groups: the one where the constraints do not apply to EC nationals and the one where the constraints apply to EC nationals. At this moment, Austria, Germany, Greece, Italy and Spain are included in the first group and Denmark stands alone in the second group. The inaplication of the first group constraints to EC nationals makes' them compatible with EC law. The existence of an exceptional rule in the EC Treaty allowing Denmark to maintain its regulation in this matter eliminates the incompatibility and makes it lawful for Denmark to enforce such requirements against EC nationals.

Chapter 3 – Conceptual framework

3.1 Aims of the chapter

This chapter builds a conceptual framework for a comparative analysis of the enjoyment rights *in rem* in the Member-states

3.2 Historical development of the legal concept of property

Property signifies dominion or right of use, control and disposition that one may lawfully exercise over things, objects, or land. The concept of property has its remote origins in the right to hunt or fish in a given area that ancient societies held in common (Microsoft Corporation 2000). Some evidence of the existence of what I may call, in modern language, private property may be found in documents as ancient as The Egyptian Empire, 2600 BCE (Ward), the Code of Hammurabi, 1785-1750 BCE (Horne) and the Constitution of Athens by Aristotle in 350 BCE (Aristotle). The Code of Hammurabi included several dispositions about the property legal framework and special provisions about it's disposing: sale, lease, barter, gift, dedication, deposit, loan, pledge, all of which were matters of contract. (Johns 1911).

The conceptual development about property was due to the Roman Empire and is compiled in the *Corpus Iuris Civilis*, the Body of Civil Law that was issued in three parts, in Latin, at the order of the Emperor Justinian and the supervision of Tribonian. It included the *Codex Justinianus*, 529 CE, who compiled all of the Hadrian's imperial *constitutiones* reported in the *Codex Theodosianus* and private collections such as the *Codex Gregorianus* and *Codex Hermogenianus*. The second part was the *Digest*, or *Pandect* issued in 533 CE and compiled the writings of the great Roman jurists such as Ulpian and the third part was the *Institutes*. The *Corpus Iuris Civilis* was organized in four books; the first named *Of Persons*, the second *Of things*, the third *Intestate Succession* and the fourth *Obligations Arising From Delicta* (Moyle 1896). It is commonly accepted that there are three widespread legal systems in the world in present times: the 'Common Law' of the Anglo-American legal tradition, the Islamic

Sharia, and the Roman Law. The later may be found in most of the European countries, Scotland, Quebec and Louisiana and has, in some aspects, influenced even the Common Law system.

The second book of the *Corpus Iuris Civilis* starts by stating the different species of things that exist: "In the preceding book I have treated of the law of persons. Let us now speak of things, which are either in our *patrimony*, or not in our *patrimony*. For some things by the law of nature are common to all; some are public; some belong to corporate bodies, and some belong to no one. Most things are the property of individuals who acquire them in different ways, as will appear hereafter." (*Corpus Iuris Civilis*, Book II, translation by Thatcher (1907)).

The division of property in three different species, public, corporate and private, according to the nature of its owner, expressed in the quotation is, even today, a valid concept and reflections of it are present in almost every western legal system.

Paragraphs one to ten of the second book of the *Corpus Iuris Civilis* are dedicated to the regulation of the legal regime of the previously defined species of property and, again, many of these rules are still integrated in modern legal orders. Paragraphs ten to forty eight are dedicated to the ways of acquiring property and introduce some references to property related concepts such as *usufructus*.

Most of the ways property could be acquired are the same, *in essentia*, as the modern ways. Occupation was the major form of acquiring property, designated then as the acquisition by means of natural law: "11**.** Things become the property of individuals in various ways; of some I acquire the ownership by natural law, which, as I have observed, is also termed the law of nations; of others by the civil law. It will be most convenient to begin with the more ancient law; and it is very evident that the law of nature, established by nature at the first origin of mankind, is the more ancient, for civil laws could then only begin to exist when states began to be founded, magistrates to be created, and laws to be written". (*Corpus Iuris Civilis*, Book II, translation by Thatcher (1907). Other forms of acquiring property accordingly to the natural law were the

Alluvium and the accession, whereas civil law forms of acquiring property were the contract, the will and the *usucapio* or Title Through Possession. (*Corpus Iuris Civilis*, Book II, translation by Thatcher (1907)).

The second section of the second book of the *Corpus Iuris Civilis* introduces another concept of vital importance in modern economies: the distinction between corporeal and incorporeal things:

> "Certain things, again, are corporeal, others incorporeal.
>
> 1. Corporeal things are those which are by their nature tangible, as land, a slave, a garment, gold, silver, and other things innumerable.
> 2. Incorporeal things are those which are not tangible, such as are those which consist of a right, as an inheritance, a *usufructus*, *usus*, or obligations in whatever way contracted. Nor does it make any difference that things corporeal are contained in an inheritance; fruits, gathered by the *usufructuary*, are corporeal; and that which is due to us by virtue of an obligation, is generally a corporeal thing, as a field, a slave, or money; while the right of inheritance, the right of *usufructus*, and the right of obligation, are incorporeal.
> 3. Among things incorporeal are the rights over estates, urban and rural, which are also called *servitutiones*" (*Corpus Iuris Civilis*, Book II, translation by Thatcher (1907)).

Sections four and five of the second book of the *Corpus Iuris Civilis* include a detailed regulation of the *usufructus* and the *usus* and *habitatio*, presented as species of temporary powers over a thing: "*Usufructus* is the right of using, and taking the fruits of things belonging to others, so long as the substance of the things used remains. It is a right over a corporeal thing, and if this thing perish, the *usufructus* itself necessarily perishes also." "The naked *usus* is constituted by the same means as the *usufructus*; and is terminated by the same means that make the *usufructus* to cease." and "If the right of *habitatio* is given to anyone, either as a legacy or in any other way, this does not seem a *usus* or a *usufructus*, but a right that stands as it were by itself. From a regard to what is useful, and conformably to an opinion of Marcellus, I have published a decision, by

which I have permitted those who have this right of *habitatio*, not only themselves to inhabit the place over which the right extends, but also to let to others the right of inhabiting it." (*Corpus Iuris Civilis*, Book II, translation by Thatcher (1907))

The *usufructus* regulation included provisions about its acquisition and extinction, as well as some other stipulating the relations between the owner of the thing and the usufructuary: "The *usufructio* is detached from the property; and this separation takes place in many ways; for example, if the *usufructus* is given to anyone as a legacy; for the heir has then the bare ownership, and the legatee has the *usufructus*; conversely, if the estate is given as a legacy, subject to the deduction of the *usufructus*, the legatee has the bare ownership, and the heir has the *usufructus*. Again, the *usufructus* may be given as a legacy to one person, and the estate minus this *usufructus* may be given to another. If any one wishes to constitute a *usufructus* otherwise than by testament, he must effect it by pacts and stipulations. But, lest the property should be rendered wholly profitless by the *usufructus* being forever detached, it has been thought right that there should be certain ways in which the *usufructus* should become extinguished, and revert to the property. 3. The *usufructus* terminates by the death of the *usufructuary*, by two kinds of *capitis deminutio*, namely, the greatest and the middle, and also by not being used according to the manner and during the time fixed; all which points have been decided by our *constitutio*. The *usufructus* is also terminated if the *usufructuary* surrenders it to the owner of the property (a cession to a stranger would not have this effect); or, again, by the *usufructuary* acquiring the property, which is called *consolidatio*. Again, if a building is consumed by fire, or thrown down by an earthquake, or falls down through decay, the *usufructus* of it is necessarily destroyed, nor does there remain any *usufructus* due even of the soil on which it stood. 4. When the *usufructus* is entirely extinguished, it is reunited to the property; and the person who had the bare ownership begins thenceforth to have full power over the thing." (*Corpus Iuris Civilis*, Book II, translation by Thatcher (1907))

The *Corpus Iuris Civilis* also included a section called the *Servitutiones*, rights that rural immovable or urban immovable have over other immovable. For the first kind, *Servitutiones* "were the right of passage, the right of passage for beasts or vehicles, the

right of way, the right of passage for water. The right of passage is the right of going or passing for a man, not of driving beasts or vehicles. The right of passage for beasts or vehicles is the right of driving beasts or vehicles over the land of another. So a man who has the right of passage simply has not the right of passage for beasts or vehicles; but if he has the latter right he has the former, and he may use the right of passing without having any beasts with him. The right of way is the right of going, of driving beasts or vehicles, and of walking; for the right of way includes the right of passage, and the right of passage for beasts or vehicles. The right of passage for water is the right of conducting water through the land of another." (*Corpus Iuris Civilis*, Book II, translation by Thatcher (1907)). For the second kind, the urban immovable, *Servitutiones* were "The *servitutiones* of urban immovables are those which appertain to buildings, and they are said to be *servitutiones* of urban immovables, because I term all edifices urban immovables, although really built in the country. Among these *servitutiones* are the following: that a person has to support the weight of an adjoining house, that a neighbour should have the right of inserting a beam into his wall, that he has to receive or not to receive the water that drops from the roof, or that runs from the gutter of another man's house on to his building, or into his court or drain; or that he is not to raise his house higher, or not to obstruct his neighbour's lights." (*Corpus Iuris Civilis*, Book II, translation by Thatcher (1907)).

The Roman Law has accepted and incorporated an Ancient Greek concept or form of property, the *ager vectigalis or emphyteuticarius*, land that was leased by the Roman state, by towns, by ecclesiastical corporations, and by the Vestal virgins. There was a distinction of it into *agri vectigales* and *non-vectigales*, according to the lease being perpetual or not; in either case the lessee had a real action (*utilis in rem actio*) for the protection of his rights, even against the owner. This institute is the base for the *Emphyteusis*, which is a perpetual right in a piece of land that is the property of another, consisting in the legal power to cultivate it, and treat it as our own, on condition of cultivating it properly, and paying a fixed sum called *canon, pensio, reditus* to the owner (*dominus*) at fixed times. (Long 1875).

The fall of the Roman Empire of the West give place to the Feudalism, where land economics developed under the concept of *Emphyteusis*, and land could be held but not owned, and such holdings involved numerous obligations. In the modern sense of ownership, only the monarch and the church owned land. Medieval England was a paradigm of this *Emphyteusis* development of the Feudalism, especially after the Normand invasion, under which all property belonged to the king, who distributed it to major tenants in return for quotas of cavalry and these major tenants in turn distributed land to knights, in order to be able to meet the quotas. The feudal system involved a contract for land and protection in exchange for fealty and homage the land tenure, under which a superior lord held all freehold lands, including fees. All landholdings formed a chain of vassal ships with ownership descending from the monarch through an overlord to a vassal. This practice, known as subinfeudation, was abolished in England by the Statute Qula Emptores (1290). This relationship between landlord and tenant was the origin of the lease agreement which is a contract under which one party, called landlord or lessor, who has superior title to the property, grants possession and use of the property for a limited term to the other party, who is called tenant or lessee. The landlord need not be the actual owner of the property, but may be a lessee granting a sublease to another tenant and keeping the right to reassume possession of the property either at the end of a specified period or sooner if the subtenant breaches a condition of the lease, such as by failure to pay the rent. (Harpum 2000). The contractual nature of the Feudal system created the need for an independent assessor of the contracts fulfilment, thus promoting the legal framework and the judicial institution development. (Pipes 1999)

During the 17th Century, it became widely accepted in Western Europe that exists a Law of Nature that is rational, unchanging and unchangeable, and transcends human laws which is the inviolability of private property and that sovereigns were bound to respect their subjects' belongings. This reasoning, mostly developed by John Locke, had no significant effect in the English system, as though private property had an estate meaning, there was a long tradition of respect and law biding procedures and rights. John Locke’s doctrine suffered with the rise if socialist tendencies defended by Marx

and Engels during the 18th Century, but British liberalism, supported by John Stuart Mill, found its way and determined the faith of property in the 20th Century (Pipes 1999).

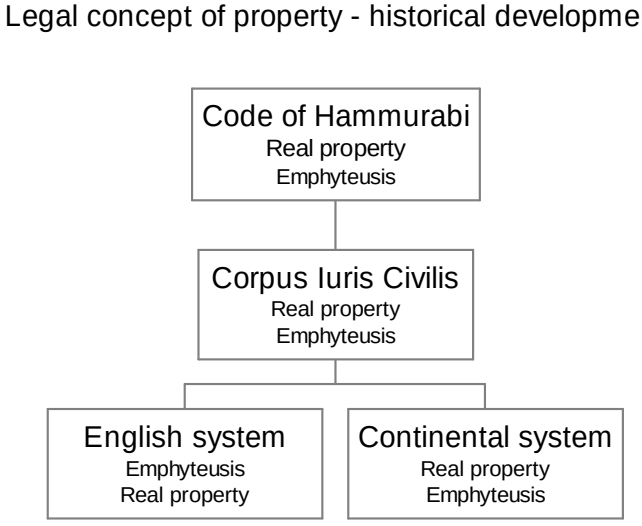

Diagram 11 - Historical development of the legal concept of property

3.3 The conceptual paradigm

The basic concepts in this research are thing, immovable thing, real property, property right and rights over immovable things or rights *in rem*. There are generic and basic definitions about all these concepts and the Merriam-Webster Dictionary of Law is a good source of information.

"Things or res are whatever may be possessed or owned or be the object of a right" (Merriam-Webster 1996). Immovable things are land including the face of the earth and everything of a permanent nature over or under it or an interest or a right over land or anything of a permanent nature over or under it (Merriam-Webster 1996), which means that immovable things can be either corporeal (land itself) or incorporeal (a right over land, a right *in rem*). Real property consists "of land, buildings, crops, or other resources still attached to or within the land or improvements or fixtures permanently attached to the land or a structure on it" and also "an interest, benefit, right, or privilege in such property (Merriam-Webster 1996). The "property right is a right or interest in or

involving property" whereas "property interest is a right, title, claim, or share in property" (Merriam-Webster 1996).

The above-mentioned definitions, however helpful as a starting point, are not sufficiently clear for a scientific analysis. In fact, some of the definitions merge into other, somehow troubling the task of abstracting the contents of the concepts. This is particularly true if the definitions of property right and property interest are compared: the reader cannot fully understand the difference between the two concepts.

Portuguese jurisprudence about the rights *in rem* helped clarifying this situation and supplied the guidelines for the initial conceptualisation, as most of the EC Member-states belong to the continental Roman-Germanic family of law. Even the English system, as demonstrated above, had some influence of Roman Law in the early foundations of its property law. Further research showed that there are great similarities between the Portuguese, Spanish and Italian legal framework (Comporti 1980) (Bergel et al.2000). This fact is only natural as it was in these countries where de Roman influence was stronger. These legal orders are thus used as the legal paradigm for building the conceptual framework of the research. References will be made to the Portuguese Civil Code alone, as a way to simplify the reading.

3.3.1 Legal concept of Things

The Portuguese doctrine receives a direct influence from the Roman Law and from the German doctrine and thus regulates the matters of *action in rem* (actions over things) in the book of the law of things included in the Portuguese Civil Code. The Portuguese system defines things as whatever may be object of a juridical relationship – Article 202 § 2 of the Portuguese Civil Code (PCC). The expression juridical relationship means any social life relation that is disciplined by law, by conferring a right to a subject and a juridical duty to another. The concept of Thing in the Portuguese legal order is similar to the English concept of chose. The Oxford Dictionary of Law defines chose as "A thing. Choses are divided in two classes. A chose in possession is a tangible item capable of being actually possessed and enjoyed (...). A choose in action is a right (...)

that can be enforced by legal action." Peter Collin Publishing Dictionary of Law defines it in a very similar way. Altogether, both definitions include the idea of an item that relates with a subject and whereas this relationship is protected by law. This idea, and the existence of two different classes of chooses, is common to the Portuguese concept. In fact, one of the classifications of things that the PCC includes is the one of corporeal and incorporeal things, the first category matching the concept of chose in possession and the second category the concept of choose in action.

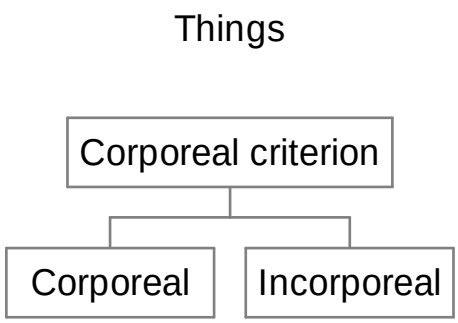

Diagram 12 - Things classification: corporeal criterion

Another classification of things within the PCC is the one that considers two different categories: immovable things and movable things. Movable things are all things that the law does not define as immovable things. Immovable things are a limited portion of land and any construction in or on it, the waters in or on it, trees and plants, while connected to it, and any rights over an immovable thing. – Article 204 PCC. The highlighted expression, any rights over an immovable thing, refers to the rights *in rem*, which I believe may be included in the concept of choose in action. The PCC definition of immovable thing includes both concepts of immovable thing and real property quoted above. The PCC defines the property right in Article 1305 PCC, as the right of use, enjoyment and disposition of a thing. This right has no limits except for those endorsed by law – Article 1306.

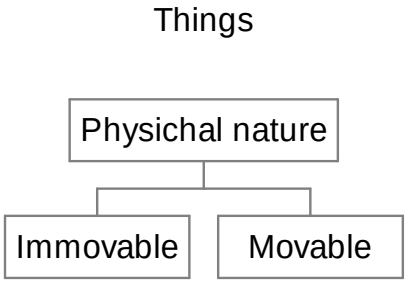

Diagram 13 - Things classification, physical nature

3.3.2 Rights *in rem*

Rights *in rem* are a generic category of rights over things that include the property right, which, in fact, is considered the strongest and more important amongst them. This category though generic is limited in its components. Portuguese law of the rights over things is developed under the principle of *numerus clausus*, which means that the rights *in rem* are those, and those alone, created by law.

There are some common characteristics to all rights *in rem* in the PCC. The first is typicality, which means that only exist the rights law establishes. The second is consolidation that means that rights *in rem* tend to actually expand and include all the powers and functionalities that, in abstract, are included therein. The third characteristic is speciality or individualization: a right *in rem* has an individualized and specific object (thing); it exists while and because that thing exist and if the thing perishes, than the right over it ends to. This characteristic has a consequence that is usually indicated as being the fourth characteristic: actuality, in the sense that the object of the right must exist in the present time. Things to be cannot be the object of a right *in rem* (though they obviously can be the object of contracts).

The fifth characteristic of the rights *in rem* is the compatibility or exclusion; this means that over a given thing only compatible rights may exist. Rights of the same nature and content over the same thing are not, in principle, compatible and thus one excludes the other. The sixth characteristic is the sequel that means that the subject of the right, the rights' owner may follow the thing object of the right wherever it may be.

Prevalence is the seventh characteristic of the rights *in rem*. It gives the owner of the right the power to oppose it to any other subject not vested previously in an incompatible right over that same thing, in which case, the second right would be void.

The last characteristic of the right *in rem* is publicity. Rights of this nature are what the Portuguese doctrine calls absolute rights, opposing to relative rights. The latter are the ones that allow its owner to demand a given behaviour from an identified subject or group of subjects, such as the right of the creditor to be paid by the debtor. Such right cannot be enforced against a person not involved and obliged, in any manner, in satisfying the credit. Absolute rights empower, at the very least, their owners to demand that all other persons refrain from unlawfully disturb their interest.

The rights *in rem* the PCC recognizes are organized in three different categories: enjoyment rights, security rights and rights in acquisition. The criterion to this classification is the function of the right. Any right *in rem* aims to allow its subject one of three different purposes: the enjoyment of a thing, the security of a credit and the acquisition of an enjoyment right.

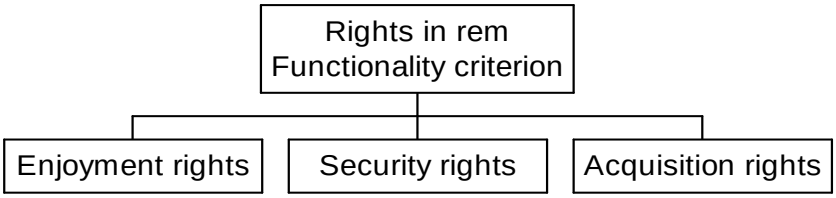

Diagram 14 - Rights *in rem* categories, functionality criterion

3.3.2.1 Enjoyment rights

The enjoyment rights are the property right (the major right *in rem*) and the *usufructus*, the *usus* and *habitatio*, the *servitutiones*, the *emphyteusis*, the surface right, the lease and the possession, that are considered minor rights *in rem*. The minor rights *in rem* are forms of decomposition of the property right.

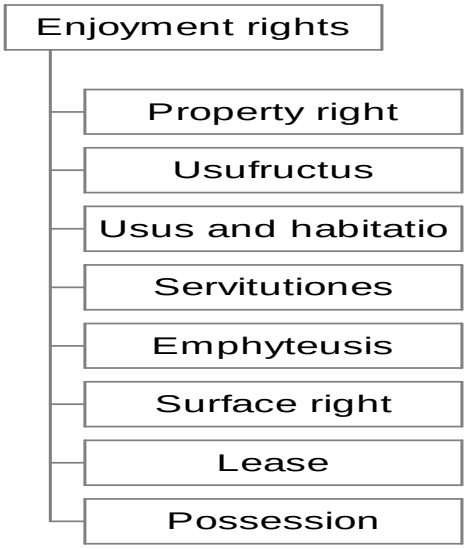

Diagram 15 - Enjoyment rights

3.3.2.1.1 Property right

The property right has no legal or academic definition in Portugal. Article 1305 of the PCC determines some elements that help determining its contents but no definition is provided. It is nevertheless widely accepted that the property right is the paradigm of the rights *in rem* in Portugal. For this reason, I will give detail to its analysis, as its characteristics will apply, *mutates mutandis*, to all other rights *in rem*.

The elements included in Article 1305 of the PCC show that the property right is full, in the meaning of fullness: it includes all the conceivable powers one may have over a thing. These powers are related with the use, fruition and disposability of the thing.

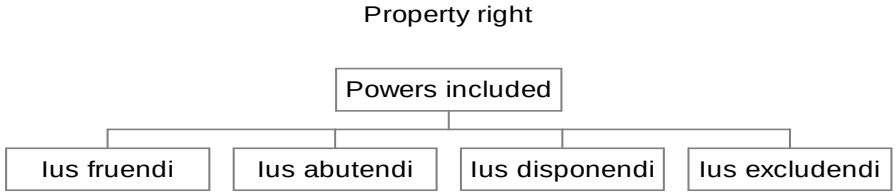

Diagram 16 - Powers within the property right

The property right is consolidated in the sense previously defined: it tends to actually expand and include all the powers and functionalities that, in abstract, are included therein. Article 1305 of the PCC also determines that, in principle, the property right is perpetual, in the sense that whilst a thing exists, there will be a property right over it, even though at a given time no owner can be determined. This is merely an identification problem. The perpetuity in general is not, as far as the Portuguese doctrine are concerned, prejudiced by the fact that the PCC allows the temporary property in Article 1307 § 2.

The concept of transmissibility is also included in Article 1305, even though this is not exclusive to the property right and, in fact, is a characteristic of many other rights. The truth is that this is not common to all rights *in rem*. Some of them, such as the *usus* and *habitatio*, Article 1488 PCC, are not transmissible.

a) Property right acquisition

Article 1306 of the PCC determines that property right may be acquired by contract, succession, usucaption, occupation and accession.

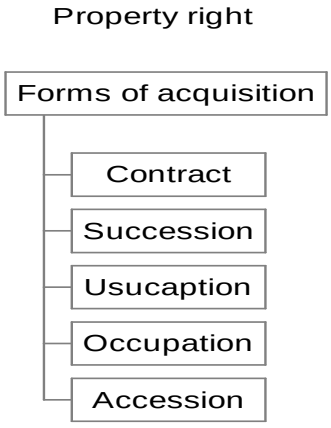

Diagram 17 - Forms of acquisition of the property right

i) Contract

History and traditional Comparative Law show three different paradigms for the transmission of the property right by means of a contract. The first considers that the right is transferred by the contract alone, the second considers that the transference is completed with an autonomous act following the contract and the third considers that both must concur so property may be transferred.

The autonomous act referred to in the previous paragraph is usually the *tradito* of the thing object of the right, when considering movable property, and the registration of the title, when considering immovable property.

The first paradigm may be considered a causal system, as its core is the title (*titulus*) or cause of the acquisition (*causa adquirendi*), whereas the second is procedural system, as its core is the *modus adquirendi*. The latter is quite accurately represented in the German legal order.

The Portuguese system in general follows the causal paradigm as it clearly results from articles 408 and 1307 of the PCC when it stipulates that property is transferred by means of the contract alone. Exception is made for the transmission of immovable property, where the registration of the title is requested to the completion of the process.

ii) Succession

The property right may be acquired by succession, i.e., *mortis causa*, when the heir receives property from the *de cujus* by means of legal or voluntary succession. This aspect is covered in Succession Law and is clearly out of the boundaries of this research.

iii) Usucaption

Usucaption – *usucapio* – is the acquisition of property through possession of the thing over a given period, Article 1287 PCC. As the previous, this mean of acquiring property is irrelevant for this research and thus will not be dealt with.

iv) Occupation

Occupation – *ocupatio* – is the acquisition of ownerless things, because either it never belonged to anyone or its owner became uncertain or unknown (Article 1318 PCC). This form of property acquisition is restricted to movable things, as immovable things whose owner is unknown belong to the state (Article 1345 PCC). As the previous, this mean of acquiring property is irrelevant for this research and thus will not be dealt with.

v) Accession is the acquisition of the property right over a thing by the fact that it was integrated into another thing previously belonging to the acquirer (Article 1325 PCC). The accession may be natural or human (also called industrial). The first happens when the thing is incorporated by natural means and the latter when the thing is incorporated by artificial means: when a river or stream adds land to a plot, that's natural accession (Article 1328 PCC) and when a building is built that's human or industrial accession (Article 1338 PCC).

b) Forms or species of Property

i) The titularity criterion

The first criterion used to distinguish the different species of property is the number of persons (physic or moral) who share the title. If there is but one owner, property is singular. If more than one person share the right, that is joint titularity in the sense that the property right belongs jointly to more than one person (Article 1401 PCC). Co-owners have no powers or rights over specific parts of the thing. They have, however, some powers over the entire thing.

Portuguese law admits that the shares may be different in quantity, while they must be equal in nature. This means that one co-owner can have 90% of the right and the other

10%. Yet different in quantity, both co-owners rights are of the same nature (Article 1403).

Co-owners have the power to regulate between them the use of the thing. If they don't use this power, than all can use the thing within two limits: that they use it for its intended use and that they use their powers in such a manner that it doesn't conflict with the other co-owners powers (Article 1406 PCC). All co-owners must concur to the maintenance expenses in a proportional way (Article 1411 PCC), have equal powers to manage the thing, have the right to demand the division of the common thing, have the right to sell their share and have the right to preferently acquire the other shares.

ii) The property of buildings

Portuguese law includes the concept of horizontal property. This type of property is exclusive for buildings and means that the building is divided into several autonomous fractions sharing a common area. Each of the fractions is the object of a property right called horizontal property and there will be so many property rights over that building as autonomous fractions of it (Article 1420 PCC). The right over the fraction of the building includes all the powers found in the property right, plus some powers and obligations found in the co-ownership. In fact, the owner of the horizontal property right is, by that fact, co-owner of the common parts of the building: stairs, external walls, roofs and so on (Article 1421 PCC).

2.2.2.1.2 The minor rights in rem: ius in re aliena

i) The *usufructus* is one of the minor rights *in rem*: *ius in re aliena* **(**Lima 1958) and entitles its owner to fully use and enjoy a thing during a limited period. There is a separation between the property right and some of the powers (the power to use and enjoy) it includes that are transmitted to the usufructuary (Article 1439 PCC). The *usufructus* is established in view of its beneficiary, thus presenting itself as *intuitus personae*. This fact justifies its time limits: the usufructus is always limited in time, weather for a number of years or for the lifetime of the usufructuary (Article 1476 PCC). Pending its duration, the *usufructus* may be transmitted *inter vivos*, even if not

extended, as the contents of the right are kept unchanged (Article 1444 PCC). The foreclosure of the time or the dead of the usufructuary enables the owner of the property right to recover the full powers over the thing.

ii) The right of *usus and habitatio* is the faculty of using a thing to satisfy the owners personal and family needs (Article 1484). It is a minor right *in rem*, as its limited by its objective: to satisfy someone's needs and thus is established *intuitus personae*, i.e., in the very interest of the beneficiary. Again, there is a separation between the titularity of the property right and some of its powers that are delivered to the owner of the right of *usus and habitatio*. The major difference between this right and the *usufructus* is that this is a much more limited right, as no transmission is ever allowed.

iii) The *servitutiones* are rights belonging to a subject because of its ownership over land. They are not autonomously transmitted and depend, for its maintenance, of the lands needs. There are, as to the constitution method, two categories of s*ervitutiones*: the legal and the contractual. The first are the ones arising from law and thus creatable by a Court of Law and the latter are the ones arising from contract and merely enforceable in a Court of Law. Legal *servitutiones* are the rights of way and the water *servitutiones*. *Servitutiones* are not autonomously transmitted and are included within the property right they are intended to serve.

iv) The emphyteusis consists of splitting the property right into two different domains: the direct domain and the useful domain, each belonging to a different subject. The direct domain remains with the landlord and the direct domain passes to the tenant, who will pay an annual fee (Article 1491 PCC, extinguished in 1976). The PCC doctrine of distinguishing two different domains within the emphyteusis is a direct heritage from the Glose School of Roman Law, who started it, and from the Commentators School of Roman Law. The emphyteusis is perpetual and both domains are transmissible by contract, will or intestate succession (Article 1499 and 1501 PCC). The emphyteusis however, will finish if both domains are reunited in the same subject, if the land or building is lost or the fee in unpaid. Both domains may be reunited if the landlord acquires, by contract or succession, the useful domain, or if the tenant acquires, by

contract, succession or remission of the fee, the direct domain. The remission of the fee is a down payment and is a right of the tenant after a minimum number of years (Article 1511 PCC). Subemphyteusis is prohibited.

v) The surface right is the right to build and/or keep a building or plantation in somebody else's land (Article 1524 PCC). This right may be, depending on the title, perpetual or temporary and for it, the owner must pay a fee, either in a single payment, or in periodic instalments. The surfacer becomes owner of the plantation or building and may transmit his property, or part of it, by contract or succession. The property right over the plantation or building is temporary if the surface right is temporary.

vi) The lease: the PCC regulates the lease in the II Book, related to the Obligations, instead of doing it in the III Book, where all the matters of the rights *in rem* are regulated. Part of the Portuguese doctrine assumes that this means that the lease is not a right *in rem* but only a contractual right. Nevertheless, has this view doesn't appear to be shared in other European legal orders, I decide to include its analysis within this section, following in fact, a minority of the Portuguese doctrine.

The lease is the temporary transference of the use of an immovable thing in exchange for a pecuniary compensation (Article 1022 PCC). The lease may have different objects and those objects will determine the applicable law: land or buildings. The lease of land is regulated in special laws, depending on the intended use of it: agriculture, Law of the rural lease, or forest exploration, Law of the forest lease. The lease of buildings is regulated in the PCC and in the Law of the urban lease.

vii) Last but not least, the possession. This right is the first mentioned in the PCC, before even the property right. The PCC defines it as the power shown when someone acts with a thing in such a manner that it appears to be exercising the property right (Article 1251 PCC). Possession may be exercised directly or through someone. The latter is the case when the owner leases his property and the lessee is, in fact and apparently but not in law, the possessor.

Apart from the fact that possession is implicit in all enjoyment rights in rem, and is autonomously justiciable, its main effect is that when its exercise does not match the ownership of a justifying right *in rem*, it may, given some circumstances, be a mean to acquire that right through usucaption.

3.3.2.2 Security rights

The security rights are the rights of a creditor over things belonging to the debtor, to ensure the satisfaction of his credit. These rights are always accessory to a credit satisfaction. The PCC establish four main security rights *in rem*: the pawn, the mortgage, the retention right (which entitles the creditor to retain possession of a thing belonging to the debtor, when the credit originated in a fact related to that thing) and the distress and seizure.

The security rights are regulated in the II Book of the PCC, The obligations. The pawn consists of the power of the creditor to satisfy his credit with the value of a movable thing belonging to the debtor with preference over any other creditors (Article 666 PCC). The settlement of the pawn is only by the delivery of the thing to the creditor (Article 669 and 677 PCC).

The mortgage produces exactly the same effects of the pawn with the difference that the object of the mortgage must be an immovable thing (articles 686 PCC).

3.3.2.3 The acquisition rights

The rights in acquisition are rights over a thing that allows its owner to acquire an enjoyment right over that thing. The main right in acquisition included in the PCC is the pre-emption, but the doctrine reveals some others.

3.3.2.4 Synoptic tables

Categories	**Contents**	**Rights included**
Enjoyment Rights	enjoyment of a thing	property right *usufructus* *usus* and *habitatio* *servitutiones* *emphyteusis* surface right lease possession
Security Rights	the security of a credit	pawn mortgage retention right distress and seizure
Acquisition Rights	acquisition of an enjoyment right	pre-emption

Table 2 - Rights *in rem*

Right	Powers	Main Obligations	Duration
Property Right	♦ *Ius utendi* ♦ *Ius fruendi* ♦ *Ius abutendi* ♦ *Ius excludendi*	♦ Legal limitations of the right: ♦ Property social function ♦ Collision of rights ♦ Public interest, mainly related to the *ius edificandi*	♦ Perpetual and only exceptionally temporary (exceptions strictly determined by law)
Usufructus	♦ *Ius utendi* ♦ *Ius fruendi*	♦ Legal and contractual	♦ Temporary
Usus and H*abitatio*	♦ *Ius utendi*	♦ Legal and contractual	♦ Temporary
Servitutiones	♦ *Ius utendi*	♦ Legal and contractual	♦ Perpetual
Emphyteusis	♦ *Ius utendi* ♦ *Ius fruendi* ♦ *Ius abutendi*	♦ Legal and contractual	♦ Perpetual
Surface Right	♦ *Ius utendi* ♦ *Ius fruendi* ♦ *Ius abutendi*	♦ Legal and contractual	♦ Temporary or perpetual
Lease	♦ use of an immovable thing	♦ rent	♦ Temporary
Possession	♦ *Ius utendi* ♦ *Ius fruendi*		♦ Separately considered is always temporary

Table 3 - Enjoyment rights

Right	Powers	Obligations	Duration
Pawn	♦ credit satisfaction with preference over any other creditors		♦ Temporary
Mortgage	♦ credit satisfaction with preference over any other creditors		♦ Temporary
Retention Right	♦ credit satisfaction with preference over any other creditors		♦ Temporary
Distress and Seizure	♦ credit satisfaction with preference over any other creditors		

Table 4 - Security rights

Right	Powers	Obligations	Duration
Pre-emption			

Table 5 - Acquisition rights

Right	Forms of acquisition	Forms of transmission
Property Right	♦ Contract ♦ Will ♦ Intestate succession ♦ Usucaption	♦ Contract ♦ Will ♦ Intestate succession
Usufructus	♦ Contract ♦ Will ♦ Usucaption	♦ Contract
Usus and H*abitatio*	♦ Contract ♦ Will ♦ Usucaption	♦ Not transmissible
Servitutiones	♦ Contract ♦ Will ♦ Usucaption	♦ Transmissible only accompanied with the transmission of the land it is intended to serve
Emphyteusis	♦ Contract ♦ Will ♦ Usucaption	♦ Contract ♦ Will ♦ Intestate succession
Surface Right	♦ Contract ♦ Will ♦ Usucaption	♦ Contract ♦ Will ♦ Intestate succession
Lease	♦ Contract	♦ The right to transmit the lease is limited by law. When admitted, can be transmitted by contract or intestate succession
Possession	♦ Practice of material acts	♦ Delivery of the thing possessed

Table 6 - Forms of acquisition

3.3.3 Conveyancing

Conveyancing is the set of procedures involved in creating, extinguishing and transferring the ownership of the rights *in rem* - Oxford Dictionary of Law, Oxford University Press. Other dictionaries of Law define conveyancing in different manners, but the Oxford's definition is more adequate, as it is broader than the others and thus more suitable to integrate the conceptual paradigm I am developing.

Most rights *in rem* can be acquired by contract, usucaption, will and intestate succession. We will study only the contractual acquisition of a right and will do so having in mind, as paradigm, the Portuguese legal order.

One of the most important steps of conveyancing its final stage, the register, or the procedure of recording the rights *in rem*. There are three classical systems to do so: private conveyancing, registration of deeds and registration of title, whereas a deed is a legal document which effects a transaction with land, such as a transfer of ownership, or mortgage and a title means the right to enjoy the use of something, the ability to dispose of it and to benefit from the rights associated with it.

In private conveyancing, documents agreeing to the transfer of ownership are passed between the seller and the purchaser. The law of the country simply provides a legal framework within which this process takes place, eventually determining some sort of formality for the act. In the system of the registration of deeds, a copy of the transfer document is deposited in a deeds registry and an entry in the registry provides evidence of the vendor's right to sell. The deeds registry may be private or public. In the later case it is normal to find a national deeds registration system. A copy of all agreements that affect the ownership and possession of the land must be registered at the registry offices and one copy of all documents is retained. Each document will normally have been checked by a notary or authorized lawyer and its validity ascertained. The third system implies that each land parcel is identified on a map and the rights associated with it and the name of the owner or owners are recorded. Finally, some countries have established a dual system, registering both the deeds and the title and others have

chosen to establish atypical systems. In the European Community there are Member-states having the title system, others with both the title and the deed system and others having atypical systems (HM Land Registry 1998).

Portuguese contract law is based in the contractual freedom principle. Nevertheless, the jurisprudence usually considers that there are two large contracts categories: typical and atypical contracts, the criterion for the distinction being the existence of a mandatory or optional legal regime for the contract.

There are five typical contracts able to transfer or create rights *in rem*: purchase, gift or *donatio*, perpetual rent, lifetime rent and lease.

i) Purchase: this is the contract by which a right *in rem* is transferred against the payment of the price in full (Article 874 PCC) or with instalments. In this case, the contract may include a reservation of title clause (Article 934 PCC).

This contract may also include a conditional reverse clause. This means that, upon verification of a given and uncertain future event, the seller as the right to revoke the sell (Article 927 PCC).

ii) Gift or *donatio* is the contract by which someone, the donor, transfer, at his expense, a thing or a right to someone else, the donee (Article 940 PCC).

iii) Perpetual rent is the contract by which a right is transferred in return for a rent for unlimited time (Article 1231 PCC). The total sum to be paid is unknown in the beginning of the contract.

iv) Life time rent is the contract by which a right is transferred in return for a rent for the lifetime of the seller or a third party (Article 1238 PCC). The total sum to be paid is unknown in the beginning of the contract.

v) Formal procedures: the general rule about the formal procedure in any contract aiming to transfer, create or extinguish any right *in rem* over an immovable thing is that

these are formal contracts. The meaning of formal contracts is that these contracts must be written and signed in the presence of a public official called Notario: they are notary acts (Article 875, 947, 1232, 1239, 1419 PCC and in general, Article 80, Código do Notariado, CN). If a contract does not fulfil this demand, it shall be null and void (Article 220 PCC). The exception to this rule concerns the lease, were a written document, signed by the parties is enough (Article 7 Regime do Arrendamento Urbano, RAU).

All facts about immovable things are submitted to a National Register and that includes creation, transference or extinction of any right *in rem* (Article 2 Código de Registo Predial, CRP). The Register's function is to publicise the existence of such rights and situations (Article 1 CRP) and no Notary shall allow the completion of any contract having as object a right over an immovable thing without the presentation of a valid statement of the Register (Article 54 CN), so the rights of the transmitent can be assessed.

The fact that the contracts aiming to transfer a right *in rem* are Notary acts implies often the need for the signature of a precontract. The precontract binds the parties to the signature of the contract (Article 410 PCC) and shall include at least the essential clauses that the parties have agreed. The precontract must be written (Article 410 PCC) and signed and the parties' signature shall be legalized, i.e., there will be a Notary certificate to prove the identity of the parties and the veracity of the signatures (Article 410 PCC).

Contract	Nature	Payment	Procedures
Purchase	Onerous, the price is determined in advance. When instalments are granted, interest may be charged.	Upfront Instalments Mixed (upfront and instalments)	Formal contract, Notary intervention. Subject to the National Register so the transfer may be opposable to third parties
Gift or *donatio*	Liberality	No payment	Formal contract, Notary intervention. Subject to the National Register so the transfer may be opposable to third parties
Perpetual rent	Onerous, price unlimited	Periodic rent	Formal contract, Notary intervention. Subject to the National Register so the transfer may be opposable to third parties
Life time rent	Onerous, price limited but unknown	Periodic rent	Formal contract, Notary intervention. Subject to the National Register so the transfer may be opposable to third parties
Lease	Onerous. Unable to transfer the property right.	Periodic rent	Written contract

Table 7 - Contracts

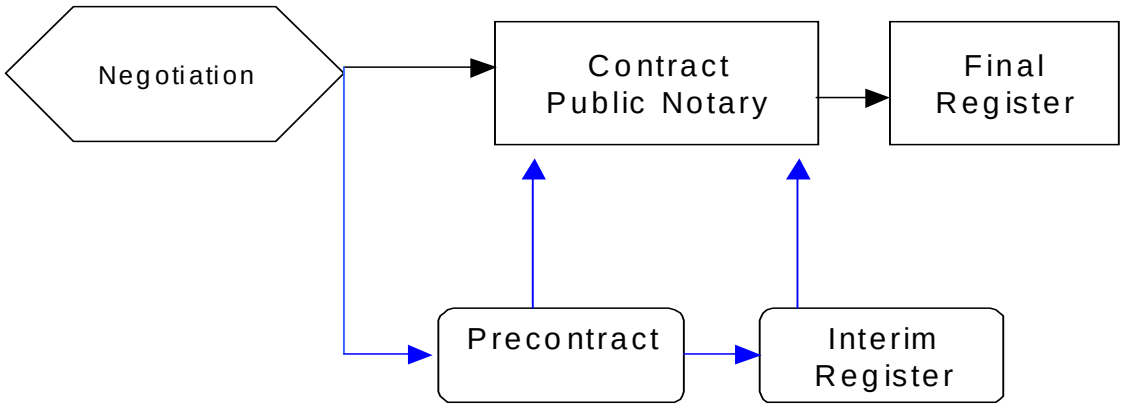

Figure 1 - Conveyancing procedure

3.4 Summary of the chapter

The readings have indicated that some of the key concepts involved could share a common root: Roman Law. The second book of the *Corpus Iuris Civilis* starts by stating the different species property: public, corporate and private. Most of the ways property could be acquired are the same, *in essentia*, as the modern ways. The second section of the second book of the *Corpus Iuris Civilis* introduces another concept of vital importance in modern economies: the distinction between corporeal and incorporeal things. Sections four and five of the second book of the *Corpus Iuris Civilis* include a detailed regulation of the *usufructus* and the *usus* and *habitatio*. The *Corpus Iuris Civilis* also included a section called the *Servitutiones*, rights that rural immovable or urban immovable have over other immovable. The Roman Law has accepted and incorporated an Ancient Greek concept or form of property, the *ager vectigalis or emphyteuticarius*, land that was leased by the Roman state, by towns, by ecclesiastical corporations, and by the Vestal virgins. The fall of the Roman Empire of the West give place to the Feudalism, where land economics developed under the concept of *Emphyteusis*. Medieval England was a paradigm of this *Emphyteusis* development of the Feudalism, especially after the Norman invasion.

The Portuguese doctrine receives a direct influence from the Roman Law and from the German doctrine and thus regulates the matters of *action in rem* (actions over things) in the book of the law of things included in the Portuguese Civil Code. Things are whatever may be object of a juridical relationship, and being so, this concept is similar to the English concept of chose. Things can be immovable and movable. Immovable things are a limited portion of land and any construction in or on it, the waters in or on it, trees and plants, while connected to it, and any rights over an immovable thing - the rights in rem, which may be included in the concept of *choose in action*. Rights *in rem* are a generic category of rights over things that include the property right, and is developed under the principle of *numerus clausus*, which means that the rights *in rem* are those, and those alone, created by law. There are some common characteristics to all rights in rem: typicality, consolidation, speciality or individualization, compatibility or exclusion; the sequel, the prevalence and the publicity. The rights *in rem* are organized in three different categories: enjoyment rights, security rights and rights in acquisition.

The enjoyment rights are the property right, the *usufructus*, the *usus* and *habitatio*, the *servitutiones*, the *emphyteusis*, the surface right, the lease and the possession. The property right is the paradigm of the rights *in rem*. It is full, consolidated, in principle perpetual and transmissible. The property right may be acquired by contract, succession, usucaption, occupation and accession. Three are three different paradigms for the transmission of the property right by means of a contract. The first considers that the right is transferred by the contract alone, the second considers that the transference is completed with an autonomous act following the contract and the third considers that both must concur so property may be transferred.

There are different species of property according to a titularity criterion, i. e., the number of persons (physic or moral) who share its title. If there is but one owner, property is singular. If more than one person share the right, that is joint titularity in the sense that the property right belongs jointly to more than one person

The minor rights *in rem* are the *usufructus*, the *usus and habitatio*, the *servitutiones*, the *emphyteusis*, the surface right, the lease and the possession. The *usufructus* entitles its

owner to fully use and enjoy a thing during a limited period. The right of *usus and habitatio* is the faculty of using a thing to satisfy the owners' personal and family needs. The *servitutiones* are rights belonging to a subject because of its ownership over land. They are not autonomously transmitted and depend, for its maintenance, of the lands needs. The emphyteusis consists of splitting the property right into two different domains: the direct domain and the useful domain, each belonging to a different subject. The direct domain remains with the landlord and the direct domain passes to the tenant, who will pay an annual fee. The surface right is the right to build and/or keep a building or plantation in somebody else's land. The lease is the temporary transference of the use of an immovable thing in exchange for a pecuniary compensation. The possession is the power shown when someone acts with a thing in such a manner that it appears to be exercising the property right.

The security rights, the pawn, the mortgage, the retention right and the distress and seizure, are the rights of a creditor over things belonging to the debtor, to ensure the satisfaction of his credit. These rights are always accessory to a credit satisfaction. The rights in acquisition are rights over a thing that allows its owner to acquire an enjoyment right over that thing.

Chapter 4 – Enjoyment Rights *in rem* in the EC Member-states

4.1 Aims of the chapter

The present chapter is probably the most challenging and ambitious part of this research. It intends to summarize and compare the current status of several aspects of Property Law in all Member-states of the European Community. This task is impossible to perform single handed to any jurist that I know and especially to me. In fact, the learning and understanding of 15 different legal orders (in fact, 16, as the United Kingdom embraces two different legal orders) implies at least, a working knowledge of 11 different languages, so the law can be read, and a minimum national law background so the law can be understood. This situation, somehow very similar to the *acte claire* testing in the Cilfit case (Case 283/81 Cilfit and Others [1982] ECR, available at http://curia.eu.int) is, as Prof. Mota Campos points out, "the impossible task" (1998).

Mr João Paulo Teixeira de Matos asked to the national branches of Andersen Legal to answer a questionnaire with the relevant issues. Unfortunately, legal and economic problems with the headquarters of Andersen Legal in the United States prevented this cooperation to be completed. Some Questionnaires where only partially answered and some other where not answered at all. The first is the case of Austria, Luxembourg, Finland and Greece and the second is the case of Belgium and Ireland. My esteemed colleague Prof. Pascale Lecocq of the Université de Liège, to whom I deeply thank, answered the Belgium Questionnaires.

The questionnaire (*see* Annex III. Questionnaire number 1) included a brief explanation about the objectives of the research and a detailed conceptual framework as included in the previous chapter. A set of instructions was delivered and the colleagues were asked to answer the questions bearing in mind both the objectives and the conceptual framework, adapting, if necessary, their national terminology to the one resulting from the conceptual framework, so a uniform view could be ascertained.

The questions covered several areas. The first was the concept of immovable thing, the second was the inventory of the existing enjoyment rights *in rem* and respective contents, object, limits, obligations to the owner and duration. The third area was conveyancing, in particular, the form of the contracts, the participating subjects, the conveyancing procedure, especially the existence of a national register and the obligation, or not, of the registry. Additionally, the respondents were asked to include brief taxation information related to the conveyancing process.

Due to the nature of the source of information used, there will be no references in this chapter, apart from the present acknowledgment and the reference to the contributor's name.

4.2 The concept of immovable thing in the EC Member-states

a) Austria

(Contribution of Preslmayr & Partners)

Within the scope of the Austrian Civil Code, land will mean a part of the surface of the earth and qualifies as immovable thing. Buildings are considered as part of the land and consequently, it is in principle not possible to dispose of buildings without the land on which they are built. Real estate (Grundstück) therefore means land and buildings. Only in case of the minor rights *in rem* the building will be considered as a separate asset and can therefore be sold or rented without the land on which it is built. Includes some rights *in rem.*

b) Belgium

(Contribution of Pascale Lecocq, Université de Liège)

Immovable things are the ones that cannot be transported without loosing their substance. Some rights *in rem* are also considered immovable.

c) Denmark

(Contribution of Kasper D. Blangsted Henriksen)

Following from The Danish Act on Registration, an "immovable thing/property" includes land and excludes all kinds of movable assets as a main principle. However, the term "immovable thing/property" also includes such assets which are connected to the land, such as buildings, including sheds, garages, technical installations etc. Also trees, plants, fences etc. are considered parts of the land and thereby encompassed by the term "immovable thing/property".

Rights *in rem* do not qualify as immovable things. Rights over immovable things can be either privately held rights or publicly held rights. Rights over immovable things must be distinguished from rights over movable assets or personal claims of debt in relation to the act of security - only rights over immovable things can be pledged.

d) Finland

(Contribution of the Andersen Legal Real Estate Group)

Immovable thing is determined as land, building or permanent construction, unextracted minerals and plants attached to an immovable thing and certain rights *in rem*.

e) France

(Contribution of Antoine Allez)

An immovable thing is a thing that cannot be moved. Article 517 from the French Civil Code: “Goods are immovable because of their nature, or their use, or the thing they are applicable to”. The concept includes land and buildings which are immovable by their nature, movable things placed thereon for servicing and exploiting the immovable, which are immovable property by their purpose, rights *in rem*, and immovable things provided by specific provisions of the law. The rights over immovable things that qualify as immovable things are easements, encumbrances (mortgages, privileges, etc.),

French leaseholds (*emphytéotique* leases), construction leases. Under French planning law, depending on the zoning qualification, plots of land may be built upon or immovable things enlarged. The building rights are attached to the land and are a function of the existing structures.

g) Germany

(Contribution of Detlev Stoecker & Amel Al-Shajlawi**)**

Immovable things are not defined under German law. German Civil Code ("Bürgerliches Gesetzbuch, BGB"), which governs the civil law side of real estate (land) rather defines "things" as merely *physical* ones (Sec. 90 of German Civil Code). Thus, immovable things are land, i.e. separate parts of the earth's surface, which are listed in the Land Register Index ("Bestandsverzeichnis") under a specific number or recorded according to Sec. 3 paragraph 3 of the Land Register Act ("Grundbuchordnung").

Rights over immovable things do not qualify as immovable things as a rule. Merely heritable building rights ("Erbbaurechte" pursuant to Sec. 1 of the Heritable Building Right Ordinance – "ErbbauVO"-), condominium or flat ownership ("Wohnungseigentum" pursuant to Sec. 1 of the Condominium Act – "WEG" -) and part-ownership – horizontal property ("Teileigentum" pursuant to Sec. 1 Condominium Act) qualifies as "restricted" ownership rights. Both rights are sold and conveyed in the same way as the ownership of immovable.

h) Greece

(Contribution of the Andersen Legal Real Estate Group)

Greek law considers immovable thing the ground and any movable thing firmly attached to the it especially buildings; the product of the immovable as long as it is connected with the soil, the underground waters and springs and the seeds and plants once showed and planted.

i) Ireland

(Contribution of the Andersen Legal Real Estate Group)

Immovable thing is land, including tenements, and hereditaments, houses and buildings, of any tenure. Tenements are whatever can be the subject of tenure, hereditaments are that which is capable of devolving upon death; these terms are used in a general sense to include such things as houses and land and the rights which arise from then. Tenure denotes the holding of land.

j) Italy

(Contribution from Ugo A. Milazzo)

Immovable thing is defined in the Italian Civil Code. According to Article 812 of the Italian Civil Code, "immovable things" are the land, including springs and watercourses, and - generally - whatever is physically annexed to it including any buildings firmly and permanently united to the ground. Mills, baths and other floating constructions are also involved so long as they are and meant to permanently be steadily secured to the shore or to the riverbed for the purposes of their use. Rights *in rem* are not immovable things. Italian law singles out two main categories of rights respectively told *diritti reali* (real rights) and *diritti personali* (personal rights). On the one hand, real rights – including the so called *diritti reali di garanzia*– consists of the rights entitling to draw from a thing – no matter whether movable or immovable – all or part of its legally granted utilities, whilst, on the other hand, personal rights entitles the creditor to demand a performance from one or more given individuals.

k) Luxembourg

(Contribution of the Andersen Legal Real Estate Group)

Immovable thing consists of land and constructions thereon. Rights *in rem* are also immovable things.

l) The Netherlands

(Contribution of Marieke Enneman & Leon Hoppenbrouwers)

An immovable thing is a tangible object that cannot be physically moved, particularly land or buildings. There is an official translation of Section 3 of Book 3 of the "Dutch Civil Code" (from 1990):

"1. The following are immovable: land, unextracted minerals, plants attached to land, buildings and works durably united with land, either directly or through incorporation with other buildings or works.

2. All things which are not immovable, are moveable"

Rights over immovable things in general are not immovable themselves. Nevertheless, some of those rights (i.e. surface rights, long term lease) do need to be registered in a notary deed and registered in order to become immovable.

The Dutch law system is based upon registered property instead of the immovable things as basic assumption. Some rights over immovable things can also be qualified as registered property, which doesn't make them immovable, but makes it necessary to follow the system of registered property which system requires the use of notary deeds and registration at the Land Register ("Kadaster").

m) Spain

(Contribution of Oscar de Santiago)

According to Article 334 of the Spanish Civil Code, "immovable things" are the land, buildings, roads and any kind of constructions adhered to the ground, and, generally, whatever is attached to any immovable thing in a fixed o permanent way. Also mines, stagnant waters, docks and other constructions, even floating, when they are destined to remain in a fixed point of a river, lake or coast, dispensations and any right *in rem* over immovable things.

According to Article 334 of the Spanish Civil Code, rights *in rem* over immovable things are qualified as immovable things.

Spanish law singles out two main categories of rights respectively told *derechos reales* (rights *in rem*) and *derechos personales* (personal rights). Rights *in rem* consist of all those rights entitling to draw from a thing – no matter whether movable or immovable – all or part of its legally granted utilities, with the consequent third parties' obligation to respect the relationship between the right *in rem* holder and the thing. Personal rights consist of those rights entitling the creditor to demand a performance from one or more given individuals (debtors).

n) Sweden

(Contribution of Per Månsson)

An immovable thing is land, two-dimensionally defined including appurtenances and fixtures. These are foremost physical fixtures as buildings, threes and other plants. (Chapter 1 and 2, Swedish Land Code). Rights *in rem* are moveable things.

o) United Kingdom (England and Wales)

(Contribution of Andrew Lewry)

Immovable property is land or "real property" and includes things such as buildings and trees and other constructions. Immovable property also includes fixtures attached to the land; whether or not any thing is attached to the land depends on the degree of annexation. Land includes "corporeal hereditaments" which refer to the physical and tangible characteristics of land and "incorporeal hereditaments" which refer to intangible rights enjoyed in respect of land (see below). This is to be contrasted with "personal property" which, in the context of land law, includes the chattels within a property. Personal rights are not normally regarded as capable of binding third parties.

Incorporeal hereditaments are intangible rights. An example of such a right is the right of way which one landowner may have over the land of another. Other such rights include mortgages and covenants in equity.

p) Synoptic table

Country	**Land**	**Buildings**	**Rights *in rem***
Austria	Yes	Yes	Yes
Belgium	Yes	Yes	Yes
Denmark	Yes	Yes	No
Finland	Yes	Yes	Yes
France	Yes	Yes	Yes
Germany	Yes	Yes	Yes
Greece	Yes	Yes	Yes
Ireland	Yes	Yes	Yes
Italy	Yes	Yes	No
Luxembourg	Yes	Yes	Yes
Netherlands	Yes	Yes	No
Portugal	Yes	Yes	Yes
Spain	Yes	Yes	Yes
Sweden	Yes	Yes	No

United Kingdom Immovable property	Yes	Yes	Yes

Table 8 - Coverage of the concept of immovable thing

4.3 Rights *in rem*

4.2.1 Austria

No answers were gathered in this matter.

4.2.2 Belgium

(Contribution of Pascale Lecocq, Université de Liège)

The property right or "*droit de propriété*" is established in Article 544 C. civ.: "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements". It includes the powers to use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing), transfer the right either by contract or succession, to exclude others from disturbing the right and the power to bring to action those who do it and the power to destroy the thing. There are limitations to the right: Legal limitations of the right: "pourvu qu'on n'en fasse pas…", the collision of rights either between two property rights or between property right and other rights i.e. authorship; théories jurisprudentielles de l'abus de droit et des troubles de voisinage and the public interest, mainly related to the right to build: règles de l'urbanisme. The property right is perpetual and only exceptionally temporary (exceptions strictly determined by law).

The usufruct, or *usufruit* (art. 578 à 624 C. civ.) is foreseen in Article 578 C. civ.: "L'usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance". It includes the powers of use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without loosing the right over the thing), transfer and exclude others from

disturbing the right and the power to bring to action those who do it. Contractual obligations may exist if usufruct finds its source in a contract. The legal obligations: a) before taking possession of the thing, the usufructuary must find some one who gives surety and an inventory must be drawn up; b) during the right, the usufructuary must pay the ordinary costs of the thing and maintain it. The usufruct is always temporary: For physical persons, the right is for life, unless a peculiar time has been set (when the origin is contractual); for legal persons (companies…) the right can be created for maximum 30 years (619 civil code).

The use and inhabit, or *droits d'usage et d'habitation* is established in articles 625 to 636 C. civ. It includes the powers to use or inhabit an immovable thing but the droit d'usage may also be set on a moveable thing. It is not transmissible and it includes the power to exclude others from disturbing the right and the power to bring to action those who do it. Its limitations and duration are the same as to, mutates mutandis, the usufruct.

The easements, or *servitudes* are foreseen in articles 637 to 710 bis. C. civ. Article 637: "Une servitude est une charge imposée pour l'usage et l'utilité d'un héritage appartenant à un autre propriétaire". Servitudes include the power to use an immovable or part of it (i.e. right of way). It is transmissible automatically with the dominant land or building. Servitudes are perpetual but a limit can be set by contract. The right comes to an end if not used during 30 years (706 Civil code). People may apply to the judge to suppress an easement that has lost any utility (710 bis Civil Code added in 1983). Legal easements have their own rules.

The *emphyteusis* or *emphytéose* (loi du 10 janvier 1824- dutch origin) is defined as "un droit réel qui consiste à avoir la pleine jouissance d'un immeuble appartenant à autrui, sous la condition de lui payer une redevance annuelle, soit en argent, soit en nature, en reconnaissance de son droit de propriété". It includes the use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing and the power to construct and is transmissible by contract and succession. The

obligation to pay is fundamental. The duration is minimum 27 years and maximum 99 years.

The surface right, or *droit de superficie* (loi du 10 janvier 1824- dutch origin) is defined as "un droit réel, qui consiste à avoir des bâtiments, ouvrages ou plantations sur un fonds appartenant à autrui." It includes the power of use and enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). It is transmissible *intervivos* and *mortis causa*. It is always temporary: maximum 50 years but it can be renewed (art. 4).

The lease, or *bail*, is a personal right (droit personnel de jouissance issu d'un contrat de bail); it is not a "real" right in belgian law. It includes the power to use an immovable thing (or movable) and is transmissible with the landlord's consent.

4.2.3 Denmark

(Contribution of Kasper D. Blangsted Henriksen)

The property right, in Danish '*ret over fast ejendom'*, includes the power to use, enjoy, transfer the right either by contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest. The property right is generally perpetual.

The usufruct, in Danish the '*privatretlige servitutter*', includes the powers to use, enjoy and, depending on the terms and conditions, may be transmissible by contract. Also includes the power to exclude others from disturbing the right and the power to bring to action those who do it. It is temporary and may be established by contract, testament or prescription.

The use and inhabit right, in Danish '*brugsret'*, includes the power to use or inhabit an immovable thing and may be transmissible depending on the terms and conditions of the contract. Also includes the power to exclude others from disturbing it and to bring to action those who do it. May be temporary or not, depending on the contract, and the main obligations are contractual.

The easements, in Danish "*servitut*", may be positive and negative. The first allows the its holder to make use of an immovable thing and the negative imposes the obligation of refraining from certain acts. The negative easements may be deviated by a public plan.

The *emphyteusis* as such is unknown in Denmark.

The surface right is very similar to the reference framework but subject to regulations and district plans.

The lease, in Danish "*leje*" is perpetual unless the contract establishes a limited period. Sublease is possible for limited periods under certain circumstances.

4.2.4 Finland

No answers where gathered in this matter.

4.2.5 France

(Contribution of Antoine Allez)

Land is generally holded under the property right, (*pleine propriété*). This right is perpetual and absolute. There are two variations of this right: horizontal property (*copropriété*) and volume units and these variations are due to special characteristics of the immovable thing they relate to: the first relates to units within buildings and the second to buildings to be constructed over public roads and railways.

Minor rights *in rem* exist in France: the *usufructio*, the surface right and the *emphyteusis*. The *usufructio* (*usufruit*) gives the rights and obligations on the income to its owner and is limited in time, not exceeding 30 years. The surface right (*bail à construction*) requires its owner to construct a building on the land and may last between 18 and 99 years. When it expires the buildings erected will revert to the owner of the land. The *emphyteusis* (*bail emphythéotique*) is very similar to the surface right, with the difference that its owner is not obliged to build.

4.2.6 Germany

(Contribution of Detlev Stoecker & Amel Al-Shajlawi**)**

Under German Civil Law, the Property right is defined as the right to possess, use and dispose of land in the most absolute way as long as no prohibited use is made thereof. There are restricted rights *in rem*, such as condominium ownership, surface right '*Erbbaurechte'*, the *usufructio* '*Nießbrauch'*, the acquisition of which is generally subject to the same statutory provisions as the property right. Servitudes are also a minor form of rights *in rem* **.**

The surface right entitles its holder to erect and own or acquire buildings, works or plantations on land which remains in the ownership of the grantor. For the duration of his right, the holder is the sole owner of such erected assets; he may use, enjoy or demolish them provided that he returns the land in the condition he obtained it. This right is usually is granted for a period of 30 to 99 years but, as there are no statutory time restrictions it can also be granted for a shorter or longer period or for an unlimited time. Rules applying to the purchase and transfer of the surface right, are the same as to the acquisition of property. Instead of a purchase price, the holder will usually pay an annual rent (land rent, *Erbbauzins*).

The right of usufruct '*Nießbrauch'* is a restricted right *in rem* which allows the usufructuary to temporarily use and enjoy real or personal property belonging to a third party, provided that its substance is preserved. The right of usufruct is typically granted for a long-term period. It can neither be transferred nor pledged.

The servitudes are limited rights for an owner of one parcel to use or prevent use of some kind of a neighbouring parcel. The right is connected to a parcel, like rights of way.

The lease is not a right *in rem* in Germany. Registered leases are defined in Sec. 31 to 42 of the Condominium Act ("Wohnungseigentumsgesetz, WEG"). Such registered

leases have to be registered with Section II of the Land Register as encumbrances and thus constitute rights *in rem*. Transmissible and inheritable (Sec. 33 Condomium Act). Includes the power to exclude others from disturbing the right and the power to bring to action those who do it (Sec. 34 para. 2 Condominium Act). According to Sec. 33 Condomium Act the Lessee has to maintain the condition of the premises and has to meet the costs of maintenance and be considerate of the interests of other beneficiaries while exercising the right. May be perpetual if agreed upon (subject to Sec. 41 Condominium Act).

4.2.7 Greece

No answers were gathered in this matter.

4.2.8 Ireland

No answers were gathered in this matter.

4.2.9 Italy

(Contribution from Ugo A. Milazzo)

The property right is the right to fully and exclusively enjoy or dispose of things within the extents and under the obligations established by the law.

These are minor rights *in rem* on things belonging to third parties, which may limit the powers of enjoyment normally granted to the owner. These rights are the surface right, the *emphyteusis*, the usufruct, the *usus and habitatio* and the *servitutiones*. The surface right makes reference to the ownership of the building or whatever is resting upon it and is distinguished from land ownership. The *emphyteusis* consists of a right whose extension is very similar to the property right, being however limited by the obligation to improve the land conditions and to pay a periodical rental to the owner. The usufruct consists of the right of temporarily enjoying properties belonging to others by complying with its economic destination. It cannot exceed either the life of the beneficial owner or the duration of 30 years, if granted to corporate bodies. *Usus and*

habitatio are two more limited types of usufruct. The first, is the right to make use of a property and should it be productive, collect its fruits to the extent of his/her own needs and the needs of his/her family. The second, is the right to live in a house within the extents of his/her own needs and the needs of his/her family. *Servitutiones*, are burdens imposed on a real estate (servant land) in favour of another real estate (dominant land). *Servitutiones* can be compulsorily or voluntarily constituted and the most frequent type is the right of way.

4.2.10 Luxembourg

(Contribution of Andersen Legal Real Estate Group)

The property right is the right to enjoy and dispose of assets in the most absolute way, provided that no use is made thereof that is prohibited or that might jeopardise the rights of every other third owners. There are minor right *in rem* in Luxembourg: the *emphyteusis*, the surface right and the usufruct.

The *emphyteusis*, or '*droit d'emphytéose'* allows the holder to use and enjoy property belonging to a third party for a yearly payment made in cash or in kind. It must be granted for a fixed period of time varying between 27 and 99 years. The holder is able to freely transfer his right to any third party, without the prior consent of the owner. The surface right '*droit de superficie'* is a right *in rem* granted for a fixed duration of a maximum of 50 years (renewable), which allows the holder to own and erect buildings, works or plantings on a property belonging to another. For the duration of the contract, ownership of the land and ownership of the buildings thereon are distinct. The *usufructio* allows the temporary enjoyment of a property belonging to another. If granted to an individual, the usufruct generally can only be terminated upon the occurrence of a certain event and its term may not exceed the lifetime of the beneficiary. If granted to a corporate body, a *usufructio* is limited to 30 years.

4.2.11 Netherlands

(Contribution of Marieke Enneman & Leon Hoppenbrouwers)

The property right is defined as the most absolute right one may have with respect to an asset. The owner may exclusively enjoy and dispose of assets and acquire the proceeds of them, provided that the use is not incompatible with the rights of others and the written and unwritten laws.

The property right may relate to an apartment or fraction of a building '*appartementsrecht'* or, within the conceptual framework, Horizontal Property. There are minor rights *in rem*: *emphyteusis* ('*erfpacht'*), the surface right ('*opstalrecht'*), the *usufructio* ('*vruchtgebruik'*). The *emphyteusis* ('*erfpacht*') is a right *in rem* which allows its holder to enjoy an immovable thing belonging to a third party in consideration for a yearly charge (a significant upfront payment may also be agreed upon). It can be contracted for a determined or undetermined period of time. The surface right ('*opstalrecht'*) is a right *in rem* of determined or undetermined duration allowing its holder to own or to acquire buildings, works or plantations in, on or above a property erected on a property belonging to a third party. By establishing a surface right, the ownership of the land and the ownership of the building(s) thereon is split. The usufruct ('*vruchtgebruik''*) is a right *in rem* which allows the owner of the usufruct to temporarily use and enjoy a real or personal property belonging to a third party. The right is in accordance with the regulations as set out in the document granting the right of usufruct or in the absence of such regulations, in accordance with the type of the property concerned and the local customs. The right of usufruct is essentially a temporary right. If it is granted to a private individual, it may not exceed the lifetime of the usufruct owner and will expire on his death, even if he dies before the expiration of the usufruct date. The right of usufruct established for the benefit of a corporate body cannot exceed thirty years.

4.2.12 Spain

(Contribution of Oscar de Santiago)

The property right is defined as the most absolute right one may have with respect to an asset. The owner may exclusively enjoy and dispose of assets and acquire the proceeds of them, provided that the use is not incompatible with the rights of others and the written and unwritten laws. The surface right is a special right over the surface of the plot, which permits the construction of buildings over or under the land that do not belong to the constructor. This right may not exceed 99 years.

The usufructio is the right to use and have the benefit of the plot granted to the owner to another person. This right can be onerous or free and can be for the entire life of the person to whom it is granted or, on the contrary, just for a specified term.

4.2.13 Sweden

(Contribution of Per Månsson)

'*Äganderätt till fast egendom'*, or the property right, includes the power to use, enjoy, transfer the right by either contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest, especially related to the ius edificandi. The right to exclude others is limited by the legal right of access to private land, "*Allemansrätt*" ("Everyman's right") which entitles anyone to walk on other person's property and to stay there temporarily, provided this behaviour is not disruptive and does not cause any damage. This right is not regulated by any statutory provision.

Nyttjanderätt, or usufruct, includes the powers to use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). It also includes the right to benefit from the relevant fruits and the power to exclude others from disturbing the right and the power to bring to action those who do it. Limitations in form of "everyman's right" (as described above) appear. Usufruct in form of a rented apartment is not fully transferable. Subletting has to be approved by the owner of the immovable or by the rent tribunal. It is always temporary.

Användande och boende, or use and inhabit, includes the power to use or inhabit an immovable thing. It is not transmissible (except through subletting). It includes the power to exclude others from disturbing the right and the power to bring to action those who do it. It is always temporary.

Tomträtt, or the surface right, includes the power to use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing), transmissible *intervivos* and *mortis causa*.

Servitut, or easements, includes the power to use something or part of another immovable thing. Easements based on contracts are not automatically transferred with the dominant land. If the easement is registered, is automatically transferred. Perpetual, unless the dominant property is sold with contractual easement not registered in the property register and the easement is not reserved in the transfer agreement.

Hyra, or lease, includes the use of an immovable thing, transmissible with the landlord's consent. The rent tribunal could accept subletting of an apartment if the landlord refuses his consent.

4.2.14 United Kingdom (England and Wales)

(Contribution of Andrew Lewry)

The United Kingdom includes England and Wales, Scotland and Northern Ireland. Each of these three areas comprise different legal jurisdictions and, whilst the laws relating to real property law in each of the jurisdictions are broadly similar, differences nevertheless do arise both in substantive and procedural law. This study will analyse it from the English and Wales legal system point of view.

The principal statutes relating to property law are the Law of Property Act 1925, the Trustee Act 1925 and the Land Registration Act 1925. These statutes divide real property into land or property itself which may be either freehold or leasehold and interests in land, which may be either legal or equitable and which may be enforceable

against all the world (rights *in rem*) or only between the parties themselves (rights *in personam*). There are two kinds of ownership: absolute ("legal") and under trusts or similar arrangements ("equitable" or "beneficial"). Real estate can be owned either absolutely and for an unlimited duration ("freehold") or may be rented from another person under a lease for a specified period ("leasehold"). There are no limits on the length of a lease, but the length chosen may have other consequences. Both a freehold and a leasehold owner may create leases of their property provided that, in the case of a leasehold owner, the owner's own lease allows this and that the new lease created ("sub-lease") is shorter than the owner's own lease.

Freehold ownership equates to absolute ownership in that it provides for the right to own, occupy and dispose of the land and any buildings on the land. Anything that is fixed or annexed to the land or buildings is termed a fixture and is treated as part of the land.

The usufruct is concept is not recognised under the law of England & Wales although the use of trusts is common (i.e. someone other than the legal owner of an estate holds the beneficial interest). There are two types of trust: "Express Trust" – where the owner of a legal title in land expressly declares himself as a trustee of that title for another and "Implied Trust" – arising by operation of law. There are two types of implied trust – resulting trust and constructive trust.

The use and inhabit is similar to the "Licence" (in contrast to a lease). A licence confers a personal permission to occupy, as opposed to an estate in land conferred by a lease. The minimal function of a licence is to suspend liability for trespass. No proprietary right is created. There are two types of licence: "bare licence" (personal permission to enter someone else's land without consideration) and "contractual licence" (permission to be present on land under an express or implied contract).

The easements include the use of something or part of another immovable thing (i.e. right of way) – a positive or negative right of user over the land of another. There must be a dominant tenement and a servient tenement, the easement must "accommodate"

the dominant tenement, the dominant and servient tenements must be owned or occupied by different persons and the easement must be capable of forming the subject matter of a grant. It is transmissible automatically with the dominant land or building.

The Emphyteusis as such is inexistent in England and Wales. Nonetheless, the long lease is a normal estate. A lease (or tenancy) is used when something less than absolute ownership is intended. It provides the leaseholder or tenant with the exclusive right to use, occupy or take the profits from land or the whole or part of a building on set terms. There is no limit on the length of a lease, which may be for a fixed term, by way of a periodic tenancy. A lease will usually be granted for a premium (a capital sum) or for a periodic rent (monthly, quarterly or any other period) or a combination of both. "Long" leases usually last for at least 50 years at a nominal rent containing only limited restrictions and obligations on the tenant. In many cases the tenant under a long lease will effectively be in the same position as if it owned the freehold interest in the land. Usually a lump sum or "premium" is paid at the outset.

The “lease” or “tenancy”, term of years absolute (s.1 (1)(b) Law of Property Act 1925), implies the right of exclusive possession for a determinate period in exchange for rent or other consideration. The demised premises must be identified with certainty, the parties to a lease must be legally competent and the lease is transmissible with the landlord’s consent by way of assignment or sub-lease.

A lease will invariably contain a provision enabling the landlord to end the lease if the tenant is in breach of any of its lease obligations (such as non payment of rent) known as "forfeiture". Forfeiture clauses are subject to a statutory right for the tenant to apply to the Court for denial of this remedy ("relief" from forfeiture) which would normally be granted, subject to the breach in question being corrected.

4.4 Summary of the chapter

In Austria land means a part of the surface of the earth and qualifies as immovable thing. Buildings are considered as part of the land. Real estate (Grundstück) therefore means land and buildings. The concept of immovable thing includes some rights *in rem.*

The definition of immovable thing in Belgium includes land, as well as buildings that are incorporated in the land on which they have been constructed. Rights *in rem* are also considered immovable things.

In Denamrk immovable thing includes land and buildings. Rights *in rem* do not qualify as immovable things.

Immovable thing in Finland is determined as land, building or permanent construction, unextracted minerals and plants attached to an immovable thing and certain rights *in rem*.

In France an immovable thing includes land and buildings which are immovable by their nature, movable things placed thereon for servicing and exploiting the immovable, which are immovable property by their purpose, rights in rem, and immovable things provided by specific provisions of the law. The rights over immovable things that qualify as immovable things are easements, encumbrances (mortgages, privileges, etc.), French leaseholds (*emphytéotique* leases), construction leases.

Immovable things in Germany are land and heritable building rights, condominium or flat ownership and part-ownership.

Greek law considers immovable thing the land and any movable thing firmly attached to the it especially buildings.

In Irish law immovable thing is land, including tenements, and hereditaments, houses and buildings, of any tenure. Tenements are whatever can be the subject of tenure, hereditaments are that which is capable of devolving upon death; these terms are used in a general sense to include such things as houses and land and the rights which arise from then. Tenure denotes the holding of land.

Immovable thing is defined in the Italian Civil Code and includes the land and whatever is physically annexed to it including any buildings firmly and permanently united to the ground. Rights *in rem* are not immovable things.

In Luxembourg immovable thing consists of land and constructions thereon. Rights *in rem* are also immovable things.

In the Netherlands an immovable thing is a tangible object that cannot be physically moved, particularly land or buildings. Some rights over immovable things qualify as immovable things.

The Dutch law system is based upon registered property instead of the immovable things as basic assumption. Some rights over immovable things can also be qualified as registered property, which doesn't make them immovable, but makes it necessary to follow the system of registered property which system requires the use of notary deeds and registration at the Land Register ("Kadaster").

According to Article 334 of the Spanish Civil Code, "immovable things" are the land, buildings, roads and any kind of constructions adhered to the ground, and, generally, whatever is attached to any immovable thing in a fixed o permanent way. According to Article 334 of the Spanish Civil Code, rights *in rem* over immovable things are qualified as immovable things.

In Sweden an immovable thing is land including appurtenances and fixtures. Rights *in rem* are moveable things.

In England and Wales immovable property is land or "real property" and includes things such as buildings and trees and other constructions. Immovable property also includes fixtures attached to the land; whether or not any thing is attached to the land depends on the degree of annexation. Land includes corporeal hereditaments which refer to the physical and tangible characteristics of land and incorporeal hereditaments which refer to intangible rights enjoyed in respect of land.

The property right in Belgium includes the powers to use, enjoy, transfer the right either by contract or succession, to exclude others from disturbing the right and the power to bring to action those who do it and the power to destroy the thing. The usufruct, or usufruit includes the powers of use, enjoy, transfer and exclude others from disturbing

the right and the power to bring to action those who do it. Contractual obligations may exist if usufruct finds its source in a contract and legal limitations do apply. The use and inhabit, includes the powers to use or inhabit an immovable thing. It is not transmissible. Its limitations and duration are the same as to, *mutates mutandis*, the usufruct. Servitudes include the power to use an immovable or part of it. Servitudes are perpetual but a limit can be set by contract. The *emphyteusis* or includes the use, enjoy and is transmissible by contract and succession. The surface right, includes the power of use and enjoy. It is transmissible *intervivos* and *mortis causa*. It is always temporary: maximum 50 years but it can be renewed. The lease, or bail, is a personal right.

The Danish property right, includes the power to use, enjoy, transfer the right either by contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest. The property right is generally perpetual. The usufruct, includes the powers to use, enjoy and, depending on the terms and conditions, may be transmissible by contract. It is temporary and may be established by contract, testament or prescription. The use and inhabit right, includes the power to use or inhabit an immovable thing and may be transmissible depending on the terms and conditions of the contract. May be temporary or not, depending on the contract, and the main obligations are contractual. The easements may be positive and negative. The *emphyteusis* as such is unknown in Denmark. The surface right is very similar to the reference framework but subject to regulations and district plans. The lease, is perpetual unless the contract establishes a limited period of time. Sublease is possible for limited periods under certain circumstances.

In France land is generally holded under the property right. This right is perpetual and absolute. Minor rights *in rem* exist in France: the *usufructio*, the surface right and the *emphyteusis*. The *usufructio* gives the rights and obligations on the income to its owner and is limited in time, not exceeding 30 years. The surface right requires its owner to construct a building on the land and may last between 18 and 99 years. The *emphyteusis* is very similar to the surface right, with the difference that its owner is not obliged to build.

Under German Civil Law, the Property right is defined as the right to possess, use and dispose of land in the most absolute way as long as no prohibited use is made thereof. There are restricted rights in rem, such as condominium ownership, surface right, the *usufructio*, the acquisition of which is generally subject to the same statutory provisions as the property right. Servitudes are also a minor form of rights in rem. The surface right entitles its holder to erect and own or acquire buildings, works or plantations on land which remains in the ownership of the grantor. The right of usufruct is a restricted *right in rem* which allows the usufructuary to temporarily use and enjoy real or personal property belonging to a third party, provided that its substance is preserved. The right of usufruct is typically granted for a long-term period. It can neither be transferred nor pledged. The servitudes are limited rights for an owner of one parcel to use or prevent use of some kind of a neighbouring parcel. The right is connected to a parcel, like rights of way. The lease is not a *right in rem* in Germany.

In Italy the property right is the right to fully and exclusively enjoy or dispose of things within the extents and under the obligations established by the law. There are minor rights *in rem* on things belonging to third parties, which may limit the powers of enjoyment normally granted to the owner. These rights are the surface right, the *emphyteusis*, the usufruct, the *usus* and *habitatio* and the *servitutiones*. The surface right refers to the ownership of the building or whatever is resting upon it and is distinguished from land ownership. The *emphyteusis* consists of a right whose extension is very similar to the property right, being however limited by the obligation to improve the land conditions and to pay a periodical rental to the owner. The usufruct consists of the right of temporarily enjoying properties belonging to others by complying with its economic destination. *Usus* and *habitatio* are two more limited types of usufruct. The first is the right to make use of a property and should it be productive, collect its fruits to the extent of his/her own needs and the needs of his/her family. The second is the right to live in a house within the extents of his/her own needs and the needs of his/her family. *Servitutiones*, are burdens imposed on a real estate (servant land) in favour of another real estate (dominant land). *Servitutiones* can be compulsorily or voluntarily constituted and the most frequent type is the right of way.

The property right in Luxembourg is the right to enjoy and dispose of assets in the most absolute way, provided that no use is made thereof that is prohibited or that might jeopardise the rights of every other third owners. There are minor right *in rem* in Luxembourg: the *emphyteusis*, the surface right and the usufruct. The *emphyteusis* allows the holder to use and enjoy property belonging to a third party for a yearly payment made in cash or in kind. The surface right is a right *in rem* granted for a fixed duration of a maximum of 50 years, which allows the holder to own and erect buildings, works or plantings on a property belonging to another. The *usufructio* allows the temporary enjoyment of a property belonging to another. If granted to an individual, the usufruct generally can only be terminated upon the occurrence of a certain event and its term may not exceed the lifetime of the beneficiary. If granted to a corporate body, a usufructio is limited to 30 years.

In the Netherlands, the property right is defined as the most absolute right one may have with respect to an asset. The owner may exclusively enjoy and dispose of assets and acquire the proceeds of them, provided that the use is not incompatible with the rights of others and the written and unwritten laws. There are minor rights in rem: *emphyteusis*, the surface right, the *usufructio*. The *emphyteusis* is a right *in rem* which allows its holder to enjoy an immovable thing belonging to a third party in consideration for a yearly charge. The surface right is a right *in rem* of determined or undetermined duration allowing its holder to own or to acquire buildings, works or plantations in, on or above a property erected on a property belonging to a third party. By establishing a surface right, the ownership of the land and the ownership of the building(s) thereon are split. The usufruct is a right *in rem* which allows the owner of the usufruct to temporarily use and enjoy a real or personal property belonging to a third party. The right of usufruct is essentially a temporary right. If it is granted to a private individual, it may not exceed the lifetime of the usufruct owner and will expire on his death, even if he dies before the expiration of the usufruct date. The right of usufruct established for the benefit of a corporate body cannot exceed thirty years.

In Spain, the property right is defined as the most absolute right one may have with respect to an asset. The owner may exclusively enjoy and dispose of assets and acquire the proceeds of them, provided that the use is not incompatible with the rights of others and the written and unwritten laws. The surface right is a special right over the surface of the plot, which permits the construction of buildings over or under the land that do not belong to the constructor. This right may not exceed 99 years. The *usufructio* is the right to use and have the benefit of the plot granted to the owner to another person. This right can be onerous or free and can be for the entire life of the person to whom it is granted or, on the contrary, just for a specified term.

In Sweden, the property right, includes the power to use, enjoy, transfer the right by either contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest, especially related to the ius edificandi. The right to exclude others is limited by the legal right of access to private land, which entitles anyone to walk on other person's property and to stay there temporarily, provided this behaviour is not disruptive and does not cause any damage. This right is not regulated by any statutory provision. The usufruct, includes the powers to use, enjoy. It also includes the right to benefit from the relevant fruits and the power to exclude others from disturbing the right and the power to bring to action those who do it. Limitations in form of "everyman's right" (as described above) appear. The use and inhabit, includes the power to use or inhabit an immovable thing. It is not transmissible. It includes the power to exclude others from disturbing the right and the power to bring to action those who do it. It is always temporary. The surface right, includes the power to use, enjoy, and is transmissible *intervivos* and *mortis causa*. The easements, include the power to use something or part of another immovable thing. Easements based on contracts are not automatically transferred with the dominant land. If the easement is registered, is automatically transferred. Perpetual, unless the dominant property is sold with contractual easement not registered in the property register and the easement is not reserved in the transfer agreement. The lease, includes

the use of an immovable thing, transmissible with the landlord's consent. The rent tribunal could accept subletting of an apartment if the landlord refuses his consent.

In England and Wales the principal statutes relating to property law are the *Law of Property Act 1925*, the *Trustee Act 1925* and the *Land Registration Act 1925*. These statutes divide real property into land or property itself which may be either freehold or leasehold and interests in land, which may be either legal or equitable and which may be enforceable against all the world (rights *in rem*) or only between the parties themselves (rights *in personam*). There are two kinds of ownership: absolute ("legal") and under trusts or similar arrangements ("equitable" or "beneficial"). Real estate can be owned either absolutely and for an unlimited duration ("freehold") or may be rented from another person under a lease for a specified period ("leasehold"). There are no limits on the length of a lease, but the length chosen may have other consequences. Both a freehold and a leasehold owner may create leases of their property provided that, in the case of a leasehold owner, the owner's own lease allows this and that the new lease created ("sub-lease") is shorter than the owner's own lease. Freehold ownership equates to absolute ownership in that it provides for the right to own, occupy and dispose of the land and any buildings on the land. Anything that is fixed or annexed to the land or buildings is termed a fixture and is treated as part of the land. The usufruct is a concept that is not recognised under the law of England & Wales although the use of trusts is. The use and inhabit is similar to the "Licence" (in contrast to a lease). The easements include the use of something or part of another immovable thing (e.g. right of way) – a positive or negative right of user over the land of another. There must be a dominant tenement and a servient tenement, the easement must "accommodate" the dominant tenement, the dominant and servient tenements must be owned or occupied by different persons and the easement must be capable of forming the subject matter of a grant. It is transmissible automatically with the dominant land or building. The *emphyteusis* as such is inexistent in England and Wales. Nonetheless the long lease is a normal estate. A lease (or tenancy) is used when something less than absolute ownership is intended.

Chapter 5 – Comparative analysis of the Enjoyment Rights *in rem*

This Chapter refers to comparative tables included in Annex VI – Comparative tables.

5.1 Property right

Let us remember the concept of property right included in the conceptual framework, as that is the starting point for the answers gathered. The analisys of the national institutes will focus only on the aspects that diverge from the conceptual framework.

The property right is full, in the meaning of fullness: it includes all the conceivable powers one may have over a thing. These powers are related with the use, fruition and disposability of the thing. The property right is consolidated in the sense previously defined: it tends to actually expand and include all the powers and functionalities that, in abstract, are included therein. In principle, the property right is perpetual, in the sense that whilst a thing exists, there will be a property right over it, even though at a given time no owner can be determined. This is merely an identification problem.

Property right may be acquired by contract, succession, usucaption, occupation and accession. Only the first method is relevant for this research.

History and Comparative Law show three different paradigms for the transmission of the property right by means of a contract. The first considers that the right is transferred by the contract alone; the second considers that the transference is completed with an autonomous act following the contract and the third considers that both must concur so property may be transferred.

The autonomous act referred to in the previous paragraph is usually the *tradito* of the thing object of the right, when considering movable property, and the registration of the title, when considering immovable property).

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The first paradigm may be considered a causal system, as its core is the title (*titulus*) or cause of the acquisition (*causa adquirendi*), whereas the second is procedural system, as its core is the *modus adquirendi*. The latter is quite accurately represented in the German legal order.

The different forms or species of Property may be found according to two different criterions: titularity and object.

i) The titularity criterion

The first criterion used to distinguish the different species of property is the number of persons (physic or moral) who share the title. If there is but one owner, property is singular. If more than one person share the right, that is joint titularity in the sense that the property right belongs jointly to more than one person. Co-owners have no powers or rights over specific parts of the thing. They have, however, some powers over the entire thing.

Portuguese law admits that the shares may be different in quantity, while they must be equal in nature. This means that one co-owner can have 90% of the right and the other 10%. Yet different in quantity, both co-owners rights are of the same nature.

Co-owners have the power to regulate between them the use of the thing. If they don't use this power, than all can use the thing within two limits: that they use it for its intended use and that they use their powers in such a manner that it doesn't conflict with the other co-owners powers. All co-owners must concur to the maintenance expenses in a proportional way, have equal powers to manage the thing, have the right to demand the division of the common thing, have the right to sell their share and have the right to preferently acquire the other shares.

ii) The property of buildings

Portuguese law includes the concept of horizontal property. This type of property is exclusive for buildings and means that the building is divided into several autonomous fractions sharing a common area. Each of the fractions is the object of a property right called horizontal property and there will be so many property rights over that building as autonomous fractions of it. The right over the fraction of the building includes all the powers found in the property right, plus some powers and obligations found in the co-ownership. In fact, the owner of the horizontal property right is, by that fact, co-owner of the common parts of the building: stairs, external walls, roofs and so on.

Such right in Belgium is named *Droit de propriété* and there are some limitations to the powers it confer. Legal limitations of the right: “pourvu qu’on n’en fasse pas…”, the collision of rights either between two property rights or between property right and other rights i.e. authorship; “théories jurisprudentielles de l’abus de droit et des troubles de voisinage” and the public interest, mainly related to the right to build: règles de l’urbanisme.

The property right in Denmark is named *Ret over fast ejendom*. The main limitations of the right are the property social function, the collision of rights and the public interest.

The property right in France is named Droit de propriété. Includes the power to use, ("droit d'user de la chose" or "usus") enjoy ("droit de percevoir les fruits " or "droit de jouir de la chose" or "fructus"), transfer the right either by contract or succession ("droit de disposer de la chose" or "abusus") and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights, the public interest and the expropriation right. Unusual disturbance of possession is defined by case law. The power to transfer the right may be limited by registered encumbrances or subject to a pre-emption right, requisition right, or expropriation right. These limitations to the transfer of the rights must be limited in time.

The property right in Germany is named *Eigentum*. The main limitations of the right are the property social function, the collision of rights and the public interest. According to

Sec. 28 of the Federal Building Act ("*Bundesbaugesetz*") communities have a statutory pre-emptive right in all private real estate sales to be exercised in pursuance of urban planning purposes. According to Sec. 906 German Civil Code, emissions enacting from neighbouring land have to be tolerated to the extent that the use of the land is not substantially affected. Substantial interferences have to be tolerated if they conform to local custom and if the prevention would be unreasonably expensive. Ownership may be restricted by expropriation against compensation in part or in total if necessary for public welfare, e. g. road construction.

The property right in Italy is named *Proprietà*. According to Article 833 (*Divieto di Atti di Emulazione*) of the Italian Civil Code the owner can not perform any acts - whenever lawful - aiming at no other purposes but to harm or cause annoyance to any third parties.

The property right in the Netherlands is defined as the most absolute right one may have with respect to an asset. The owner may exclusively enjoy and dispose of assets and acquire the proceeds of them, provided that the use is not incompatible with the rights of others and the written and unwritten laws. The property right may relate to an apartment or fraction of a building (*appartementsrecht*).

The property right in Portugal is named *Propriedade* and coincides exactly with the description of the conceptual framework.

The property right in Spain is named *Propriedad*. There may be limitations imposed either by the transferor within the legal limits (i.e., prohibition of disposing of property), or by the owner granting rights *in rem* over the thing on behalf of any third parties and there is a prohibition of acts of emulation ("actos de emulación"): the owner can not perform any acts - whenever lawful - aiming at no other purposes but to harm or cause annoyance to any third parties. Property may be perpetual or temporary: Temporality can be imposed also by the transferor (i.e., property subject to condition subsequent or to a term).

The property right in Sweden is named *Äganderätt till fast egendom*. The right to exclude others is limited by the legal right of access to private land, "*Allemansrätt*" "Everyman's right" which entitles anyone to walk on other person's property and to stay there temporarily, provided this behaviour is not disruptive and does not cause any damage. This right is not regulated by any statutory provision.

The equivalent to the property right in UK is the Freehold. s.1 Law of Property Act 1925 distinguishes two legal estates (freehold and leasehold) and five legal interests or charges (easements, rent charges, mortgages, miscellaneous charges and rights of entry). All other proprietary rights in land are equitable only. Freehold ownership equates to absolute ownership in that it provides for the right to own, occupy and dispose of the land and any buildings on the land.

There is a remarkable similarity in the concept and contents of the property right within the legal orders included in the survey. The property right generally includes the power to use, enjoy, transfer the right by either contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights, the public interest and the "right's abuse", the misuse of a lawful power. The property right is generally perpetual.

5.2 Usufrutus

The *usufructus* is one of the minor rights *in rem*: *ius in re aliena* and entitles its owner to fully use and enjoy a thing during a limited period of time. There is a separation between the property right and some of the powers (the power to use and enjoy) it includes that are transmitted to the usufructuary. The *usufructus* is established in view of its beneficiary, thus presenting itself as *intuitus personae*. This fact justifies its time limits: the usufructus is always limited in time, weather for a number of years or for the lifetime of the usufructuary. Pending its duration, the *usufructus* may be transmitted *inter vivos*, even if not extended, as the contents of the right are kept. The foreclosure of

the time or the dead of the usufructuary enables the owner of the property right to recover the full powers over the thing.

In Belgium the usufructus is named *Usufruit*. Contractual obligations may exist if usufruct finds its source in a contract. The legal obligations: a) before taking possession of the thing, the usufructuary must find some one who gives surety and an inventory must be drawn up; b) during the right, the usufructuary must pay the ordinary costs of the thing and maintain it. The usufruct is always temporary: For physical persons, the right is for life, unless a peculiar time has been set (when the origin is contractual); for legal persons (companies…) the right can be created for maximum 30 years (619 civil code).

In Denmark the usufructus is named *Privatretlige servitutter*. It is transmissible by contract, depending on the terms and conditions of the usufruct. It can be established by contract, by testament or by prescription and is always temporary.

In France the usufructus is named *Usufruit*. The Usufruct is *intuitus personae*. It may be transferred subject to prior approval of the "nu propriétaire" (grantor of the usufruct). It is always Temporary: for natural persons: their entire life, and for corporate entities: 30 years maximum.

In Germany the usufructus is named *Nießbrauch.* According to Sec. 1059 German Civil Code usufruct is not transferable. However, the right to exercise may be transferred to a third party. The beneficiary is not allowed to alter the economic purpose of the land or to transform existing buildings in a substantial manner unless agreed upon. According to Sec. 1041 to 1047 German Civil Code the beneficiary is legally obliged to maintain the condition of the land, including the buildings, if any. In general, the beneficiary has to undertake to insure the property or maintain insurance obligations and/or pay insurance costs. The beneficiary has to meet all public encumbrances as well as private encumbrances, i.e. interests on land charges or mortgages. The usufruct is terminated by the death of the beneficial occupier and/or liquidation of a legal entity (Sec. 1061

German Civil Code). Usufruct expires if it coincides with the ownership of the land (Sec. 1063 German Civil Code).

In Italy the usufructus is named *Usufrutto*. It also includes the right to benefit from the relevant fruits. Transmissible by contract, according to Italian Law can also be acquired by acquisitive prescription. The main legal restriction to the right of usufruct consists in the usufructuary's duty to respect the economic destination of the immovable thing he has the usufruct on. Charges and duties are borne by either the proprietor and the usufructuary. The former shall bear any expenses for extraordinary maintenance and any charges burdening the property, the latter shall pay expenses for ordinary maintenance and any charges burdening the income. It is always temporary: Whenever entitled to the usufruct is an individual the right can not exceed his own life, whilst usufruct can not last over 30 years as it is held by a legal entity.

In the Netherlands the usufructus is named *Vruchtgebruik*. The bare owner ("*boot eigenaar*") can give the usufructuary the right to eat into his capital. It is always temporary.

In Portugal the usufructus is named *Usufruto* and matches the conceptual framework.

In Spain the usufructus is named *Usufructo*. Usufruct can fall either on movable or immovable things. According to Spanish Law usufruct can be acquired either by contract, succession or by acquisitive prescription (in case of immovable things, a prescription of 20 or 30 years). The main legal restriction to the right of usufruct consists in the usufructuary's duty to respect the form and the substance of the immovable thing he has the usufruct on, to the effect that he is obliged to maintain the thing, respect its economic destination and value, and refrain from destroying it, unless law or the usufruct deed allow the opposite. Charges and duties are borne by either the proprietor and the usufructuary. The former shall bear any expenses for extraordinary maintenance and any charges burdening directly the capital, the latter shall pay expenses for ordinary maintenance and any annual charges, contributions and any charges burdening the fruits. Whenever usufruct holder is an individual the right can not

exceed his own life, or the life of the person who dies the last, in case usufruct is constituted on behalf of more than one person, whilst usufruct can not last over 30 years as it is held by a legal entity.

In Sweden the usufructus is named Nyttjanderätt. Limitations in form of "everyman's right" (as described above) appear. Usufruct in form of a rented apartment is not fully transferable. Subletting has to be approved by the owner of the immovable or by the rent tribunal. It is always temporary.

The usufructus does not exist in the UK (England and Wales). The most similar institute is the Trust. The use of trusts is common (i.e. someone other than the legal owner of an estate holds the beneficial interest).

With the exception of England an Wales, there is a remarkable convergence in the usufruct within the legal orders considered.

5.3 Usus and Habitatio

The right of *usus and habitatio* is the faculty of using a thing to satisfy the owners personal and family needs. It is a minor right *in rem*, as its limited by its objective: to satisfy someone's needs and thus is established *intuitus personae*, i.e., in the very interest of the beneficiary. Again, there is a separation between the titularity of the property right and some of its powers, that are delivered to the owner of the right of *usus and habitatio*. The major difference between this right and the *usufructus* is that this is a much more limited right, as no transmission is ever allowed.

In Belgium the *usus and habitatio* is named *Droits d'usage et d'habitation*. It includes the powers to use or inhabit an immovable thing but the droit d'usage may also be set on a moveable thing. It is not transmissible and it includes the power to exclude others from disturbing the right and the power to bring to action those who do it. Its limitations and duration are the same as, *mutatis mutandis*, the usufruct.

In Denmark the *usus and habitatio* is named *Brugsret*. Transmissibility depends on the terms and conditions of the contract. The rights deriving from use and inhabit are usually based on a contract and are limited to the terms and conditions of the contract. Temporality depends of the contract.

In France the *usus and habitatio* is included in the Lease regulation.

In Germany the *usus and habitatio* is named *Dauernutzungsrecht* / *Dauerwohnrecht* and it includes the use or inhabit of an immovable thing.

In Italy the *usus and habitatio* is named *Uso e Abitazione*. According to Article 1021 of the Italian Civil Code, the right of use does not differ from the right of usufruct, but for the extension of the right to the possible fruits, in a sense that whoever holds the use over a productive thing can benefit from its fruits to the extent of his own and his family's needs. As far as the inhabit, Article 1022 of the Italian Civil Code defines it as the right to inhabiting a house within the limit of his own and his family's needs. It is always temporary.

In the Netherlands the *Usus and habitatio* includes the power to use an immovable thing. It may be established by law or contract. It is always temporary.

In Portugal the *usus and habitatio* is named *Uso e habitação* and matches the Conceptual framework.

In Spain *Uso y habitación*. According to Article 524 of the Spanish Civil Code, the right of use consists of the right to use a productive thing (whether movable or immovable) receiving its fruits to the extent of his own and his family's needs. The inhabit right is defined as the right to occupy the pieces of somebody else's house within the limit of his own and his family's needs. Charges and duties are borne, in principle, by the owner, but by the right of use or inhabit holder if he consumes all the fruits of the thing or occupies the entire house. If he only consumes part of the fruits of the thing or occupies part of the house, he only have to contribute to charges and duties if the remaining fruits and uses are not enough to cover them. It is always temporary.

In Sweden the *usus and habitatio* is named *Användande och boende* and matches the description of the conceptual framework.

In England and Wales the *usus and habitatio* corresponds to the Licence.

A licence confers a personal permission to occupy, as opposed to an estate in land conferred by a lease. The minimal function of a licence is to suspend liability for trespass. No proprietary right is created. There are two types of licence: "bare licence" (personal permission to enter someone else's land without consideration) and "contractual licence" (permission to be present on land under an express or implied contract).

There is a remarkable similarity in the use and inhabit within the legal orders considered.

5.4 Surface Right

The surface right is the right to build and/or keep a building or plantation in somebody else's land. This right may be, depending on the title, perpetual or temporary and for it, the owner must pay a fee, either in a single payment, or in periodic instalments. The surfacer becomes owner of the plantation or building and may transmit his property, or part of it, by contract or succession. The property right over the plantation or building is temporary if the surface right is temporary.

In Belgium the surface right is named *Droit de superficie*. It is always temporary: maximum 50 years but it can be renewed.

In Denmark the surface right is known as Building right and is subject to public regulation and district plans. May be temporary or perpetual.

The surface right does not exist in France.

The surface right is named *Erbbaurecht* in Germany. The owner of a heritable building right demands the consent of the owner of the land for the disposition and encumbrance

of the right. Payment of a ground rent ("*Erbbauzins*") by the owner of the heritable building right if agreed (Sec. 9, 9a of the Heritable Building Right Ordinance ("ErbbauRVO"). The ordinance provides in Sec. 1 for further contractual obligations which may be agreed upon and entered into the Land Register to be effective towards legal successors. Heritable building rights may be granted for an indefinite period of time, whereas they are seldom granted for more than ninety-nine years.

In Italy the surface right is named *Superficie*. The building right suspends the effects of the principle of accession (*Accessione*) - according to which any constructions existing on the soil belong to the owner of the soil - so that the holder of the right is entitled (Article 952 of the Italian Civil Code) to build up or to maintain a construction over the soil belonging to a third party not being the ownership of such construction acquired by the owner of the soil. The building right bears a 20 (twenty) year term Statute of Limitation. Whenever the constitution of the right is made for a fixed time, once elapsed this time the building right is extinguished and the owner of the soil acquires the ownership of the building insisting on it.

In the Netherlands the surface right is known as *Opstalrecht* and matches the conceptual framework.

The surface right in Portugal is named *Direito de superficie* and matches the conceptual framework.

In Spain the surface right is named *Superficie*. The surface right excludes the effects of the principle of accession ("*accesión*") - according to which any constructions existing on the soil belong to the owner of the soil – consist of the right to either build or plant, or to maintain a construction or a plantation over the soil belonging to a third party not being the ownership of such construction acquired by the owner of the soil. Registration with the Land Registry is required for the due constitution of surface right. According to Spanish Law surface right is temporary and it only can be granted for a maximum term of 75 years – in case of surface right granted by any public corporation- or 99 years – in case of surface right granted by a private person. Once elapsed this time, surface right is

extinguished and the owner of the soil acquires the ownership of the building existing on it, unless otherwise stated. Besides surface right, it is regulated the right known as "*derecho de sobreelevación*", that consists of the right to raise one or more storeys of a building or to carry out constructions under its soil, acquiring the resultant constructions.

In Sweden the surface right is known as *Tomträtt* and matches the conceptual framework.

The surface right does not exist in England and Wales.

The surface right does not exist in all the legal orders considered. Where it exists there is a remarkable similarity.

5.5 Servitutiones

The *servitutiones* are rights belonging to a subject because of its ownership over land. They are not autonomously transmitted and depend, for its maintenance, of the lands needs. There are, as to the constitution method, two categories of s*ervitutiones*: the legal and the contractual. The first are the ones arising from law and thus creatable by a Court of Law and the latter are the ones arising from contract and merely enforceable in a Court of Law. Legal *servitutiones* are the rights of way and the water *servitutiones*. *Servitutiones* are not autonomously transmitted and are included within the property right they are intended to serve.

In Belgium the *servitutiones* are named *Servitudes*. They include the power to use an immovable or part of it (i.e. right of way). It is transmissible automatically with the dominant land or building. Servitudes are perpetual but a limit can be set by contract. The right comes to an end if not used during 30 years (706 Civil code). People may apply to the judge to suppress an easement that has lost any utility (710 bis Civil Code added in 1983). Legal easements have their own rules.

In Denmark the *servitutiones* are named *Servitut*. They allow the use of something or part of another immovable thing. Transmissible automatically with the dominant land or building. Danish law distinguishes between "positive easements" and "negative easements". A positive easement allows the holder of the easement to make use of an immovable thing or property whereas the negative easement imposes an obligation on the owner of an immovable thing or property to refrain from certain acts. Negative easements can be deviated from by a public district plan.

In France the *servitutiones* are named *Servitudes*. They allow the use of something or part of another immovable thing. Transmissible automatically with the dominant land or building. Easements are attached to the land. They are created either by agreement (conventional easements) or by virtue of law (planning easements). Both easements created by operation of law and recorded conventional easements are transferable. Perpetual

In Germany the *servitutiones* are named *Dienstbarkeiten*. They allow the use of something or part of another immovable thing. Transmissible automatically with the dominant land or building. German Civil Law distinguishes between restricted personal easements ("*persönliche beschränkte Dienstbarkeiten*") and easements in terms of Sec. 1018 German Civil Code ("*Grunddienstbarkeit*"). Whereas the latter always entitles the owner of another real property, the restricted personal easement is charged in favour of an individual person. Land may also be charged so that certain acts may not be done by the land owner (i.e. a specific kind of building may not be built or that rights deriving from the ownership in the land may not be exercised). According to Sec. 1092 German Civil Code restricted personal easements are not transmissible. Even the right to exercise may not be transferred to a third party unless being agreed upon. According to Sec. 1021 German Civil Code the holder of the right has to be considerate of the interests of the landowner while exercising the right. Further obligations conform to the specific right and may be contractually agreed upon. Restricted personal easements expire with death of the individual or at the time agreed upon.

In Italy the *servitutiones* are called *Servitù Prediali*. They allow the use of something or part of another immovable thing. Transmissible automatically with the dominant land or building. According to Italian Law - Easements bear a 20 (twenty) year term Statute of Limitation. Under this point of view Italian Law makes a distinction between "Positive Easements" - which allow the owner of the dominant tenement to make a direct use of the servient tenement so that the owner of the latter shall only refrain from disturbing such use - and "Negative Easements" -consisting in the obligation not to do something (i.e. not to build up, not to add a storey to a building etc.) binding upon the owner of the servient tenement. As far as the Positive Easement, the period provided by the Statute of Limitation starts running from the ceasing of the use of the servient tenement, whilst, as far as the "Negative Easements" it starts running on the occurring of any events violating the negative easement's content (i.e. the owner of the servient tenement build up a gazebo) and yet the owner of the dominant tenement does not complain.

In the Netherlands the Servitutiones allow the use of something or part of another immovable thing. Transmissible automatically with the dominant land or building

The *servitutiones* are called *Servidão* in Portugal. They allow the use of something or part of another immovable thing. Transmissible automatically with the dominant land or building

Servidumbre is the Spanish designation for *servitutiones*. They allow the use of something or part of another immovable thing. Transmissible automatically with the dominant land or building. Also entails the power to exclude others from disturbing the right and the power to bring to action those who do it. According to Articles 530, 531 and 533 of the Spanish Civil Code, Spanish law singles out four main categories of easements: "*servidumbres reales*" (real easements), that consist of the encumbrance imposed on a land (servient tenement) on behalf of another pertaining to a different owner (dominant tenement); "*servidumbres personales*" (personal easements), that consist of attribution to one or more people or a community, any partial profit that a tenement is susceptible to provide; "*servidumbres positivas*" (affirmative easements), where the servient owner allows the dominant owner to do something in the servient

tenement; "*servidumbres negativas*" (negative easements), where the servient owner stops the dominant owner from doing something that it would be allowed without the easement.

According to Spanish Law, continuous and apparent easements can be acquired by acquisitive prescription of 20 years. Necessary works for the use and maintenance of the easement are borne by the dominant owner. If they are several, or if the servient owner uses in some way the easement, they will pay the works proportionally to the profit that each one of them obtain from the works. Although the easements are in principle perpetual, the doctrine and case law admits the possibility of granting them for a certain period of time. Easements can be extinguished by non-use during a term of 20 years that starts running from the ceasing of the use of the servient tenement in case of discontinuous easements, and from the day in which an act in opposition to the easement has taken place, in case of continuous easements.

In Sweden the *servitutiones* are called *Servitut*. They allow the use of something or part of another immovable thing. Easements based on contracts are not automatically transferred with the dominant land. If the easement is registered, it is automatically transferred. Perpetual, unless the dominant property is sold with contractual easement not registered in the property register and the easement is not reserved in the transfer agreement.

The *servitutiones* are known as Easements in England and Wales.

The Easements include the use of something or part of another immovable thing (i.e. right of way) – a positive or negative right of user over the land of another. There must be a dominant tenement and a servient tenement, the easement must "accommodate" the dominant tenement, the dominant and servient tenements must be owned or occupied by different persons and the easement must be capable of forming the subject matter of a grant. It is transmissible automatically with the dominant land or building.

There is a remarkable convergence in the easements within the legal orders considered.

5.6 Emphyteusis

The *emphyteusis* consists of splitting the property right into two different domains: the direct domain and the useful domain, each belonging to a different subject. The direct domain remains with the landlord and the direct domain passes to the tenant, who will pay an annual fee. The *emphyteusis* is perpetual and both domains are transmissible by contract, will or intestate succession. The *emphyteusis* however, will finish if both domains are reunited in the same subject, if the land or building is lost or the fee in unpaid. Both domains may be reunited if the landlord acquires, by contract or succession, the useful domain, or if the tenant acquires, by contract, succession or remission of the fee, the direct domain. The remission of the fee is a down payment and is a right of the tenant after a minimum number of years. *Subemphyteusis* is prohibited.

In Belgium the *emphyteusis* is named *Emphytéose*. The obligation to pay is fundamental. The duration is minimum 27 years and maximum 99 years.

The *emphyteusis* does not exist in Denmark.

In France the *emphyteusis* is called *Bail emphytéotique* and is transmissible by contract and succession. Created by virtue of a contractual relation. It must be registered at the land registry. Temporary: maximum of 99 years.

In Germany the *emphyteusis* is called *Erbpacht*. It was formerly defined as a right to operate an agricultural business on a leased property. Besides the legal institution of "heritable building right" ("*Erbbaurecht*") German law currently does not provide for *emphytheusis* any more.

In Italy the *emphyteusis* is known as *Enfiteusi*. It is firstly to be remarked that Emphiteusis is no longer applied in now days legal practice. Considering its wideness, the right of *emphyteusis* is the most similar to the right of property and the reason of its obsolescence lays in the fact that - actually - the *emphyteusis* holder is awarded the right to redeem the tenement by paying a consideration summing up to the amount of the annual instalments capitalisation, not being the ground landlord allowed to refuse his

consent to the redemption. Nevertheless, in case the long lease holder failed in paying two yearly instalments or in improving the tenement, the ground landlord is entitled to go to court to demand either the devolution of the tenement - i.e. the expiry of the right of *emphyteusis*.

In the Netherlands the *emphyteusis* is known as *Erfpacht*. Requires the payment of a rent. May be temporary or perpetual.

In Portugal the *emphyteusis* is called *Enfiteuse* perfectly matches the conceptual framework. It is no longer in use.

In Spain the *emphyteusis* is called *Enfiteusis* and is transmissible by contract and succession. *Emphyteusis* is an institution in disuse in the current legal practise. One of the reasons of its obsolescence lays in the fact that *emphyteusis* holder may redeem the *emphyteusis*. In case of purchase and sale or donation in payment ("*dación en pago*") of the tenement, ground landlord has first refusal and pre-emption rights. In case of onerous transmission of the tenement, parties can agree a right of "*laudemio*" (*laudemium*) on behalf of the ground landlord – money consideration that *emphyteusis* holder have to pay to the ground landlord. Contributions and taxes over the tenement are borne by the *emphyteusis* holder, who is also obliged to pay the relevant instalments. Although *emphyteusis* is in principle perpetual or constituted for an indefinite time, the *emphyteusis* holder is allowed to redeem the *emphyteusis* by paying the ground landlord a money consideration, not being the ground landlord allowed to refuse his consent to the redemption. Notwithstanding, parties can agree that the redemption cannot take place during the life of the *emphyteusis* holder or any certain person, or during a term that does not exceed 60 years. In the event that the *emphyteusis* holder failed in paying three yearly instalments or in fulfilling the agreed conditions, or that he seriously damaged the tenement, the ground landlord is entitled to claim the refund of the tenement.

The *emphyteusis* does not exist in Sweden.

The *emphyteusis* does not exist as such in England and Wales. Some leaseholds (long leases) have similar nature and effects. A lease (or tenancy) is used when something less than absolute ownership is intended. It provides the leaseholder or tenant with the exclusive right to use, occupy or take the profits from land or the whole or part of a building on set terms. There is no limit on the length of a lease, which may be for a fixed term or by way of a periodic tenancy or even for an individual's lifetime. A lease will usually be granted for a premium (a capital sum) or for a periodic rent (monthly, quarterly or any other period) or a combination of both. "Long" leases usually last for at least 50 years at a nominal rent containing only limited restrictions and obligations on the tenant. In many cases the tenant under a long lease will effectively be in the same position as if it owned the freehold interest in the land. Usually a lump sum or "premium" is paid at the outset.

The *emphyteusis* is a decaing institution in most Member-states. Nevertheless, there is significant convergence.

5.7 Lease

The lease is not a right *in rem* but only a contractual right. Nevertheless, has this view doesn't appear to be shared in other European legal orders, I decide to include its analysis within this section.

The lease is the temporary transference of the use of an immovable thing in exchange for a pecuniary compensation. The lease may have different objects and those objects will determine the applicable law: land or buildings. The lease of land is regulated in special laws, depending on the intended use of it: agriculture, Law of the rural lease, or forest exploration, Law of the forest lease.

In Belgium the lease is called *Bail*. It includes the power to use an immovable thing (or movable) and is transmissible with the landlord's consent.

In Denmark the lease is known as *Leje*. It includes the use of an immovable thing. It is transmissible with the landlord's consent. Sublease can be made of up to half of the

rooms of the lease or the lease in whole for up to 2 years under certain circumstances, The Danish Lease Act §§ 69-72. Perpetual unless the lease contract is for a limited period of time.

In France the lease is called *Bail*. It includes the use of an immovable thing and is transmissible with the landlord's consent. Created by virtue of contractual relationship. Lease law contains many restrictions (mainly directed toward protecting tenants). There is a distinction between residential leases, mainly subject to a 1989 law, and commercial leases, subject to a 1953 decree on commercial leases, which was recently incorporated into the Commercial Code. The lease is temporary: inhabitation - minimum of 3 years for leases granted by individuals, and 6 years for leases granted by corporate entities; commercial - minimum of 9 years, with a break clause at every 3-year period.

In Germany the Lease is the use of an immovable thing, transmissible with the landlord's consent. Besides the rental payment obligation the parties may constitute further main obligations, i.e. the lessee's obligation to redecorate the rented property. Although the lessee may theoretically lease property for longer than thirty years under a short term lease Sec. 567 German Civil Code provides that either party may terminate the lease after that period, subject only to the statutory notice requirements. In Germany leases are not rights *in rem*. Registered leases are defined in Sec. 31 to 42 of the Condominium Act ("Wohnungseigentumsgesetz, WEG"). Such registered leases have to be registered with Section II of the Land Register as encumbrances and thus constitute rights *in rem*. Transmissible and inheritable (Sec. 33 Condomium Act). Includes the power to exclude others from disturbing the right and the power to bring to action those who do it (Sec. 34 para. 2 Condominium Act). According to Sec. 33 Condomium Act the Lessee has to maintain the condition of the premises and has to meet the costs of maintenance and be considerate of the interests of other beneficiaries while exercising the right. May be perpetual if agreed upon (subject to Sec. 41 Condominium Act).

The lease is named *Locazione* in Italy. It includes the use of an immovable thing and is transmissible with the landlord's consent. Actually - according to Article 1572 of the Italian Civil Code - the Lease is a contract whereby one party undertakes to make another party enjoy an immovable thing (enjoyment of also movable things is generally provided) for a given time and against a given consideration.

The lease in the Netherlands allows the use of an immovable thing, and is transmissible with the landlord's consent.

The Portuguese designation for lease is *Arrendamento* and matches the conceptual framework.

The lease in Spain is known as *Arrendamiento*. According to Article 1543 of the Spanish Civil Code - the lease is a contract whereby one party undertakes to make another party enjoy a thing (movable or immovable) for a given time and against a given price.

The Swedish expression for lease is *Hyra*. It allows the use of an immovable thing and is transmissible with the landlord's consent. Subletting of an apartment could be accepted by the rent tribunal if the landlord refuses his consent.

In England and Wales the "lease" or "tenancy", term of years absolute (s.1 (1)(b) Law of Property Act 1925), implies the right of exclusive possession for a determinate period in exchange for rent or other consideration. The demised premises must be identified with certainty, the parties to a lease must be legally competent and the lease is transmissible with the landlord's consent by way of assignment or sub-lease.

There is a big similarity in the lease within the legal orders considered.

5.8 Table of equivalence

Right → Country ↓	Property right	Usufructus	Usus and Habitatio	Servitutiones	Emphyteusis	Surface Right	Lease	Possession
Austria								
Belgium	Droit de propriété	Usufruit	Droits d'usage et d'habitation	Servitudes	Emphytéose	Droit de Superficie	Bail	Possession
Denmark	Ret over fast ejendom	Privatretlige servitutter	Brugsret	Servitut	Inexistent	Building right	Leje	
Finland								
France	Droit de propriété	Usufruit		Servitudes	Bail emphytéotique		Bail	Prescription acquisitive
Germany	Eigentum	Nießbrauch	Dauernutzungsrecht / Dauerwohnrecht	Dienstbarkeiten	Erbpacht	Erbbaurecht		Besitz
Greece								
Ireland								
Italy	Proprietà	Usufrutto	Uso e Abitazione	Servitù Prediali	Enfiteusi	Superficie	Locazione	
Luxembourg								
Netherlands		Vruchtgebruik			Erfpacht	Opstalrecht		
Portugal	Direito de propriedade	Usufruto	Uso e habitação	Servidão	Enfiteuse	Direito de superficie	Arrendamento	Posse
Spain	Propriedad	Usufructo	Uso y habitación	Servidumbre	Enfiteusis	Superficie	Arrendamiento	
Sweden	Äganderätt till fast egendom	Nyttjanderätt	Användande och boende	Servitut	Inexistent	Tomträtt	Hyra	Besittning
UK	Freehold	Inexistent (most similar institute is the Trust)	Licence	Easements	Inexistent (most similar institute is the long lease)	Inexistent	Lease	Possession

Table 9 - Synoptic table, enjoyment rights in EC

Chapter 6 - Conveyancing

6.1 Conveyance

This section refers to the answers included in Annex VII – Answers to the questionnaires Conveyance.

6.1.1 Austria

(Contribution of Preslmayr & Partners)

The Austrian system of property transfer is based on the Zwieaktigkeit, which means that two transactions are necessary in order to acquire a piece of property: the sales contract, written and signed with the participation of a notary and the registration in the Land Register (Grundbuch). This proceeding is called "Einverleibung" and has to be executed at the competent Court of first instance as the Land Register's Court (Bezirksgericht als Grundbuchsgericht), of the district where the property is situated.

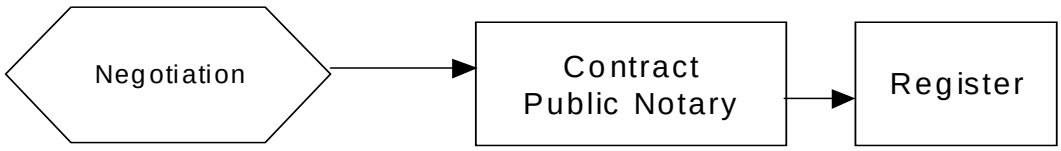

Figure 2 - Conveyancing procedure in Austria

6.1.2 Belgium

(Contribution of Pascale LECOCQ, Université de Liège)

The purchase of a property is made by the conclusion of a sales agreement governed by the rules of general law. According to these rules, the sale will require a written contract

for the purposes of evidencing the transaction and payment of the registration duties. This written contract may be drafted privately, i.e. without the intervention of a notary public. It is then commonly called a “precontract”. The final contract must be a notary act, so the transfer can be registered (“transcription”/ “overschrijving”).

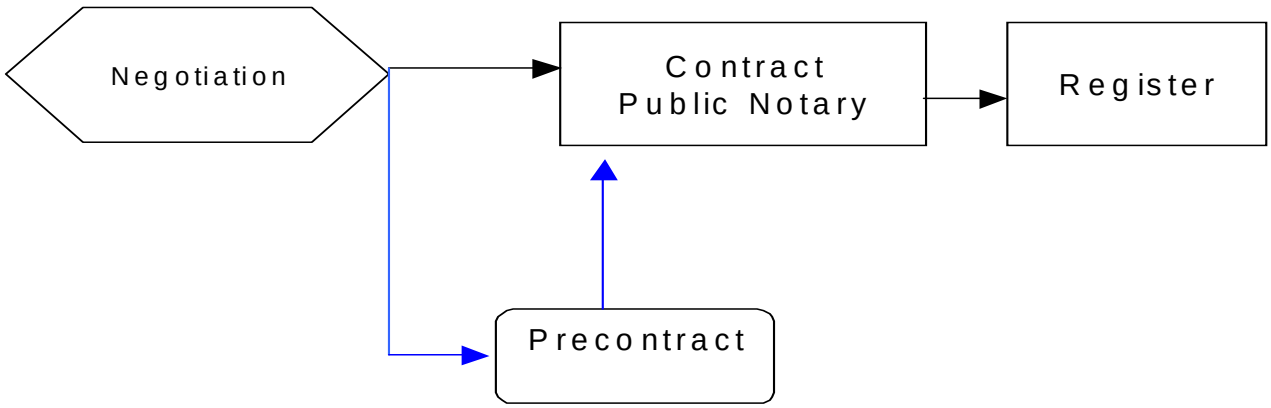

Figure 3 - Conveyancing procedure in Belgium

The Precontract (preliminary agreement) in Belgium – compromis – is optional. It can not be registered at the “Conservation des hypothèques” (immovable publicity, permitting the act to have effect towards third parties), but it can be registered at the “bureau de l’enregistrement” (tax formality). The purchase agreement is a Formal contract (notary act), so to have effect towards third parties, (property, usufruct, use and habitation, easement, emphyteusis, surface right).

The lease is an Informal contract (without notary intervention)

The conveyance must be entered into the Land register - Registre de la Conservation des hypothèques. Otherwise, the act is valid but cannot have any effect regarding third parties.

6.1.3 Denmark

(Contribution of Kasper D. Blangsted Henriksen)

The Precontract is optional, but usually a purchase agreement is concluded. This agreement is not subject to land register. The final contract is a notary deed of ownership and is necessary for registration of the title. Upon registration, the title is registered in the land register which is open to the public.

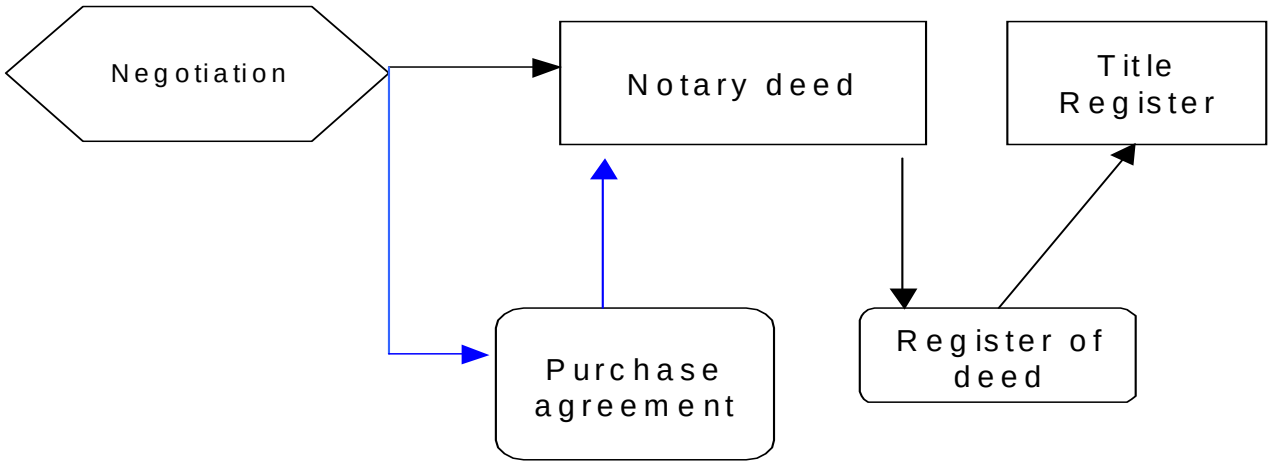

Figure 4 - Conveyance procedure in Denmark

6.1.4 Finland

(Contribution of Andersen Legal Real Estate Group)

The contract transferring a ***right in rem*** must be written and signed within the presence of a Notary, who will communicate the conveyance to the National register.

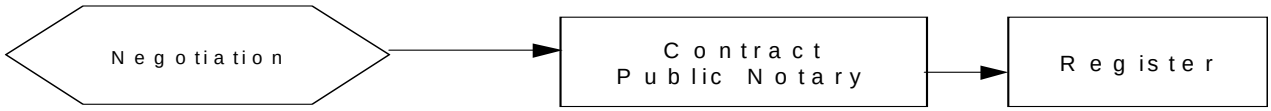

Figure 5 - Conveyance procedure in Finland

6.1.5 France

(Contribution of Antoine Allez)

The notary's role is to record the sale so that it may be transcribed at the land registry. Under French civil law, an informal sale (*i.e.*, not evidenced by a notary deed) is valid, but French law requires it to be recorded for tax purposes and to be enforceable against third parties. The usual procedure includes therefore a precontract, *(promesse synallagmatique de vente).* A unilateral promise to sell has to be recorded. If it is not, this preliminary agreement is void. A bilateral promise to sell need not be recorded unless the parties have agreed to it or if the agreement contains a substitution clause. Bilateral precontracts may be recorded at the Land Registry.

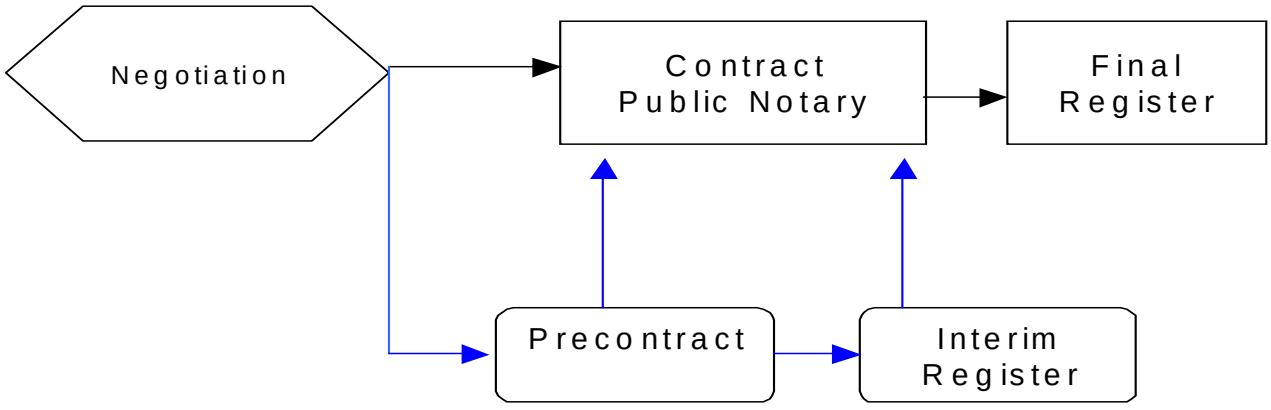

Figure 6 - Conveyancing procedure in France

6.1.6 Germany

(Contribution of Detlev Stoecker & Amel Al-Shajlawi**)**

According to Sec. 313 German Civil Code agreements concerning land or interests in land including some types of preliminary contracts, require notarisation to be legally effective. Even if the purchase agreement is part of a set of agreements where parts of it merely require written form (i.e. lease agreement), all agreements legally connected with the real property purchase agreement must be recorded to prevent the entire set of agreements being void. In the new Federal States of reunited Germany (territory of former "German Democratic Republic, GDR") and East Berlin parties formerly entitled to properties may have claims to the re-conveyance of the relevant property if said property has been taken from them away illegally, in particular through expropriation in the former GDR. The Act Regulating Unresolved Asset Questions ("Vermögensgesetz – VermG") prohibits an entitled person to dispose of a property if a claim to re-conveyance is still pending. Alternatively, claims to re-conveyance may be assigned by the former owner of the property, which requires notary form. Registration of the transfer of title can only be effected if the clearance certificate ("Unbedenklichkeitsbescheinigung") regarding the payment transfer tax has been issued by the tax authorities and local authorities have confirmed that they are not entitled to a right of pre-emption or will not exercise any such existing right. The grant of rights *in rem* must be notarised and entered in the land register (Grundbuch). The grant of a surface right is entered in a special register, the surface right register (Erbbaugrundbuch).

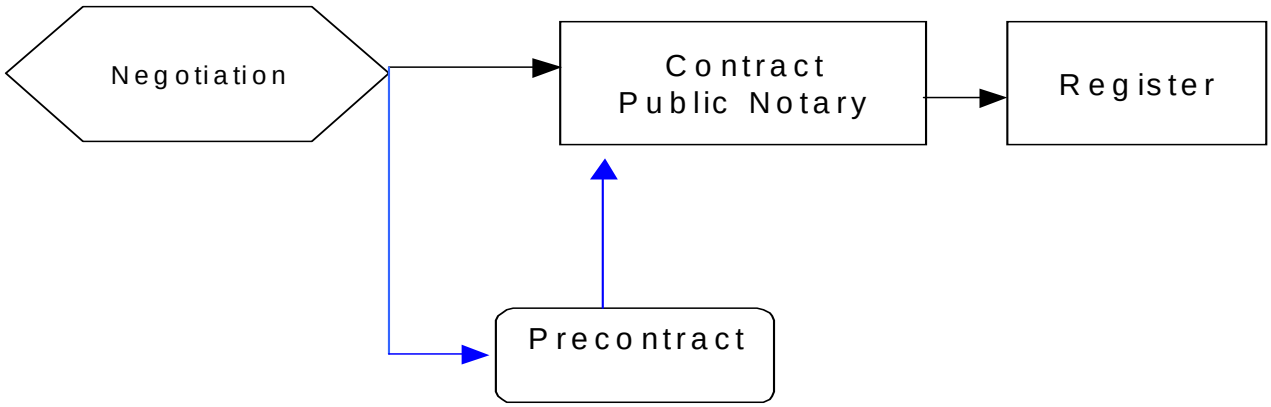

Figure 7 - Conveyancing procedure in Germany

6.1.7 Greece

(Contribution of Andersen Legal Real Estate Group)

The grant of rights *in rem* must be notarised and entered in the land register. A precontract may be celebrated.

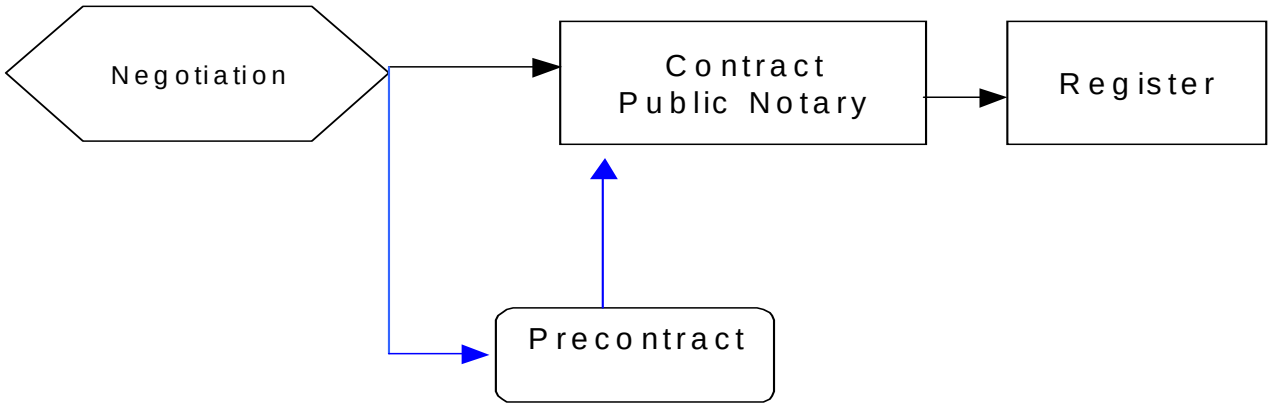

Figure 8 - Conveyancing procedure in Greece

6.1.8 Ireland

No answers where gathered in this matter.

6.1.9 Italy

(Contribution from Ugo A. Milazzo)

Under Italian Law precontracts are optional by definition, though - particularly with reference to immovable things and rights - actually pre-contracts always apply. It is to be remarked that - according to Article 1351 of the Italian Civil Code - pre-contracts are void unless made in the same form provided by Law for the validity of the relevant definitive contract, i.e. – as better hereinafter specified – the written form. For the purpose to make it publicly known to any third parties pre-contracts can be posted in the Land Register. It is however provided (Article 2645*bis*, fourth Paragraph of the Italian Civil Code) that the effect of the posting of any pre-contracts in the Land Register expires whenever - elapsed one year from the date scheduled by the parties for the execution of the relevant definitive contract and, in any case, elapsed three (3) years from the date of the aforementioned posting - the relevant definitive contract or any other deed however giving execution to the provisions contained in the pre-contract is not posted in the Land Register. According to Article 2645*bis*, first Paragraph, of the Italian Civil Code, - even though subject to any conditions or relevant to building to be constructed or under construction should they result from a notary act or a private deed with authentic signature or judicially assessed - pre-contacts are subject to the register whenever providing the execution of any of the following contracts:

1. Contracts transferring the property right over immovable things.

2. Contracts constituting, transferring or modifying (i) the right of usufruct over immovable things, (ii) the right of building lease (iii) the right of either the Landlord or of the emphyteusis holder.

3. Contracts constituting the ownership in common of the aforementioned rights.

4. Contracts constituting or modifying (i) the easements (ii) the right of use over immovable things (iii) the right of occupancy.

For the purposes of their validity - and under penalty of voidness - Italian Law provides the only requirement of the written form. Hence, it is necessary to draw down in writing - no matter however in the form of notary act or private deed indiscriminately - (i) any contracts transferring the right of property and, generally, any other real rights over an immovable things, (ii) any contracts however constituting, modifying or extinguishing whichever real right over an immovable thing, and finally (iii) lease contracts lasting more than nine years. The form of notary act or of authenticated private deed is however required for the purposes of posting the aforementioned contracts in the Land Register.

The posting of the contracts in the Land Register serves the purpose to make it publicly known to any third parties. Basically, as a written contract is perfectly valid and binding upon the parties, the posting makes the difference insofar as - should a dispute on the actual and lawful title to the right over an immovable thing rise between one or more people - the settlement shall be definitively in favour of the first one who posted the contract. According to Articles 2643, 2645 and 2653 of the Italian Civil Code shall be made public by filing in the Land Register (i) Contracts transferring the right of property over an immovable good or otherwise (ii) constituting, transferring, modifying or extinguishing any Real Security Rights over an immovable good, (iii) lease contracts lasting more than nine years and (iv) partnership or incorporation contracts whereby an immovable thing is contributed upon an open-ended or over nine (9) year enjoyment, (v) unilateral acts – such as the statement of redemption relevant to a sale with right of redemption - producing the same effects and (vi) judgments and any other judicial proceedings suitable to produce such effects.

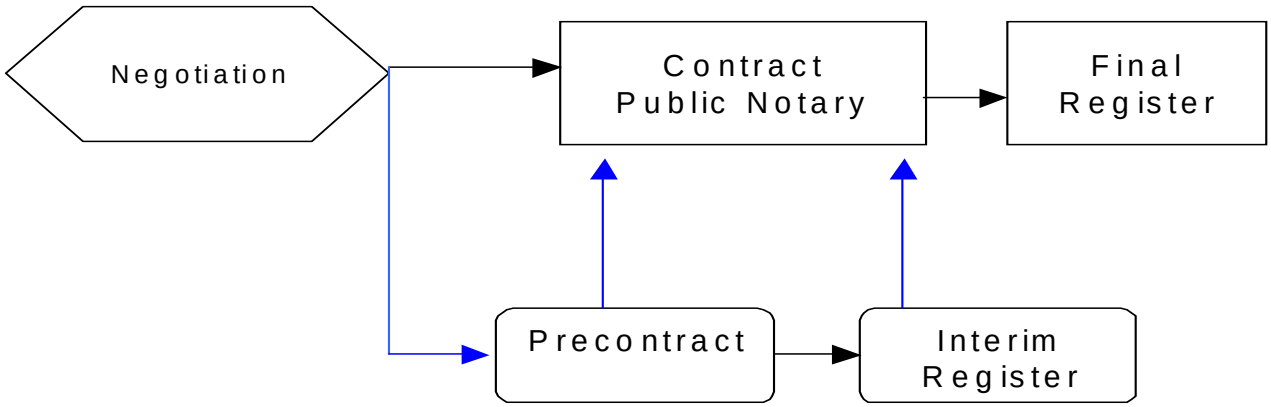

Figure 9 - Conveyance procedure in Italy

6.1.10 Luxembourg

No answers were gathered in this matter.

6.1.11 Netherlands

(Contribution of Marieke Enneman & Leon Hoppenbrouwers)

The transference of rights *in rem* in the Netherlands is a notary act subject to the national register. Ownership of registered property will only appear after registration of the notary deed in the Land Register. The ownership is transferred at the time and date that the deed is registered.

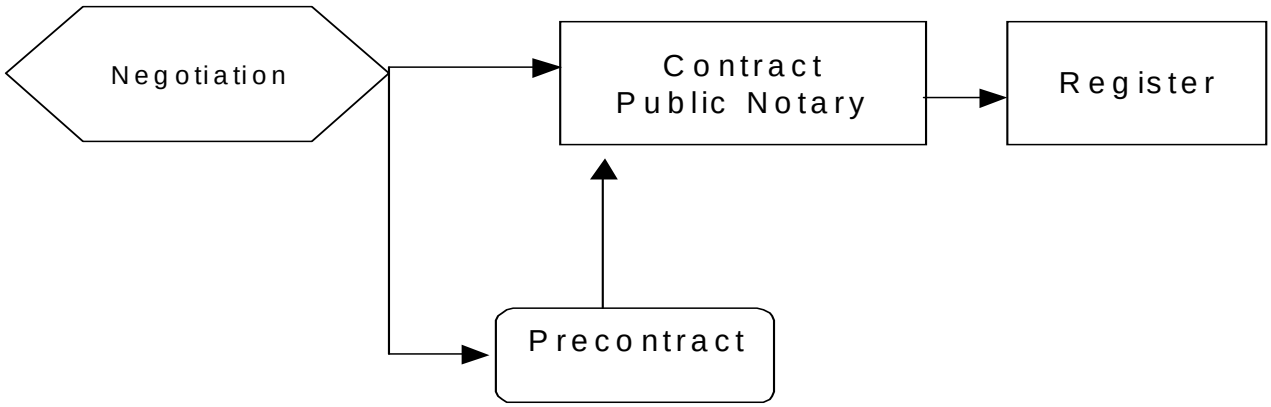

Figure 10- Conveyance procedure in The Netherlands

6.1.12 Portugal

The precontract is optional but can be registered. The purchase agreement is a formal act with a notary intervention. The register is necessary to allow the enforceability against third parties.

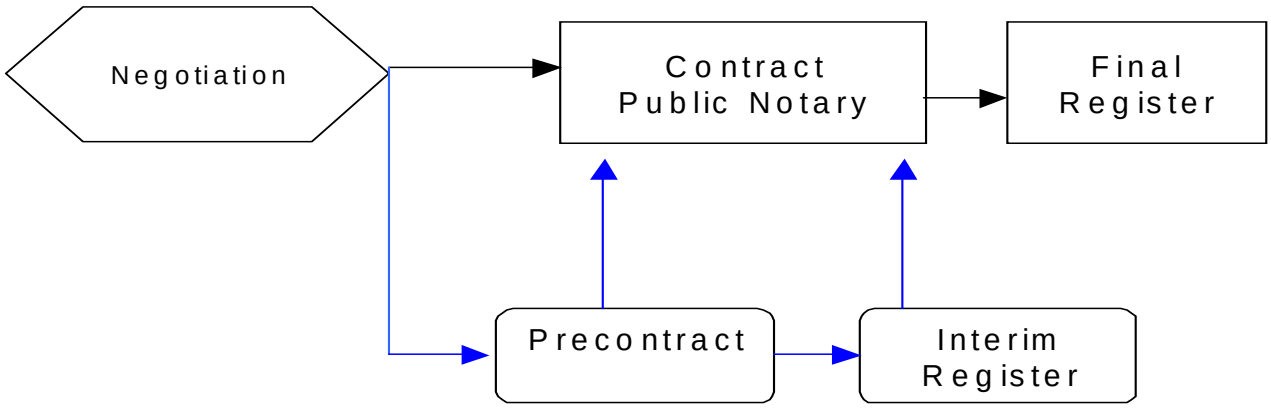

Figure 11 - Conveyance procedure in Portugal

6.1.13 Spain

(Contribution of Oscar de Santiago)

Under Spanish Law precontracts are optional by definition, though - particularly with reference to immovable things and rights – actually precontracts are usual. Pre-contracts are void unless made in the same form provided by Law for the validity of the relevant definitive contract (i.e., the written form). The only precontract that can be registered with the Land Register is the Option Right Agreement (section 14 Reglamento Hipotecario). All other precontracts cannot be registered as they entail personal rights among the parties, therefore with no access to the Land Register.

According to Article 1280 of the Spanish Civil Code, it is necessary to draw down in the form of notary act the following contracts: i) any contracts constituting, transferring, modifying or extinguishing whichever right *in rem* over an immovable thing; ii) lease contracts over immovable things lasting more than 6 years, whenever they must harm third parties. On the other hand, it is necessary to draw down in writing – no matter however in the form of notary act or private deed indiscriminately – any contract in which the consideration of any of the parties exceed of Pesetas 1,500 (9,02 €). The form of notary act or of authenticated private deed is however required for the purposes of posting the aforementioned contracts in the Land Register.

According to Articles 1278 and 1279 of Spanish Civil Code, contracts are compulsory, whatever their form, if they fulfil all the essential requirements for their validity. If written form or any special form is legally demanded, the parties may demand the fulfilment of such a form, but the absence of this form does not affect the validity of the contract. The posting of the contracts in the Land Register serves the purpose to make it publicly known to any third parties, granting a priority or preference right to the person who first post the contract.

According to Article 2 of the Spanish Mortgage Act, the following contracts can be registered with the Land Register: (i) titles transferring or declaring the property over an immovable thing (ii) titles constituting, acknowledging, transferring, modifying or

extinguishing any rights *in rem* over an immovable thing, (iii) acts or contracts adjudicating immovable things or rights *in rem*, (iv) court judgments declaring legal disability for managing, absence, decease, or any judgment modifying the individuals' capacity of exercise civil rights in relation to the free use of theirs goods, (v) lease contracts over immovable things, sublease, assignments and any subrogation of such rights (vi) title of acquisition of goods from the state, civil or ecclesiastical corporations.

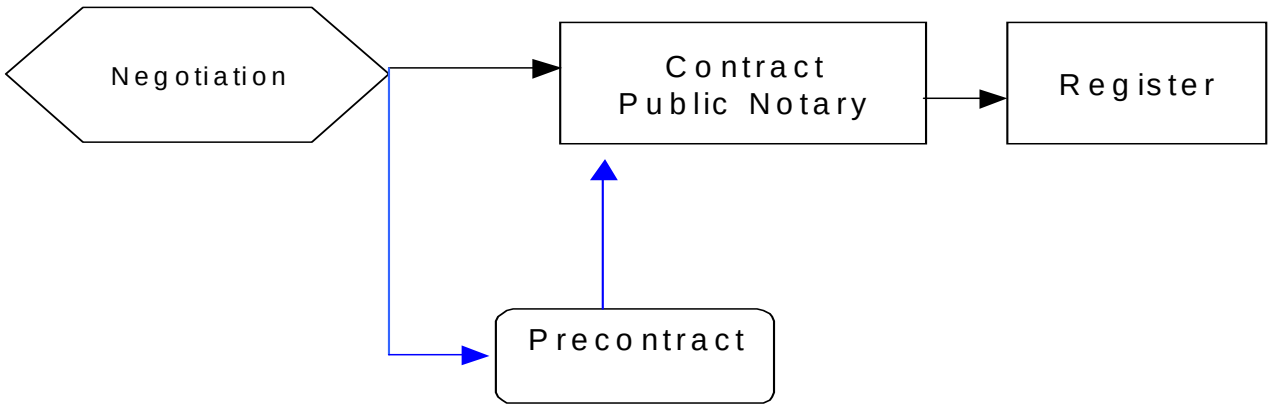

Figure 12 - Conveyance procedure in Spain

6.1.14 Sweden

(Contribution of Per Månsson)

The Precontract is optional and not legally binding. The final contract is formal but does not require the notary intervention. It is subject to the Land register.

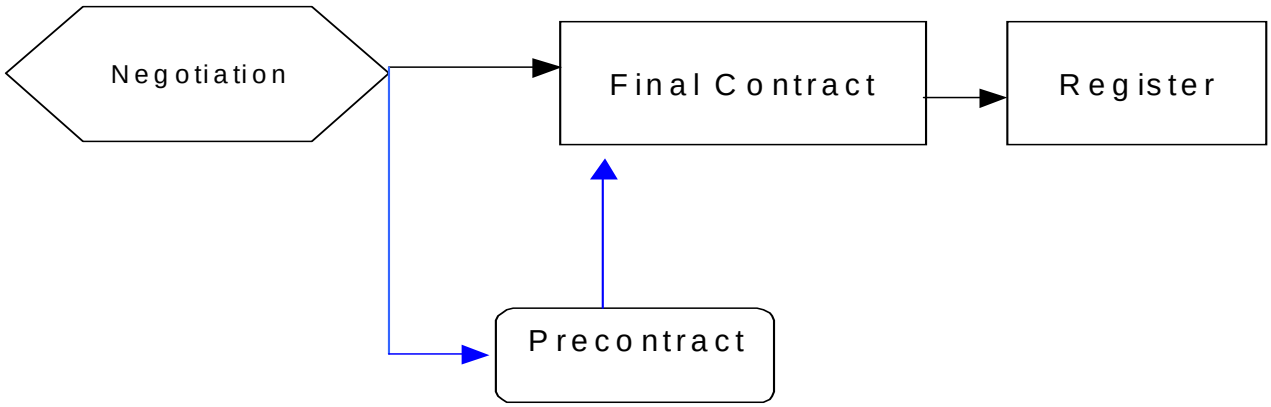

Figure 13 - Conveyance procedure in Sweden

6.1.15 UK (England and Wales)

(Contribution of Andrew Lewry)

At the pre-contract stage, the seller will normally prepare a pre-contract package (including the draft contract) for the buyer. The buyer will then make a number of pre-contract searches and enquiries, investigate the title and approve the draft contract. Once the draft contract is approved, contracts are exchanged. At this point, neither party can withdraw from the process without being in breach of contract. The buyer then prepares the purchase deed which the seller approves and the transfer is completed. Any transfer of an interest in land must be made in writing and must be signed as a deed. It is compulsory to register all transfers of freehold land and leases for a term of over 21 years at HM Land Registry. Where the land has already been registered an application must be made to change the register.

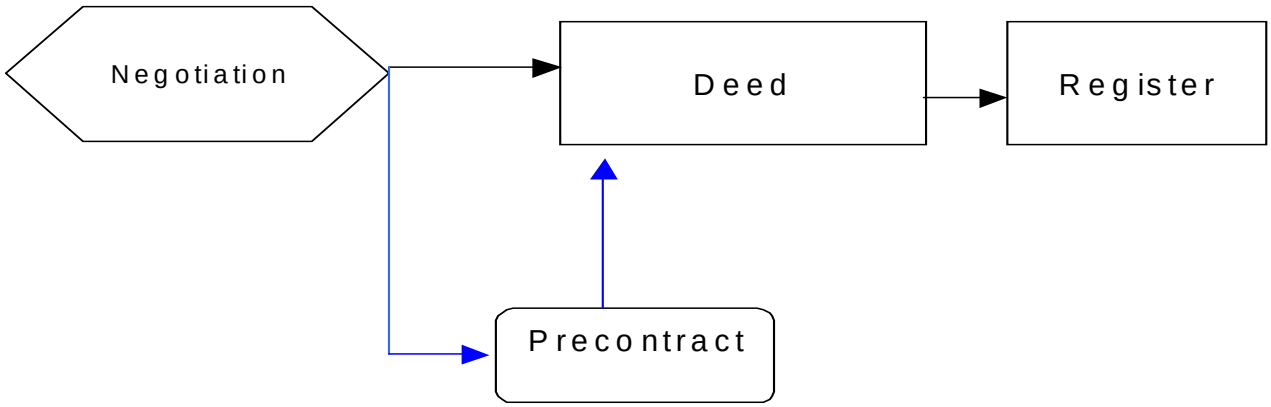

Figure 14 - Conveyance procedure in UK (England and Wales)

6.1.16 Synoptic table

Country	Precontract	Precontract register	Final Contract	Final register
Austria	Optional	NA	**Notary**	Yes
Belgium	Optional	No	Notary	Yes
Denmark	Optional	No	Notary deed	Deed and title
Finland	NA	NA	Notary	Yes
France	Optional	Optional	Notary act	Mandatory
Germany	Optional	Optional	Notary act	Mandatory
Greece	NA	NA	Notary	Yes
Ireland	NA	NA	NA	NA
Italy	Optional	Mandatory	Notary act	Mandatory

Luxembourg	NA	NA	NA	NA
The Netherlands	Optional	No	Notary act	Mandatory
Portugal	Optional	Optional	Notary act	Mandatory
Spain	Optional	Optional	Notary act	Mandatory
Sweden	Optional	No	Formal act	Mandatory
UK (England and Wales)	Optional	No	Deed	Mandatory

Table 10 - Synoptic table Conveyancing

6.2 Conveyance cost and taxation

6.2.1 Austria

(Contribution of Preslmayr & Partners)

There are notary and register fees in Austria. The real estate transfer tax **("Grunderwerbsteuer** is levied on the transference of land, buildings and rights *in rem* and is calculated at a rate of 3.5% of the price.

6.2.2 Belgium

(Contribution of Pascale Lecocq, Université de Liège)

Transactions regarding immovable property are subject to proportional registration rights, which are indirect taxes imposed on a certain transaction, due to the registration of a notary act in which the transaction is laid down. All transactions are subject to registration duties except if they are subject to VAT, in which case it will be exempted

of the proportional registration right and only subject to a fixed registration right of BEF 1,000. The proportional right is fixed in 12.5%.

6.2.3 Denmark

(Contribution of Kasper D. Blangsted Henriksen)

The transmission of immovable property is subject to notary fees, DKK 1.400 and 0.6% of registry fees

6.2.4 Finland

(Contribution of Andersen Legal Real Estate Group)

There are Notary and Registry fees in Finland. There is a transfer tax in Finland levied on the acquisition of immovable property (land/building/permanent construction) and certain transfers of rights *in rem.*

6.2.5 France

(Contribution of Antoine Allez)

There are registration taxes (“Droits d’Enregistrement”) in France. They apply to the transactions of immovable property, included the transmission of rights in rem. There are four administrative levels that tax the transmission of immovable property: 1) the department, at a rate which depends on the nature and place of the property (average = 15.40% for commercial buildings); 2) the city, at a rate of 1.2%; 3) the region, at a rate of 1.6%; 4) the country, at a rate of 2.5% of the tax levied at the level of the department.

6.2.6 Germany

(Contribution of Detlev Stoecker & Amel Al-Shajlawi)

The amount of notary fees depends upon the value of the transaction. e. g. the value of a conveyance of real estate is generally determined by the market value of the land. The amount of registry fees also depends upon the value of the transaction, whereas such fees are less high than notary fees. Real property transfer tax ("Grunderwerbsteuer") amounts currently at a rate of 3,5 %. Other taxes to be taken into account in connection with transactions involving real estate are value added tax ("Umsatzsteuer") at a rate of currently 16 % and inheritance and gift tax ("Erbschafts- und Schenkungsteuer") – at a rate depending on the net asset value and the amount of personal exemption.

6.2.7 Greece

(Contribution of Andersen Legal Real Estate Group)

There are notary and register fees in Greece. There is also a transfer tax on land and property in Greece. The taxable base for this tax is the "objective value", which is the value defined in the tables of the Ministry of Finance in accordance with several factors (area, age, type of immovable property).

6.2.8 Ireland

(Contribution of Andersen Legal Real Estate Group)

There is a Stamp Duty payable on instruments which convey property in Ireland. Stamp Duty is a transaction tax payable by the purchaser and the general rate applicable on the sale of property is 6%.

6.2.9 Italy

(Contribution of Ugo A. Milazzo)

There is a Transfer Tax ("Imposta di registro") in Italy. It covers the acquisition immovable property, including the rights *in rem*; the rate may vary between 1% and 15% depending on the nature of the property transferred and the kind of transaction. The taxable base is the market value of the property at the time the transaction. Additionally, there is a Mortgage and Cadastral Tax ("Imposte ipotecaria e catastale"), levied at the moment of the registration of the transaction, at a rate of 3%. The taxable base is the market value of the property at the time the transaction.

6.2.10 Luxembourg

(Contribution of Andersen Legal Real Estate Group)

There are registration duties ("Droits d'Enregistrement") in Luxembourg, levied at a proportional rate ranging from 0.24% to 14.4%, depending upon the nature and the purpose of the legal procedure involved, in respect of deeds which contain an obligation in cash or securities, and for all transfers *inter vivos* of the rights *in rem* **.**

6.2.11 The Netherlands

(Contribution of Marieke Enneman and Leon Hoppenbrouwers)

There are Notary and Register fees in the Netherlands. There is a transfer tax ("Overdrachtsbelasting") levied on the acquisition of rights *in rem,* at a rate of 6% of the greater of the fair market value of the real estate or the price.

6.2.12 Portugal

There is a property transfer tax ("SISA"), levied at 10% of the price of the acquisition of the right *in rem*. Notary and register charges apply to conveyance, at a rate of 0.3% of the price.

6.2.13 Spain

(Contribution of Oscar Santiago)

There is a transfer tax in Spain ("Impuesto sobre Transmisiones patrimoniales onerosas"). Transfer tax is levied on transfers of assets and rights in rem. The transfer tax amounts 6% of the actual value of the immovable property or right transferred. There is a Stamp Duty Tax ("Impuesto sobre actos jurídicos documentados") in transactions involving notary documents, mercantile documents, and administrative documents where the transaction is formalised in Spain, or where formalised outside of Spain but having legal or economic effects in Spain. The contribution is paid through minor fixed quotas, depending upon the number of pages the document has. Additionally, and under certain requirements, first copies of public deeds executed before a notary public are taxed at a rate of 0.5%, when they refer to a valuable thing, they contain acts susceptible of being registered at the Mercantile or Industrial Property Register, and the act or contract is out the scope of Transfer Tax. The taxable base will be the value declared by the parties although, similar to transfer tax; the Tax Administration may verify this valuation.

6.2.14 Sweden

(Contribution of Per Månsson)

There is a real estate transfer tax called "stämpelskatt" (stamp duty) in Sweden, levied on the purchase of rights *in rem*, at a rate of 1.5% for private persons and 3.0% for legal entities.

6.2.15 UK (England and Wales)

(Contribution of Andrew Lewry)

There is a Stamp duty**,** payable on the conveyance of a freehold, or on the sale or assignment of a lease, at the rate of 4% of the VAT-inclusive consideration if it exceeds

£500,000, with reduced rates where the consideration is less. Stamp duty is payable on the grant of a lease on any premium at the same rates, and also on the average annual rent of a lease at a rate which varies from 1% - 24% depending on the duration of the lease and the amount of the rent.

6.2.16 Synoptic table Conveyance cost

Country	Notary fees	Registry fees	Stamp duty	Transfer tax
Austria	Yes	Yes	NA	3.5%
Belgium	Yes	12.5%	No	No
Denmark	Yes	0.6%	No	No
Finland	Yes	Yes	No	4%
France	Yes	Yes	No	20.5% (average)
Germany	Yes	Yes	No	3.5% plus 16% VAT
Greece	Yes	Yes	Yes	Between 9% and 13%
Ireland	NA	NA	Between 6% and 9%	12.5% (VAT)
Italy	Yes	Yes	No	Between 1% and 15%
Luxembourg	NA	NA	Yes	Between 0.24% and 14.4%
The Netherlands	Yes	Yes	No	6%
Portugal	Yes	Yes	No	10%
Spain	Yes	Yes	Yes	6%
Sweden	No	No	Between 1.5% and 3%	No
UK (England and Wales)	No	No	4%	No

Table 11 - Synoptic table conveyance cost

6.2.17 Data analysis of conveyance cost

There are notary fees and registery fees in eleven Member-states. Some of those Member-states also charge stamp duty, some other charge transfer tax and some charge both. In a nutshell, conveyance may cost as little as 0.6% (Denmark) or as much as

more than 20.5% of the price or value of the property (France and Ireland). Amoungst the Member-states there are six that charge conveyance clearly over the mark of 10% of the value or price of the property, six that charge bellow that mark and three that charge around it.

Chapter 7 – Conclusions

7.1 The European integration

The idea of the European Union is increasingly present in the minds of the European citizens. Mass media, politicians and all sorts of opinion makers have contributed to this situation. Nonetheless, looking into it under a legal approach, the European Union is probably no more than just that: an idea. What in truth exists is the European Community (EC), which is an organization of European countries dedicated to increasing economic integration and strengthened cooperation among its members. This discussion, however, belongs to a research area, namely the Theory of the Subjects of International Law that is clearly out of the scope of this project.

This vision of a European Union, or a united Europe, dates back, at least, to the Roman Empire and has repeatedly been adopted and aimed through history. Charlemagne in the 9th Century, Napoleon in the 19th, Hitler on the 20th, pursued it by the strength of weapons and actually succeeded for smaller or longer periods. Its remarkable that cyclically countries, nations and leaders have it and fight to implement it and it is also remarkable that the length of the vision gets smaller and, at the same time, it revives in smaller intervals. The Roman Empire lasted for more than one thousand years; three centuries latter Charlemagne's empire was the base for the Sacred Roman Empire that actually lasted for almost one thousand years; in the 19th century, Napoleon's vision lasted only for a few years and one hundred years later Hitler wanted a one thousand years Reich.

During the last half of the 20th century, there were some attempts to unite Europe in a peaceful way. Too ambitious aims have probably condemned them to failure and thus a more modest idea was brought up to light by Robert Schuman. This project actually succeeded and the EC was born. The EC is using the successive approach methodology to pursue this vision for the past fifty years. It works to promote and expand cooperation

among its members in several areas, including economics and trade, social issues, foreign policy, security, and judicial matters.

The EC has a number of powers and competences that allow it to produce legislation. These powers have an attributive nature and consequently are limited by nature in their scope: there is a fundamental principle of limited competence. This means that when a state enters the EC it gives away a part of its powers (while keeping the rest to itself) so the EC uses them.

Such partition of powers requires clear rules. The first is naturally the principle of limited competence, but the principle of subsidiarity, the principle of proportionality and the implicit powers doctrine play a major role as well, and so does the principle of cooperation.

The EC's powers are exercised by its organs, the Council, the European Parliament, the Commission, the European Communities Court of Justice and the Court of Auditors. The treaty establishing the EC clearly determines the decision making proceedings rules and the specific powers and competences of the EC's organs. Among those organs, the ECJ stands out as the creator of the basic principles that shape the EC's legal order: the principle of direct effect and the principle of supremacy.

The principle of the direct effect implies that member-states nationals (and sometimes residents) may relay on the EC law provisions and ask for jurisdictional protection for the rights or interests that arise from it in the national courts. The principle of supremacy determines that such rights are enforceable in those courts and must prevail even against national legislation whatever its nature may be.

The core of the integration performed by the EC is economic. The basis for it is the Internal Market, defined as a space of economic freedom, where there are no barriers to trade and where the production factors and the goods and services circulate freely. This concept incorporates the vision of the fundamental EC freedoms: the freedom of circulation of goods, the people's freedom of circulation, the capital freedom, the

freedom to provide services and the right of establishment. All of them but the first relate to production factors: work and capital.

In all integrative measures and legislation the driving principle is the one of the national treatment (also called principle of the non-discrimination), that essentially requires EC member-states nationals to be treated in any other member-state as its own nationals are in so far as economic, social and even (in a minor scale) political rights and obligations are concerned. This principle has allowed the ECJ to extend the EC's law jurisdiction well beyond the EC's intended, and sometimes even declared, goals and powers.

7.2 Research rationale

The European Community is interested in harmonizing Civil Law in the Member-states. There are a number of official documents legislation where this intention is clearly stated. The EC has even supported the Lando Commission to draft a set of Principles of European Contract Law, the "Study group on a European Civil Code" to research and prepare a European Civil Code, the Pavia group to study an European contract code, and the Trento group to search for the Common Core of European Private Law. The first two projects – PECL and European Civil Code – aim to produce legislative propositions. The other two are comparative law research projects. The first uses the Schlesinger methodology and the second one approaches the subject under a traditional comparative law methodology.

The European Commission considers that differences in private law, property law included, between the Member-states are obstacles to the European integration and thus harmonization is required. Moreover, the European Commission has included these views in the proposals for several Directives and regulations, as shown in sections 1.1.1, 1.1.2, 1.1.3 and especially in Chapter 2 above.

This intention faces a major obstacle as Article 295 EC Treaty excludes the property legal framework of the EC competence. Even so, property law has not completely escaped of the EC law influence and jurisdiction, as the ECJ has ruled in several cases that there are some aspects of the national property law that may conflict with the

European integration and therefore incompatible with the EC law. These cases reported situations where national property law conflicted with the principle of non-discrimination: the Austrian property law imposed an administrative authorization requirement for the purchase of real property in Tyrol an the Italian legislation also determined that an authorization would be necessary for the purchase of real property in specified areas. Both requirements applied solely to non-nationals. The Danish legislation imposes a ban on the acquisition of immovable property in some areas of the country; this ban, however, benefits of an exceptional permit included in the EC Treaty.

These conflicts are, in my view, the reason why the European institutions consider that there are differences in the property law in the Member-states that have a negative impact on the European integration. Indeed, any conflict between national law and EC law is likely to act as an obstacle to European integration. Removing these obstacles, however, does not imply that a harmonized or uniform legal framework must be accomplished, especially when to do so it is necessary to change a fundamental rule of the Treaty and expand the competences of the EC to new areas.

The cases about the national constraints to real estate ownership by EC nationals were solved with the principle of the non-discrimination. To learn if the ECJ case law was enough to eradicate these conflicts was the goal of the second questionnaire used in this research. The main reason for this is that the only shadow of evidence supporting the EC's argument in favour of the harmonization of property law found was precisely that.

The questionnaire included a brief introduction to the subject matter followed by the explanation of what are the areas of the national property frameworks that may have EC law relevance and ended by defining the concept of national constraint to real estate ownership. The objective of the questionnaire was to learn about the existence and enforcement of such constraints against EC member-states nationals.

The answers gathered showed that the ECJ case law was efficient in solving and removing those conflicts: it results from the answers to the questionnaire that there are nine Member-states that do not report national constraints to the acquisition of

immovable property by foreigners and six Member-states that do have such special requirements or even interdictions. The six positive reports can be divided in two groups: the one where the constraints do not apply to EC nationals and the one where the constraints apply to EC nationals. At this moment, Austria, Germany, Greece, Italy and Spain are included in the first group and Denmark stands alone in the second group. The non-application of the first group of constraints to EC nationals makes it compatible with EC law. The existence of an exceptional rule in the EC Treaty allowing Denmark to maintain its regulation in this matter eliminates the incompatibility and makes it lawful for Denmark to enforce such requirements against EC nationals.

In the light of what was found, the single shred of supporting evidence to the EC argument vanishes and what lasts is a completely uncorroborated statement. To seriously sustain that the differences in the national property laws are an obstacle to the European integration it is necessary to have an acquired and grounded certainty and knowledge that there are differences and that those differences produce a negative impact. The scientific community must look for evidence of such legal discrepancy and the research must start with the basic concepts in the subject matter: the concept of immovable thing and the species and contents of the rights *in rem*. If significant divergence is found, then the impact of it should be studied. The first study is pure comparative law and is the core of this research process.

7.3 Research methodology

Comparative law traditionally uses the comparative method, focusing on formal rules that are compared *per se*, in an abstract way, leaving any involving circumstances unconsidered. The comparative researcher defines the *tertium comparationis* - what to compare, choose the legal orders involved - where to compare, and then searched for the relevant legal rules within, interpreting them and compared the results of both elements of the rule: the factual description and the command. The modern criticism to this comparative method showed that such analysis, by neglecting the cultural, social and legal environment produces inaccurate results. Moreover, the latter critics to this method point out that a comparative law research will never be accurate as this would

require the researcher to have identical knowledge and living experience within all the legal orders under comparison: social and cultural environment, education, legal background and, of course, language proficiency.

The criticism, undeniably valid, transformed Comparative law in a discipline where research must be conducted by groups of researchers. The first attempt to create such methodology developed the Cornell method, in which researchers would solve a case according to each one's legal order detailing and explaining its groundings.

The Cornell methodology is not adequate to a comparative research aiming to compare legal institutes. It is so especially when the research object is not easily outlined in a jurisdictional controversy. This is the situation of the legal institutes to compare in this research.

The functional method is an alternative to the Cornell method. It also accepts the validity of the modern criticism and consequently admits that Comparative law research is a collective discipline. The weakest point of the functional methodology is that, departing from a functional description of the object of comparison, builds up an artificial and proprietary terminology.

Based in all the previous experiences and criticism, this research developed a variant of the functional method, the expert survey.

This novel methodology requires - after defining what legal institutes and in what legal orders to compare – the search, through literature review, for some common core to the legal orders under consideration. That common core will deliver a legal paradigm that will ground a conceptual framework and a common terminology that, in their turn, will be the basis for a questionnaire that experts in each of the legal orders under consideration will answer.

This methodology produced two questionnaires: the above mentioned about the national constraints and one about the research's core subject: the rights over immovable thing

that allow some sort of enjoyment of its physical or legal functionalities and utilities and its conveyance process and cost.

7.4 The conceptual framework

The main questionnaire included a conceptual framework to deliver the respondents a common terminology. Latin language was its base, and described, for each concept, the characteristics to look for. This way, language barriers, educational, cultural and legal barriers were flatten. The justification for the contents of the conceptual framework and its terminology being based in Roman law by reference to the Portuguese law is that I found that the continental legal systems and the England and Wales legal systems share that root and that the Portuguese system is closely linked to the Roman system.

The Roman legal system had two main areas of development: the *ius civile* and the *ius gentium*. The first was essentially a legislated system, imposing to roman citizens and the second was essentially a praetorian system, imposing on the non-roman inhabitants of the empire. This dichotomy may well be the base for the different approaches to the role of the judge in the law making process that, in my view, determine the essential difference between the common law and the civil law systems.

Even so, the *ius civile* was the starting point for the praetorian analysis that allowed the development of the *ius gentium*, i.e.;, the praetorian roman law that blends codified and legislated *ius civile* principles and rules with the local costumes and traditions. In respect of what is important for this research, the object of the property right, the concept of the property right and, broadly, the concept and contents of the rights over immovable things other than the property right, there seems to be also a two lanes development of the concepts created under the roman law *ius civile*. The roman concept of emphyteusis, allowing the constitution of differentiate interests over land, as a manifestation of the disposition powers of the rightful owner, seems to be the basis for the common law system of property, based more in an array of structured interests or estates rather than the subjective rights approach that underlies the continental property

system. Being so, however there are two different approaches, there may be little doubts that there is a common root in Roman law.

The Portuguese legal system was used as a starting point to the analysis that showed that Roman law could be the solution. A comparative historical legal research set the origin of the system and grounded the belief that other continental Europe systems could be in the same situation. The Spanish and Italian systems were found to have a clear identification with the Portuguese one and further research proved that among the three legal orders under consideration, the Portuguese one could be considered paradigmatic. Hence, Portuguese property law was the conceptual paradigm for the build up of the conceptual framework.

The conceptual framework started with an historical background of the origins of the legal concept of property, beginning with the Code of Hammurabi, the Athenian Constitution, and the *Corpus Iuris Civilis*. The last was comprehensively reviewed. The historical background included also the Feudal period, the rise of socialism and the liberalism.

The first part of the questionnaire aimed to learn about the concept of immovable thing, accepted to be the foundation of any immovable property legal framework and defined as limited portion of land and any construction in or on it, the waters in or on it, trees and plants, while connected to it, and any rights over an immovable thing. The answers showed that, though legislative form may vary, there is an absolute legal convergence about the physical correspondence of the concept of immovable thing in the member-states.

The concept of immovable thing incorporated the rights *in rem*. In this matter there is some legal divergence between the member-states: immovable thing is part of the surface of the earth and the buildings that are incorporated therein. In some member-states rights *in rem* don't qualify as immovable things. That is the case of Denmark, Italy, the Netherlands and Sweden. This fact, however, does not prevent the existing

rights *in rem* from having the nature, characteristics and level of protection that their equivalents enjoy in the other member-states.

Legal theory in Portugal, Spain and Italy splits the rights *in rem* in three families, according to functionality criterion: the acquisition rights, the enjoyment rights and the security rights. The first category includes the rights that allow a third party to acquire an enjoyment right. These rights may arise by law or contract. The enjoyment rights are the ones that allow its holder to enjoy physical or legal advantages (use) of the thing. Security rights are the ones that allow its beneficiary to secure a credit he holds. The security rights, *maxime* the mortgage, are always ancillary to a credit relationship. In fact, although securities such as mortgages are considered rights *in rem*, as far as the level of protection its beneficiary gets from the law, the Portuguese Civil Code includes its regulation in a different book; the rights in rem are included in book III and securities are included in book II. This research focuses on the enjoyment rights *in rem*.

7.5 Enjoyment rights *in rem* – comparative analysis findings

The most absolute right *in rem* in the member-states under survey is the property right. As all other rights *in rem*, the property right is a legal relationship between a person and a thing. This right includes the powers to use, enjoy and transfer the thing either by contract or succession, to exclude others from whatever behaviour that may conflict with it, the power to bring to action those who do it. Included within the property right is the right to establish minor rights *in rem*. By doing so, the owner of the property voluntarily accepts a restriction of his right. The property right is the continental equivalent of the freehold.

All of the minor rights *in rem* described in the conceptual framework were found in the member-states under survey. In some cases, not all exist presently, but in a way the concept is not at all strange in the legal orders under consideration.

The usufruct, includes the powers of use, enjoy, transfer and exclude others from disturbing the right and the power to bring to action those who do it. The usufruct may be established by contract and acts as a limitation to the powers of the owner of the

property. It is usually temporary. The right to use and inhabit, includes the powers to use or inhabit an immovable thing. This is generally a more limited right than the usufruct, as it intends to allow someone to personally use and inhabit the immovable thing. In this sense, it clearly distinguishes from the usufruct where the beneficiary can take advantage of the thing either directly or through a third person. Moreover, in the usufruct it is generally accepted its transmission, whereas in the use and inhabit this is not possible.

The surface right in general matches the concept included in the conceptual framework and essentially allows someone to build in someone else's land whilst splitting the property of the land and of the building. The first is in general temporary and by the end of the granted permit, the owner of the land acquires the buildings. In this sense, it is common in the legal orders under consideration that the main effect of the surface right is to suspend the principle of accession, by which the owner of the land acquires any building sitting on it.

Servitutiones are minor rights *in rem* that include the power to use an immovable or part of it. They are transmissible automatically with the dominant land or building and may be constituted by law or contract.

The *emphyteusis* enables someone to use and fully enjoy an immovable thing. In some member-states it is a legal institution that is no longer in use, but is, in any case, an institute that was part of the law of the land. Common trace to this institute is its similarity to the property right, with the limitation that some consideration is due to the landlord.

The lease, or bail, is normally a personal right. In this sense, the characteristics of general enforceability of the rights *in rem* are excluded.

The rights *in rem* in the English and Welsh legal system require further comparative analysis. The freehold ownership equates to absolute ownership in that it provides for the right to own, occupy and dispose of the land and any buildings on the land.

Furthermore, the freeholder may establish lesser interests on his property, in a similar way the continental owner may establish minor rights *in rem* over his property.

Some of the interests recognized in the English system are quite similar in its contents and constitution to some of the minor rights *in rem*. Such is the case of the usufruct, unknown as such in England and Wales, but where the use of trusts is common.

The same happens with the license, that presents effects and contents similar to the use and inhabit and the easements, similar to the *servitutiones*.

The most remarkable case of legal convergence between England and Wales and the other member-states under consideration is the *emphyteusis.* This institute is apparently inexistent in England and Wales. The fact is that the interests created through long lease may present remarkable similarity to the ones of *emphyteusis.* In many cases the tenant under a long lease will effectively be in the same position as if it owned the freehold interest in the land, with few limitations, exactly like the *emphyteusis*.

7.6 Conveyance procedure and cost – Comparative analysis findings

The conveyance procedure is quite similar in the member-sates under survey. Three stages may generally be considered. The first stage is the precontract. This will usually be a more or less privately drafted document where the buyer and the seller agree the general terms of the purchase. The second phase is the completion of the sales agreement. This phase requires, in all member-states except Sweden and England and Wales, the intervention of a public notary.

The third phase is the register. All member-states have a system of land register where transactions regarding immovable property and interests over it are recorded. In some member-states precontracts may be entered into this register and thus gain reinforced efficacy.

Ultimately, there are detail level differences in the conveyance procedure in the member-states, one of which is the administrative and fiscal cost of the process.

In this particular aspect, there is enormous divergence between the legal orders under survey. The conveyance cost varies between less then 1% of the transaction price and more than 24%. Considering the nature of the goods involved, the differences in the cost can be enormous.

7.7 Research outcome

The main purpose of this research was to learn if there is a significant difference between the member-states' concept and contents of the enjoyment rights *in rem*. The outcome partially answers the question raised in its beginning. In other words, to learn if it is true, like the EC consistently argues, that there are significant differences in property law between the member-states.

As far as the enjoyment rights are concerned, I found that there are no significant differences between the member-states included in the survey. This statement must be understood in a restrictive way: not all member-states were included in the study and, for some of those who were the study is incomplete. This limitation is due to the unfortunate circumstance related to the Andersen Legal Group's extinction before the end of the process.

Anyway, the level of legal convergence found grounds my personal belief that, should the process be completed and all member-states comprehensively included, still no significant differences would be found in the specific aspect of the contents and species of the enjoyment rights *in rem*. In this particular aspect, the EC's statement appears to be – in my personal view is – wrong.

As to the conveyance process, this research also demonstrates that there is a high level of legal convergence and, is this particular aspect, the findings have a broader base. Again, the EC's statement appears to be – in my personal view is – wrong. Unfortunately, this research also demonstrates that there is one aspect of conveyance where there are significant differences between the member-states: the conveyance cost. This fact, however, does not justify the need for the harmonization of property law in the EC. It does justify the harmonization of one particular aspect of it that, in my view,

does not even require any changing of the EC treaty. In fact, conveyance cost may well be harmonized under the EC's existing competences, in a similar solution to the one found for the discrepancy between the cost of establishing companies – see directive 69/335CEE.

There are additional deliveries in this research. The first is the comprehensive rights *in rem* equivalence table. The second is the illustration of the conveyance process and the third is the awareness of the conveyance cost. Altogether, these deliveries, and the concepts that underlie, are helping tools for the real estate and financial industries, in the perspective of the immovable intra-community real estate investment.

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Glossary

Abstract of title	An epitome of facts showing ownership
Alienation	Act of disposing or transferring property
Assignment	A disposition or transfer
Assurance	A disposition or transfer
Assured tenancy	A residential tenancy with limited statutory protection as to rent and possession
Beneficial owner	A person entitled for his own benefit and not i.e. as a trustee.
Beneficiaries	Those entitled to benefit under a trust or will
Bona vacantia	Goods without an owner (res nullius)
Caution	An entry protecting an interest in registered land (registo do facto)
Cestui que trust	A beneficiary under a trust
Cestui que vie	A person for whose life an estate por autre vie lasts
Chattel real	A leasehold interest
Commorientes	Persons dying at the same time
Condition precedent	A condition which must be fulfilled before a disposition can take effect
Condition subsequent	A condition which may defeat a gift after it has taken effect
Contingent	Operative only upon an uncertain event. The contrary of vested (unconditionally owned)
Conveyance	An instrument (other than a will) transferring property
Copyhold	A form of tenure peculiar to manors
Corporeal	Admitting of physical possession
Covenant	A promise contained in a deed
Deed	A document signed, sealed and delivered
Deed pool	A deed with only one party. The contrary of Indenture
Defeasance	The determination of an interest on a specified event
Demise	A transfer, usually by the grant of a lease
Determine	Terminate, come to an end
Development	Altering land or the use of it
Disentail	To bar an entail
Disseisin	Dispossession. The contrary of seisin
Distrain, distress	The lawful extrajudicial seizure of chattels to enforce a right
Dominant tenement	Land to which the benefit of a right is attached. The dominant tenement has an easement over the servient tenement.
Durante viduitate	During widowhood
Easement	A right over land for the benefit of other land, such as the right of way (SERVIDÃO)
Emblements	Growing crops which an outgoing tenant may take
En ventre sa mere	Conceived but not born

Enfranchise	The statutory right of certain lessees to purchase the fee simple
Entail	An estate or interest descending only to issue of the grantee
Equitable easement	A right over land operating in equity only
Equities	Equitable rights
Equity of redemption	The sum of a mortgagor's rights in the mortgaged property
Escheat	A lord's right to ownerless realty
Escrow	A document which upon delivery will become a deed
Estate	1. The quantum of an interest in land. (see tenure) 2. An area of land 3. The whole of the property owned by a deceased person
Estate contract	A contract for the sale or the lease of land
Estate rentcharge	A rentcharge created for certain proposes of management
Estoppel	Prohibition of a party from denying facts which he has led another to assume to be true
Execute	To perform or complete a deed
Fealty	Loyalty due to a feudal lord
Fee	1. Base 2. Conditional 3. Determinable 4. Simple 5. Tail
Fine	A collusive action partially barring an entail. A premium or a lump sum payment
Foreclosure	Proceedings by a mortgagee which free the mortgaged property from the equity of redemption
Franchise	Royal right granted to a subject
Freehold	1. Free tenure 2. An estate of uncertain maximum duration
Incumbrance	A liability burdening property
Indenture	A deed between two or more parties
Inhibition	An order prohibiting dealings with registered land
Injunction	An order of a court restraining a breach of obligations or commanding performance
Instrument	A legal document
Interesse termini	The rights of a lessee before entry
Jus tertii	A thirds party's title
Legal memory	Any time lather than the accession of Richard I in 1189
Limitation, words of	Words limiting the estate granted to some person previously mentioned
Limited owner	An owner with an estate less than a fee simple
Lis pendens	A pending action
Member-states	Countries belonging to the European Union

Mesne	Intermediate, middle
Minor	A person under 18 of age
Minor interest	An interest in registered land which requires protection by an entry on the register
Mortgage	Transfer of property as security for a loan (clarificar conceito de hipoteca. 19-001. A mortgage transfere a propriedade, é uma espécie de leasing em PT)
Particular estate	An estate less than a fee simple
Periodic tenancy	Tenancy from year to year, month to month, etc.
Possibility of reverter	The grantor's right to the land if a determinable fee determines
Prescription	The acquisition of easements or profits by long use (USACAPIÃO)
Privity of contract	The relation between parties to a contract
Privity of estate	The relation of landlord and tenant
Profit à prendre	Right to take something from another's land
Protected tenancy	A contractual tenancy fully protected by the Rent Acts
Puisne mortgage	A legal mortgage not protected by a deposit of title deeds
Pur autre vie	For the life of another person
Purchase, words of	Words conferring an interest on the person they mention
Que estate	Dominant tenement
Recovery	A collusive action completely barring an entail
Regulated tenancy	A protected or statutory tenancy
Release	Waiver of some right or interest without transfer of possessions
Remainder	The interest of a grantee subject to a prior particular estate
Rent	Fee farm rent, ground rent, rack rent, rentcharge
Restrictive covenant	A covenant restricting the use of land
Resulting	Returning to the grantor or remaining in him, by implication of law or equity
Reversion	The interest remaining in a grantor after granting a particular estate
Riparian owner	The owner of land adjoining a watercourse
Root of title	A document from which ownership is traced
Seignory	The rights of a feudal lord
Seisin	The possession of land by a freeholder
Servient tenement	Land burdened by a right such as an easement
Settlement	Provisions for persons in succession
Severance	The conversion of a joint tenancy to a tenancy in common
Severance, words of	Words showing that property is to pass in different shares
Simplified planning zone	SPZ. An area in which it is proposed to authorise specified types of development in advance
Socage	Freehold tenure
Specialty	A contract by deed

Squatter	A person wrongfully occupying land and claiming title to it
Statutory owner	Person with the powers of a tenant for life
Statutory tenant	A person holding under the Rent Acts
Statutory trusts	Certain trusts imposed by statute (compropriedade e intestado)
Subinfeudation	Alianation by creating a new tenure
Sub-mortgage	A mortgage of a mortgage
Sui juris	Of his own right, subject to no disability
Surrender	The transfer of an interest to the person next entitled to the property
Survivorship	A surviving joint tenant's right to the whole land
Tacking	Extension of a mortgagee's security to cover latter loan
Tenement	Property held by a tenant
Tenure	The set of conditions upon which a tenant holds land
Term of years	A period with a defined minimum for which a tenant holds land
Time immemorial	The time of the accession of Richard I in 1189
Title	Evidence of a person's right to property or the right itself
Trust	Bare, completely constituted, constructive, executed, executory, express, implied
Trust of land	Any trust of property which consists of or includes land, whether the interests under that are successive, concurrent or otherwise
Undivided share	The interest of a tenant in common
Vested	Unconditionally owned
Vesting assent	Declaration, deed, instrument
Voluntary conveyance	A conveyance not made for valuable consideration
Waiver	Abandonment of a legal right

Annex I – List of EC legislation

Prepared by the European Commission, available at http://europa.eu.int

1. CONSUMER CONTRACT LAW

1.1. Sale of consumer goods and associated guarantees

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees
Objective
Ensure consumer protection and strengthen consumer confidence in cross-border shopping by laying down a common set of minimum rules valid no matter where the goods are purchased.

1.2. Unfair terms in consumer contracts

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts
Objective
To eliminate unfair terms from contracts drawn up between a professional and a consumer.

1.3. Package travel, package holidays and package tours

Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours
Objective
To approximate the laws, regulations and administrative provisions of the Member-states concerning package travel, package holidays and package tours sold or offered for sale in the territory of the Community.

1.4. Contracts negotiated away from business premises

Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises
Objective
To protect consumers against dishonest business practices in connection with contracts negotiated away from business premises.

1.5. Consumer credit

Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member-states concerning consumer credit as modified by Directive 90/88/EEC and 98/7/EEC
Objective
To harmonise the rules governing consumer credit while ensuring a high level of consumer protection.

1.6. Distance contracts

Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
Objective

To approximate the laws, regulations and administrative provisions of the Member-states concerning distance contracts between consumers and suppliers by laying down a common set of minimum rules.

1.7. Timeshare immovable property

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 to the purchase of the right to use immovable properties on a timeshare basis
Objective
To approximate laws, regulations and administrative provisions of the Member-states on the protection of persons who purchase the right to use immovable property on a timeshare basis.

1.8. Distance marketing of consumer financial services

Proposal for a Directive concerning the distance marketing of consumer financial services, and amending Council Directives 90/619/EEC, 97/7/EC and 98/27/EC
Objective
To establish a harmonised and appropriate legal framework for distance contracts, pertaining to financial services while ensuring an appropriate level of consumer protection.

2. SYSTEMS OF PAYMENT

2.1. Late payments in commercial transactions

Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions
Objective
To combat late payments made as remuneration in commercial transactions within the European Union, whether the delays in payment are between enterprises or between the public sector and an enterprise.

2.2. Cross-border credit transfers

Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers
Objective
To establish minimum information and performance requirements for cross-border credit transfers up to €50.000, effected in the currencies of the Member-states and in Euro within the European Union and the European Economic Area and carried out on the initiative of an originator. The overriding purpose of Directive 97/5/EC is to enable funds to be transferred from one part of the Community to another rapidly, reliably and inexpensively. “Debit transfers” and payments by cheques are not under the scope of Directive 97/5/EC.

2.3. Settlement finality in payment and securities settlement systems

Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems
Objective
To reduce the systemic risk inherent in payment and securities settlement systems and to minimise the disruption caused by the insolvency of a participant in such a system. Directive 98/26/EC was created to deal with the legal problems specifically linked to insolvency situations and bankruptcy (i.e. rights of foreign creditors) and to protect the development of a single monetary policy in the European Monetary Union (EMU) by promoting the efficiency of cross-border operations.

3. COMMERCIAL AGENTS

Council Directive 86/653/EEC of 18 December 1986 on the co-ordination of the laws of the Member-states relating to self-employed commercial agents
Objective
Directive 86/653/EEC co-ordinates national laws governing the legal relationships of selfemployed commercial agents and their principals. An objective of social protection for commercial agents is pursued by the Directive, which sets minimum levels of harmonization in this area. The provisions of the Directive cannot be derogated from to the detriment of a commercial agent. Agreements leading to a contract more favourable to the commercial agent are permitted. The Directive also lays down provisions concerning the remuneration of the agent and the right to indemnity or reparation where the agent suffers harm by the cessation of the contract.

4. POSTING OFWORKERS

Directive 96/71/CE of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services
Objective
To remove uncertainties and obstacles which may impede the freedom to provide services, by increasing legal certainty and allowing identification of the terms and conditions of employment applicable to workers who carry out temporary work in a Member-state other than that whose law governs their employment relationship; to avoid the risks of abuse and exploitation of posted workers.

5. LIABILITY FOR DEFECTIVE PRODUCTS

Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member-states concerning liability for defective products (Amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999).
Objective
Directive 85/374/EEC (as amended by Directive 99/34/EC) is an internal market measure striking a balance between a high level of consumer protection and a stable legal framework of liability for producers, thus eliminating competition distortion due to diverging liability regimes and facilitating the free circulation of goods under common liability rules.

6. ELECTRONIC COMMERCE

6.1. Electronic commerce services

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce')
Objective
Directive 2000/31/EC seeks to contribute to the proper functioning of the internal market by ensuring the free movement of information society services between the Member-states.

6.2. Electronic signatures

Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures
Objective
To ensure the proper functioning of the internal market in the field of electronic signatures, by creating a harmonised and appropriate legal framework for the use of electronic signatures within the European Community.

7. FINANCIAL SERVICES

7.1. Banking

7.1.1. Solvency ratios for credit institutions

Directive 96/10/EC of the European Parliament and of the Council of 21 March 1996 amending Directive 89/647/EEC as regards recognition of contractual netting by the competent authorities (solvency ratios for credit institutions).
Objective
To contribute to the harmonisation of prudential supervision and to strengthen solvency standards among Community credit institutions, thereby protecting depositors and investors and maintaining banking stability.

7.2. Insurance

7.2.1. Life insurance

Council Directive 79/267/EEC of 5th March 1979 on the co-ordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life insurance (First Life Assurance Directive)

Council Directive 90/619/EEC of 8 November 1990 on the co-ordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (Second Life Assurance Directive)

Council Directive 92/96/EEC of 10 November 1992 on the co-ordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (Third Life Assurance Directive)
Objective
To facilitate the effective exercise of the right to supply life assurance services and lay down special rules relating to freedom to provide cross-frontier services in the life assurance field.

7.2.2. Insurance other than life insurance

Council Directive 92/49/EEC of 18 June 1992 on the co-ordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive)
Objective
To lay down rules for the exercise of cross-frontier non-life insurance which balances the needs of freedom of services and consumer protection.

7.3. Transactions in securities

7.3.1. Publication of listing particulars

Council Directive 80/390/EEC of 17 March 1980 co-ordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing
Objective
Council Directive 80/390/EEC aims to provide actual and potential investors in securities with adequate and objective information, by co-ordinating the requirements regarding the listing particulars to be published by issuers of securities. Council Directive 80/390/EEC also co-ordinates the requirements for the drawing up,

scrutiny and distribution of listing particulars to be published for the admission of securities to official stock exchange listing.

7.3.2. Public offer prospectus

Public offer prospectus Council Directive 89/298/EEC of 17 April 1989 co-ordinating the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public
Objective
To co-ordinate the requirements for the drawing-up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public for the first time.

7.3.3. Investment services in the securities field.

Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field.
Objective
To liberalise access to stock-exchange membership and financial markets in host Member-states for investment firms authorised to provide the services concerned in their home Member-states.

8. PROTECTION OF PERSONAL DATA

Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
Objective
To harmonise national laws relating to the processing of personal data and protect the rights and freedoms of persons, in particular the right to privacy.

9. COPYRIGHT AND RELATED RIGHTS

9.1. Rental, lending and other rights related to copyright in the field of intellectual property

Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property
Objective
To harmonise the law relating to rental right, lending right and certain rights related to neighbouring rights, including the right of fixation, reproduction, broadcasting and distribution to the public, so as to provide a high level of protection of literary and artistic property.

9.2. Term of protection of copyright and certain related rights

Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights
Objective
Council Directive 93/98/EEC establishes a total harmonisation of the period of protection for all types of works and subject matter protected by copyright and related rights in the Member-states.

9.3. Computer programs

Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs
Objective
Directive 91/250/EEC aims to harmonise Member-states' legislation concerning the protection of computer programs in order to create a legal environment that will afford a degree of security against unauthorised reproduction of such programs.

9.4. Databases

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases
Objective
Directive 96/9/EC provides harmonised protection, for both original databases, through the Directive's copyright provisions, and non-original databases through a *sui generis* regime.

9.5. Satellite broadcasting and cable retransmission

Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
Objective
To fill the gaps in the protection of programmes broadcast across borders where satellite broadcasting or cable retransmission are involved. Directive 93/83/EEC aims to remove legal uncertainties resulting from disparities in Member-states' levels of protection of copyright and neighbouring rights in national rules and uncertainties concerning the applicable law in the field of cross-border satellite broadcasting and the cable retransmission of programs from other Member-states.

9.6. Topographies of semiconductor products

Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products
Objective
To provide for the legal protection of the layout designs (topographies) of semiconductor products, whether individual components or a part or the whole of an integrated circuit on a semiconductor chip

10. PUBLIC PROCUREMENT

10.1. Public service contracts

Council Directive 92/50/EEC of 18 June 1992 relating to the co-ordination of procedures for the award of public service contracts.
Objective
To co-ordinate procedures for the award of public service contracts in so far as such procurement is not already covered by procedures for the award of public works contracts and public supply contracts.

10.2. Public works contracts

Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts.
Objective
To consolidate and co-ordinate procedures for the award of public works contracts.

10.3. Review procedures to the award of public supply and public works contracts

Council Directive 89/665/EEC of 21 December 1989 on the co-ordination of laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts as amended by Council Directive 92/50/EEC.
Objective
The Directive seeks to ensure that the review procedures are available to sufficiently interested parties having been or likely to be injured by an alleged infringement.

Annex II – List of International instruments

Prepared by the European Commission, available at http://europa.eu.int

1. UN CONVENTIONS

CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS adopted in New York in 1974 (as amended by the PROTOCOL AMENDING THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS of 11.04.1980).
Status:
The Convention, as amended by the Protocol, is in force (neither the Protocol nor the Convention has been signed by any EU Member-state). The former German Democratic Republic was a participant by virtue of its accession on 31 August 1989 to the Protocol amending the Convention and therefore also to the Convention of 1974.

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS adopted in Vienna, in 1980.
Status:
Only the UK, Portugal and Ireland have not acceded to the Convention, i.e. are not contractual parties. The convention is in force for the rest of the EU Member-state.

UNCITRAL LEGAL GUIDE ON INTERNATIONAL COUNTERTRADE TRANSACTIONS adopted in 1992.
Status:
Not legally binding

UNITED NATIONS CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES adopted in New York, in 1988.
Status:
The Convention is not in force. 10 actions are required. No EU Member-state has signed.

UNCITRAL LEGAL GUIDE ON ELECTRONIC FUNDS TRANSFERS adopted in 1987.
Status:
Not legally binding

UNCITRAL MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS adopted in 1992.
Status:
Binding once enacted in domestic law.

UNITED NATIONS CONVENTION ON INDEPENDENT GUARANTEES AND STAND-BY LETTERS OF CREDIT adopted in New York, in 1996.
Status:
The Convention entered into force 1 January 2000. No EU Member-state has signed.

UNITED NATIONS CONVENTION ON THE CARRIAGE OF GOODS BY SEA adopted in Hamburg, in 1978 (HAMBURG RULES).
Status:
The Convention entered into force 1.11.1992.

Signed by Denmark (18.04.1979), Finland (18.04.1979), France (18.04.1979), Germany (31.03.1978), Portugal (31.03.1978) and Sweden (18.04.1979).
Ratified by Austria (29.07.1993).

UNITED NATIONS CONVENTION ON THE LIABILITY OF OPERATORS OF TRANSPORT TERMINALS IN INTERNATIONAL TRADE adopted in Vienna, in 1991.
Status:
The Convention is not in force. 5 Actions are required.
Signed by France (15.10.1991) and Spain (15.04.1991).

UNCITRAL MODEL LAW ON ELECTRONIC COMMERCE WITH GUIDE TO ENACTMENT adopted in 1996, with additional Article 5 bis as adopted in 1998.
Status:
Binding once enacted in domestic law.

UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of IndustrialWorks, adopted in New York, in 1987.
Status:
Not legally binding.

2. UNIDROIT (THE INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF CONTRACT LAW) INSTRUMENTS.

UNIDROIT Principles for International Commercial Contracts adopted in 1994.
Status:
Not legally binding.

CONVENTION RELATING TO A UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS signed in the Hague, in 1964.
Status:
In force in the UK (ratified on 31.08.1967). Denounced by Italy (11.12.1986), Germany (1.01.1990), the Netherlands (1.01.1991), Belgium (1.11.1996) and Luxembourg (20.01.1997)).
Signed by Greece (ad referendum, 3.08.1964) and France (31.12.1965).

CONVENTION RELATING TO A UNIFORM LAW ON THE FORMATION OF CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS signed in the Hague, on 1 July 1964.
Status:
In force in the UK (ratified on 31.08.1967), and denounced by Italy (11.12.1986), Germany (1.01.1990), the Netherlands (1.01.1991), Belgium (1.11.1996) and Luxembourg (20.01.1998).
Signed by Greece (ad referendum, 3.08.1964) and France (31.12.1965).

CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS signed in Geneva, on 17 February 1983.
Status:
Ratified by Italy (16.06.1986) and France (7.08.1987).
Has not been signed by other EU Member-states.
The Convention will only enter into force when accepted by ten contracting States (Article 33).

UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING adopted in Ottawa, on 28May 1988.
Status:
The Convention is in force.
Ratified by France (with declaration, 23.09.1991) and Italy (29.11.1993).
Signed by Finland (30.11.1990) and Belgium (21.12.1990).

UNIDROIT CONVENTION ON INTERNATIONAL FACTORING adopted in Ottawa, on 28 May 1998.
Status:
The Convention is in force.
Ratified by France (with declaration, 23.09.1991), Italy (29.11.1993) and Germany (20.05.1998)
Signed by Finland (30.11.1990), Belgium (21.12.1990) and the UK (31.12.1990).

3. COUNCIL OF EUROPE INSTRUMENTS

EUROPEAN CONVENTION ON COMPULSORY INSURANCE AGAINST CIVIL LIABILITY IN RESPECT OF MOTOR VEHICLES signed in Strasbourg, on 20.04.1959.
Status:
The Convention entered into force 22.09.1969.
Ratified by Austria (10.04.1972), Denmark (24.06.1969), Germany (5.01.1966), Greece (29.05.1961) and Sweden (22.06.1969).
Signed by Belgium (20.04.1959), France (20.04.1959), Italy (20.04.1959) and Luxembourg (20.04.1059).

CONVENTION ON THE LIABILITY OF HOTELKEEPERS CONCERNING THE PROPERTY OF THEIR GUESTS signed in Paris, on 17.12.1962.
Status:
The Convention entered into force 15.02.1967.
Ratified by Belgium (14.09.1972), France (19.09.1967), Germany (14.11.1966), Ireland (7.05.1963), Italy (11.05.1979), Luxembourg (25.01.1980) and the UK (12.07.1963)
Signed by Austria (17.12.1962), Greece (17.12.1962) and the Netherlands (17.12.1962).

CONVENTION ON THE UNIFICATION OF CERTAIN POINTS OF SUBSTANTIVE LAW ON PATENTS FOR INVENTION signed in Strasbourg, on 27.11.1963.
Status:
The Convention entered into force 1.08.1980.
Ratified by Belgium (23.09.1999), Denmark (29.09.1989), France (27.02.1980), Germany (30.04.1980), Ireland (25.01.1968), Italy (17.02.1981), Luxembourg (14.09.1977), Netherlands (2.09.1987), Sweden (3.03.1978) and the UK (16.11.1977).

EUROPEAN CONVENTION ON ESTABLISHMENT OF COMPANIES signed in Strasbourg, on 20.01.1966.
Status:
The Convention is not in force. 5 ratification actions are needed.
Signed by Belgium (20.01.1966), Germany (5.11.1968), Italy (24.03.1966) and Luxembourg (18.09.1968).

EUROPEAN CONVENTION ON FOREIGN MONEY LIABILITIES signed in Paris, on 11.12.1967.
Status:
The convention is not in force. 3 ratification actions are needed.
Ratified by Luxembourg (9.02.1981).
Signed by Austria (11.12.1967), France (11.12.1967) and Germany (11.12.1967).

EUROPEAN AGREEMENT ON "AU PAIR" PLACEMENT signed in Strasbourg, on 24.11.1969.
Status:
The agreement entered into force 30.05.1971.
Ratified by Denmark (29.04.1971), France (5.02.1971), Italy (8.11.1973), Luxembourg (24.07.1990) and Spain (11.08.1988).
Signed by Belgium (24.11.1969), Finland (16.07.1997), Germany (2.10.1976) and Greece (22.08.1979).

EUROPEAN CONVENTION ON THE PLACE OF PAYMENT OF MONEY LIABILITIES signed in Basle, on 16.05.1972.
Status:

The Convention is not in force. 5 ratification actions are needed.
Signed by Austria (16.05.1972), Germany (16.05.1972) and the Netherlands (16.05.1972).

EUROPEAN CONVENTION ON THE CALCULATION OF TIME-LIMITS signed in Basle, on 6.05.1974.
Status:
The Convention entered into force 28.04.1983.
Ratified by Austria (11.08.1977) and Luxembourg (10.10.1984).
Signed by Sweden, Portugal, Spain, Germany, Belgium, Italy and France.

EUROPEAN CONVENTION ON CIVIL LIABILITY FOR DAMAGE CAUSED BY MOTOR VEHICLES signed in Strasbourg, on 14.05.1973.
Status:
The Convention is not in force. 3 ratification actions are needed.
Signed by Germany (14.05.1973).

EUROPEAN CONVENTION ON PRODUCTS LIABILITY IN REGARD TO PERSONAL INJURY AND DEATH signed in Strasbourg, on 27.01.1977.
Status:
The Convention is not in force. 3 ratification actions are needed.
Signed by Austria (11.08.1977), Belgium (27.01.1977), France (27.01.1977) and Luxembourg (27.01.1977).

CONVENTION ON CIVIL LIABILITY FOR DAMAGE RESULTING FROM ACTIVITIES DANGEROUS TO THE ENVIRONMENT signed in Lugano, on 21.06.1993.
Status:
The Convention in not in force. 3 ratification actions are needed.
Signed by Finland (21.06.1993), Greece (21.06.1993), Italy (21.06.1993), Luxembourg (22.06.1993), the Netherlands (21.06.1993) and Portugal (06.03.1997).

EUROPEAN CONVENTION RELATING TO QUESTIONS ON COPYRIGHT LAW AND NEIGHBOURING RIGHTS IN THE FRAMEWORK OF TRANSFRONTIER BROADCASTING BY SATELLITE signed in Strasbourg, on 11.05.1994.
Status:
The Convention is not in force. 7 ratification actions are needed.
Signed by Belgium (6.08.1998), Germany (18.04.1997), Luxembourg (11.05.1994), Spain (11.05.1994) and the UK (2.10.1996).

CIVIL LAW CONVENTION ON CORRUPTION signed in Strasbourg, on 4.11.1999.
Status:
The Convention is not in force. 14 ratification actions are needed.
Signed by Belgium (8.06.2000), Denmark (4.11.1999), Finland (8.06.2000), France (26.11.1999), Germany (4.11.1999), Greece (8.06.2000), Ireland (4.11.1999), Italy (4.11.1999), Luxembourg (4.11.1999), Sweden (8.06.2000) and the UK (8.06.2000).

CONVENTION RELATING TO STOPS ON BEARER SECURITIES IN INTERNATIONAL CIRCULATION signed in the Hague, on 28.05.1970.
Status:
The Convention entered into force 11.02.1979.
Ratified by Austria (11.08.1977), Belgium (23/05/73), France (23/05/73) and Luxembourg (23/05/73).
Signed by Germany (28/05/70), Ireland (23/04/74), the Netherlands (23/04/74) and the UK (28.05.1970).

EUROPEAN CONVENTION ON CERTAIN INTERNATIONAL ASPECTS OF BANKRUPTCY signed in Istanbul, on 5.06.1990.
Status:

The Convention is not in force. 3 ratification actions are needed.
Signed by Belgium (13.06.1990), France (5.06.1990), Germany (5.06.2000), Greece (5.06.1990), Italy (15.01.1991) and Luxembourg (5.06.1990).

Annex III. Questionnaire number 1

a) Backgound

There will be a two phases survey. The first, will gather information about rights *in rem* in the EC Member-states. The second will inquire about national constraints to the acquisition of rights *in rem*.

b) Conceptual framework

Property signifies dominion or right of use, control and disposition that one may lawfully exercise over things, objects, or land. The concept may be found in documents as ancient as The Egyptian Empire, 2600 BC, the Code of Hammurabi, 1785-1750 BC and the Constitution of Athens by Aristotle in 350 BC. The conceptual development about property was due to the Roman Empire and is compiled in the *Corpus Iuris Civilis*. The second book of the *Corpus Iuris Civilis* starts by stating the different species property: public, corporate and private. This division is, even today, a valid concept and reflections of it are present in almost every western legal system. Most of the ways property could be acquired are the same, *in essentia*, as the modern ways. The second section of the second book of the *Corpus Iuris Civilis* introduces another concept of vital importance in modern economies: the distinction between corporeal and incorporeal things. Sections four and five of the second book of the *Corpus Iuris Civilis* include a detailed regulation of the *usufructus* and the *usus* and *habitatio*. The *Corpus Iuris Civilis* also included a section called the *Servitutiones*, rights that rural immovables or urban immovables have over other immovables. The Roman Law has accepted and incorporated an Ancient Greek concept or form of property, the *ager vectigalis or emphyteuticarius*, land that was leased by the Roman state, by towns, by ecclesiastical corporations, and by the Vestal virgins. The fall of the Roman Empire of the West give place to the Feudalism, where land economics developed under the concept of *Emphyteusis*. Medieval England was a paradigm of this *Emphyteusis* development of the Feudalism, especially after the Normand invasion.

The basic concepts in this research are **thing, immovable thing, real property, property right** and **rights over immovable things** or rights in rem. This conceptual framework is the result of a cross referenced analisys of the Portuguese, Spanish and Italian legal orders, assumed to be the most closely connected and influenced by the Roman Law. To simplify the reading, the references to the statutes will be to the Portuguese law. **Things** are whatever may be object of a juridical relationship, and being so, this concept is similar to the English concept of **chose**. **Things** can be immovable and movable. **Immovable things** are a limited portion of land and any construction in or on it, the waters in or on it, trees and plants, while connected to it, and **any rights over an immovable thing** - the rights in rem, which may be included in the concept of *choose in action*. **Rights *in rem*** are a generic category of rights over things that include the property right, and is developed under the principle of *numerus clausus*, which means that the rights *in rem* are those, and those alone, created by law. There are some common characteristics to all rights in rem: typicality, consolidation, speciality or individualization, compatibility or exclusion; the sequel, the prevalence and the publicity. The rights *in rem* are organized in three different categories: enjoyment rights, security rights and rights in acquisition.

The enjoyment rights are the property right, the *usufructus*, the *usus* and *habitatio*, the *servitutiones*, the *emphyteusis*, the surface right, the lease and the possession. The property right is the paradigm of the rights *in rem* in Portugal. It is full, consolidated, in principle perpetual and transmissible. The property right may be acquired by contract, succession, usucaption, occupation and accession. Three are three different paradigms for the transmission of the property right by means of a contract. The first considers that the right is transferred by the contract alone, the second considers that the transference is completed with an autonomous act following the contract and the third considers that both must concur so property may be transferred. The Portuguese system in general follows the causal paradigm with the exception of the

transmission of immovable property, where the registration of the title is requested to the completion of the process.

There are different species of property according to a titularity criterion, i. e., the number of persons (physic or moral) who share its title. If there is but one owner, property is singular. If more than one person share the right, that is joint titularity in the sense that the property right belongs jointly to more than one person. Portuguese law admits that the shares may be different in quantity, while they must be equal in nature. Portuguese law includes the concept of horizontal property. This type of property is exclusive for buildings and means that the building is divided into several autonomous fractions sharing a common area.

The minor rights *in rem* are the *usufructus*, the *usus and habitatio*, the *servitutiones*, the emphyteusis, the surface right, the lease and the possession. The *ususfrutus* entitles its owner to fully use and enjoy a thing during a limited period of time. The right of *usus and habitatio* is the faculty of using a thing to satisfy the owners personal and family needs. The *servitutiones* are rights belonging to a subject because of its ownership over land. They are not autonomously transmitted and depend, for its maintenance, of the lands needs. The emphyteusis consists of splitting the property right into two different domains: the direct domain and the useful domain, each belonging to a different subject. The direct domain remains with the landlord and the direct domain passes to the tenant, who will pay a annual fee. The surface right is the right to build and/or keep a building or plantation in somebody else's land. This right may be, depending on the title, perpetual or temporary and for it, the owner must pay a fee, either in a single payment, or in periodic instalements. The lease is the temporary transference of the use of an immovable thing in exchange for a pecuniary compensation. The possession is the power shown when someone acts with a thing in such a manner that it appears to be exercising the property right. Possession may be exercised directly or through someone. The latter is the case when the owner leases his property and the lessee is, in fact and apparently but not in law, the possessor.

The security rights, the pawn, the mortgage, the retention right and the distress and seizure, are the rights of a creditor over things belonging to the debtor, to ensure the satisfaction of his credit. These rights are always accessory to a credit satisfaction. The rights in acquisition are rights over a thing that allows its owner to acquire an enjoyment right over that thing.

c) Questionnaire

Thank you for availability to answer the questionnaire. Please answer using the boxes provided. In question 2 replace or delete the inapplicable items or characteristics.

Country:

Respondents name, address and email:

1. Immovable things

1.1 What is an immovable thing?

1.2 Do rights *in rem* qualify as immovable things?

1.3 If the answer to Q1.2 is affirmative, which rights?

2. Rights *in rem*

Considering the following table, please indicate if the rights included therein exist in your legal order, their name or designation and if there is any significant difference.

Right	Powers	Main Obligations	Duration
Property Right	♦ Ius utendi ♦ Ius fruendi ♦ Ius abutendi ♦ Ius excludendi	♦ Legal limitations of the right: ♦ Property social function ♦ Collision of rights ♦ Public interest, mainly	♦ Perpetual and only exceptionally temporary (exceptions strictly determined by law)

		related to the ius edificandi	
Usufructus	• Ius utendi • Ius fruendi • Transmissible intervivos	• Legal and contractual	• Temporary
Usus and Habitatio	• Ius utendi • Not transmissible	• Legal and contractual	• Temporary
Servitutiones	• Ius utendi • Transmissible automaticly with the dominant land or building	• Legal and contractual	• Perpetual
Emphyteusis (Long lease)	• Ius utendi • Ius fruendi • Ius abutendi • Transmissible intervivos and mortis causa	• Legal and contractual	• Perpetual
Surface Right (building right)	• Ius utendi • Ius fruendi • Ius abutendi • Transmissible intervivos and mortis causa	• Legal and contractual	• Temporary or perpetual

Lease	♦ use of an immovable thing ♦ Transmissible with the landlord's consent	♦ rent	♦ Temporary
Possession When exercised on the possessor's behalf (different from mere detention, where its exercised in the owners behalf)	♦ Ius utendi ♦ Ius fruendi ♦ Transmissible		♦ Separately considered is always temporary

3. Conveyance (transfer of immovable things or rights *in rem* by means of a contract)

3.1 Do the following phases apply to conveyance procedure?

Phase	Yes	No	Optional
Precontract (preliminary agreement)			
Precontract (preliminary agreement) subject to the register?			
Formal contract (notary act)			
Informal contract (without notary intervention)			

Land register			

3.2 Conveyance cost

a) Notary fees (when applicable)

b) Registry fees (when applicable)

c) Transfer tax (when applicable)

Thank for answering this questionnaire. You'll be receiving shortly an executive summary of the survey.

Annex IV. Questionnaire number 2

a) Backgound

The main contribution of this research is a generic model that identifies the constraints to the acquisition of immovable property by foreigners which are common across the European Community Member-states. The application of such model will produce a grounded theory about the implications of EC law in the national property law. This research will lead to better understanding of the application of European laws to the Real Estate domain. The outcome of this research will include an EC wide study about the concept, contents and conveyance of the real property right, as well as an in depth analysis of the species and contents of the statutory rights over real estate.

There will be a two phases survey. The first, will gather information about rights *in rem* in the EC Member-states and will allow the creation of categories. The second will inquire about national constraints to the acquisition of rights *in rem.*

b) Conceptual framework

The property national legal framework must be interpreted in the light of the EC obligations. In Commission of the European Communities v Hellenic Republic, (Case 305/87 [1989] 1461, available at http://curia.eu.int/jurisp), the ECJ declared that, by maintaining in force and applying a national provision aiming to preclude the acquisition by nationals of other Member-states of immovable property situated in its border regions, the Hellenic Republic has failed to fulfil its obligations under the former Articles 48, 52 and 59 of the EC Treaty.

The facts in this Case relate to the existence of a national provision, the sole Article of the Presidential Decree of 22 to 24 June 1927, establishing that the acquisition by foreign natural or legal persons of ownership of immovable property, or other real rights therein, with the exception of mortgages, situated in border regions of the country was prohibited on pain of absolute nullity of the legal act in question, criminal sanctions and the removal from office of any notary who infringed that prohibition. The Greek Government argued that the rules at issue were justified as a measure adopted under the former Article 224 of the EC Treaty.

The grounds the European Commission brought action against Greece where the infringement of the former Articles 48, 52 and 59 of the EC Treaty: the freedom of movement for workers, the freedom of establishment and the freedom to provide services. The freedom of movement for workers infringement was alleged as it "entails the right «to stay in a Member-state for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action». It follows that access to housing and ownership of property, provided for in Article 9 of Regulation No 1612/68, is the corollary of freedom of movement for workers and is for that reason covered by the prohibition of discrimination against a national of a Member-state who wishes to take employment in another Member-state, laid down in Article 48 of the Treaty".

The infringement of the freedom of establishment was alleged as "Article 52 of the Treaty guarantees the right of nationals of a Member-state who wish to work as self-employed persons in another Member-state to be treated in the same way as nationals of that Member-state and prohibits all discrimination on grounds of nationality arising under the legislation of the Member-states and hindering access to or exercise of such activities" and "the said prohibition is concerned not solely with the specific rules on the pursuit of an occupation but also with the rules relating to the various general facilities which are of assistance in the

pursuit of that occupation" and "the right to acquire, use or dispose of immovable property on the territory of a Member-state is the corollary of freedom of establishment".

The infringement of the freedom to provide services was alleged as access to ownership and the use of immovable property is guaranteed by the former Article 59 of the Treaty in so far as such access is appropriate to enable that freedom to be exercised effectively.

The ECJ subscribed all the European Commision arguments and considered that a national constraint to the ownership of immovable property is contrary to the foundamental freedoms established in the EC Treaty.

The existence of a European space without barriers to the circulation of the goods, services, people and capitals, composed by the economies and the territories of the members-states is, from the very beginning, the founding principle of the EC. This space, called at first as the Common Market, changed its designation in 1986, with the European Single Act to the Internal Market. The expression internal market, by itself, doesn't have very defined contours, nor it corresponds to an unequivocal concept. A first approach with view to the materialization of the concept of internal market will necessarily have as starting point the problem of economic integration, understood as a process of combination of national economies in that the barriers to the free change of goods, services, people and capitals are eliminated and are established cooperation and coordination mechanisms as to the economic politics..

We can find several species of economic integration, distinguished one from the other with a qualitative criterion. The less integrated is the free trade zone, where barriers are eliminated but there is no common foreign policy. The costumes union represents more a step in the sense of the integration of the economies. Here, besides the characteristics pointed to the zone of free trade, it still exists a common position third countries. The following stadium, the common market, introduces some difficulties. In conceptual terms, the common market requires both economic freedoms, such as movement of goods, work and capital, and the matching of the economic policies.

The EC concept of internal market is included in the second paragraph of the no. 1 of the former Article 7-A EC Treaty: "The internal market is a space without internal borders in which the free circulation of goods, people, services and capitals are assured in the terms of the dispositions of the present Treaty". Apparently, this provision seems to limit the internal market to a space of freedom of movement. This is not true, as its final expression, "in the terms of the dispositions of the present Treaty" must be followed and the rest of the Treaty (or some of it) probably included in the concept; and the fact is that spread along the Treaty I find a number of measures either attributing powers to the EC in matters of economic policy coordination, either attributing to the EC itself powers to legislate. This must be completed with the basic principle of the national treatment, sometimes called the non-discrimination principle, established in the EC Treaty in Article 12, that determines that "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited".

The basic framework for the free movement of persons is established in articles 12, 14, 18, 39 and 61 of the EC Treaty. In the last section of its judgment in *Martínez Sala* (Case C-85/96 Maria Martínez Sala v Freistaat Bayern, [1998] ECR, available at http://curia.eu.int) the Court examined whether a citizen who is lawfully residing in the territory of a host Member-state can rely on the principle of non-discrimination enshrined in Article 12 EC Treaty. The Court stated that such a citizen may rely on that Article in all situations falling within the substantive scope of Community law. That is the case of the freedom of movement of persons, as determined in Article 18 EC Treaty: "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member-states, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect." Advocate General Cosmas in his Opinion in the Wijsenbeek case (Case C-378/97 [1999] ECR, available at http://curia.eu.int) defended the direct effect of that Article with two main arguments. First, the literal formulation of Article 18 EC Treaty militated in favour of direct effect. The right of every citizen of the Union to move and reside freely within the territory of the Member-states was expressly recognised. He further pointed to the particular feature of Article 18 EC Treaty which introduces into the Community legal order a purely

individual right mirrored in the right to freedom of movement which is constitutionally guaranteed in the legal systems of the Member-states. On those grounds it produced direct effect by obliging Community and national authorities to observe the rights of European citizens to move and reside freely and to refrain from adopting restrictive rules which would substantively impinge on those rights. In fact, "Union citizenship is destined to be the fundamental status of nationals of the Member-states, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for." (Case C-184/99, Grzelczyk, [2001] ECR, available at http://curia.eu.int).

The freedom of establishment and the freedom to provide services are usually included under the same heading in the EC Law manuals and books. Nonetheless, there is a clear distinction between them. The first is concerned with the freedom to permanently exercise a non-employed economic activity – "Since the Luxembourg company is involved on a stable and continuous basis in the economic life of Italy, that situation falls within the provisions of the chapter on freedom of establishment, namely Articles 52 to 58, and not those of the chapter concerning services (see, to that effect, Case 2/74 Reyners v Belgian State [1974] ECR, available at http://curia.eu.int, and Case C-55/94 Gebhard v Consiglio degli Avvocati e Procuratori di Milano [1995] ECR, available at http://curia.eu.int).", Case Sodemare (Case C-70/95 Sodemare [1997] ECR, available at http://curia.eu.int). The second is concerned with the possibility of exercising that same activity in a non-permanent base.

The right of establishment is forseen in Article 43 EC Treaty and the freedom to provide services in Article 49 EC Treaty. Article 43 defines right of establishment as "the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital." This right applies equally to natural and legal persons, as the ECJ stressed in Sodemare (Case C-70/95 Sodemare [1997] ECR, available at http://curia.eu.int): "As regards Article 52 (now Article 43) of the Treaty, read in conjunction with Article 58 (now Article 48) thereof (third question), it must be borne in mind that ***the right of establishment*** with which those provisions are concerned ***is granted*** both ***to natural persons*** who are nationals of a Member-state of the Community and to legal persons within the meaning of Article 58. Subject to the exceptions and conditions laid down, it allows all types of selfemployed activity to be taken up and pursued on the territory of any other Member-state, undertakings to be formed and operated and agencies, branches or subsidiaries to be set up (Case C-55/94 Gebhard [1995] ECR, available at http://curia.eu.int)."

The right of establishment includes in itself the principle of the non-descrimination: "As the Court found in its judgment in Factortame and Others, cited above, at paragraph 25, freedom of establishment includes, in the case of nationals of a Member-state, 'the right to take-up and pursue activities as self-employed persons … under the conditions laid down for its own nationals by the law of the country where such establishment is effected …'." (Case C-62/96 Commission v Greece [1997] ECR, available at http://curia.eu.int)

There are a number of corollaries of the right of establishment: entry and residence (Case C-62/96 Commission v Greece [1997] ECR, available at http://curia.eu.int) (Case C-151/96 Commission v Ireland [1997] ECR, available at http://curia.eu.int) (Case C-334/94 Commission v France [1996] ECR, available at http://curia.eu.int), the right to reside after ceasing an activity (Case C-62/96 Commission v Greece [1997] ECR, available at http://curia.eu.int) (Case C-151/96 Commission v Ireland [1997] ECR, available at http://curia.eu.int) (Case C-334/94 Commission v France [1996] ECR, available at http://curia.eu.int) the right to access general facilities which are of assistance in the pursuit of that occupation (Case C-305/87 Commission v Greece [1989] ECR, available at http://curia.eu.int) and the the right to acquire, use or dispose of immovable property: "In particular as is apparent from Article 54(3)(e) of the Treaty and the General programme for the abolition of restrictions on freedom of establishment of 18 December 1961 (Official Journal, English Special Edition, Second Series IX, p.7), the right to acquire, use or dispose of immovable property on the territory of a Member-state is the corollary of freedom of establishment." (Case C-305/87 Commission v Greece [1989] ECR, available at http://curia.eu.int).

The rule in Article 43 is "by its essence, capable of being directly invoked by nationals of all the other Member-states." (Case C-2/74 Reyners [1974] ECR, available at http://curia.eu.int)

Amongst the economic freedoms provided in the EC Treaty there is the capitals freedom of movement, forseen in Article 56 EC Treaty: "Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member-states and between Member-states and third countries shall be prohibited."

This freedom is ancillary to other freedoms determined by the Treaty. Should there be restrictions to the payments circulation, this would stop all other freedoms. But capital's freedom is important *per se*, being the core issue to the freedom to provide finantial services, i. e., when the capitals circulate for investment porposes and not for the satisfaction of a debt: "thus the free movement of capital constitutes, alongside that of persons and services, one of the fundamental freedoms of the community" (Case 203/80, Casati, [1981] ECR, available at http://curia.eu.int) and "the movements of capital covered by Article 67 are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service" (Case 286/82, Luisi & Carbonne, [1984] ECR, available at http://curia.eu.int).

The core of the freedom of capital circulation was enforced in the Directive 88/361/EC (available at http://www.europa.eu.int):

"Article 1

1. Without prejudice to the following provisions, Member-states shall abolish restrictions on movements of capital taking place between persons resident in Member-states. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I."

"Annex I.

I - DIRECT INVESTMENTS

1. Establishment and extension of branches or new undertakings belonging solely to the person providing the capital, and the acquisition in full of existing undertakings.

2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.

3. Long-term loans with a view to establishing or maintaining lasting economic links.

4. Reinvestment of profits with a view to maintaining lasting economic links.

A - Direct investments on national territory by non-residents

B - Direct investments abroad by residents

II - INVESTMENTS IN REAL ESTATE (not included under I)

A - Investments in real estate on national territory by non-residents

B - Investments in real estate abroad by residents"

The 1988 Directive includes an exceptional regime for the acquisition of secondary residence. The existing national legislation, limiting this type of investment, was exceptionally accepted: "Existing national legislation regulating purchases of secondary residences may be upheld until the Council adopts further provisions in this area in accordance with Article 69 of the Treaty. This provision does not affect the applicability of other provisions of Community law." (Directive 88/361/EC available at http://www.europa.eu.int). The second phrase in the quoting is perhaps the most significant. It imply that those national provisions will not be prejudiced by the Directive, provided that they are not contrary to other provisions of Community law. Again, one of the critical principles that expression may refer to is the principle of the non discrimination or of the national treatment.

The Article 12 EC Treaty includes the principle of the non discrimination. The full understanding of its contents must include the ECJ interpretation, especially where it applies the principle in matters apparently excluded of the EC competence, as the interpretation is likely to have the same nature as the one applying the principle to the national property regime, which is a core issue in this research.

The place to find those interpretations is the ECJ case law, especially that in the preliminary rulings. Amoungst those judgments, the ECJ held, in Martinez Sala (Case C-85/96, Martinez Sala, [1998] ECR, available at http://curia.eu.int), the "Article 8(2) of the Treaty attaches to the status of citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 6 of the Treaty, not to suffer discrimination on grounds of nationality within the scope of application *ratione materiae* of the Treaty."

Furthermore, in Grzelczyk, (Case C-184/99, Grzelczyk, [2001] ECR, available at http://curia.eu.int) the ECJ clarified the previous judgment: "As the Court held in paragraph 63 of its judgment in *Martínez Sala*, cited above, a citizen of the European Union, lawfully resident in the territory of a host Member-State, can rely on Article 6 of the Treaty in all situations which fall within the scope *ratione materiae* of Community law"

"Those situations include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the right to move and reside freely in another Member-state, as conferred by Article 8a of the Treaty"

In Bickel, (Case C-274/96 Bickel [1998] ECR, available at http://curia.eu.int), the Court declared that "… by prohibiting 'any discrimination on grounds of nationality', Article 6 of the Treaty requires that persons in a situation governed by Community law be placed entirely on an equal footing with nationals of the Member-state". In Saldanha, (Case C-122/96 Saldanha and MTS v Hiross [1997] ECR, available at http://curia.eu.int), the ECJ held that "By prohibiting 'any discrimination on grounds of nationality', Article 6 of the Treaty requires, in the Member-states, complete equality of treatment between persons in a situation governed by Community law and nationals of the Member-state in question."

Again, these declarations are no more then a clarification of what the Court had said early in 1989 in Cowan, (Case 186/87 Cowan [1989] ECR, available at http://curia.eu.int): "By prohibiting "any discrimination on grounds of nationality" Article 7 of the Treaty requires that persons in a situation governed by Community law be placed on a completely equal footing with nationals of the Member-state . In so far as this principle is applicable it therefore precludes a Member-state from making the grant of a right to such a person subject to the condition that he reside on the territory of that State - that condition is not imposed on the State' s own nationals".

There are two areas of legal requirements to real estate ownership that are relevant to the EC law: the nationality of the acquirer and it/his/her residence. A given legal order may restrict the access to the ownership of a right *in rem* either to its national or, regardless of the nationality, to their residents or even use both criteria in conjunction: requiring a given nationality and imposing a residence. Thus, a broad concept of national constraint ot real estate ownership must be drawn:

It constitutes a national constraint to real estate ownership, for the porpose of this research, any special legal requirement, for the purchase of immovable property, applying to natural or legal persons who do not have the nationality of, or seat in, the Member-state where the immovable is located.

That sort of legal requirements are, if applicable to natural or legal persons national of a Member-state, as laid above, incompatible with the EC law, especially with the principle of the non-descrimination in regard of the fundamental freedoms established by the EC Treaty.

The enforcement of such requirements is most probably committed to the national immovable property register, as this department was found to be an essential player in the conveyance process across the Member-states, especially in those where the purchase agreement is not a notary act.

In those countries where the purchase agreement is a notary act, the enforcement of the above mentioned special requirements may be commited to the notary himself or to the register or to both.

c) Questionnaire 2

Thank you for availability to answer the questionnaire. Please answer using the boxes provided.

Country:

Respondents name, address and email:

1. Is there any limitation or special requirement for foreigner natural or legal person to acquire immovable property?

2. If yes, which are those limitations?

3. Do they apply to EC nationals?

Thank for answering this questionnaire. You'll be receiving shortly an executive summary of the survey.

Annex V. Answers to questionnaire number 1

1. Belgium

(Contribution of Pascale LECOCQ, Université de Liège)

Right	Powers	Main Obligations	Duration
Property Right = droit de propriété Art 544 C. civ. : "La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements"	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Power to transfer the right either by contract or succession ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it ♦ Power to destroy the thing	♦ Legal limitations of the right: "pourvu qu'on n'en fasse pas…" ♦ Things that cannot be seized (articles 1408 et s. du Code judiciaire) ♦ Collision of rights either between two property rights or between property right and other rights i.e. authorship; théories jurisprudentielles de l'abus de droit et des troubles de voisinage ♦ Public interest, mainly related to the right to build : règles de l'urbanisme	♦ Perpetual and only exceptionally temporary (exceptions strictly determined by law)
Usufruct = usufruit (art. 578 à 624 C. civ.) Art 578 : "L'usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance"	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible by contract ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	Contractual obligations may exist if usufruct finds its source in a contract Legal obligations : a) before taking possession of the thing, the usufructuary must find some one who gives surety and an inventory must be drawn up; b) during the right, the usufructuary must pay the ordinary costs of the thing and maintain it	♦ Temporary For physical persons, the right is for life, unless a peculiar time has been set (when the origin is contractual); for legal persons (companies …) the right can be created for maximum 30 years (619 civil code)
Use and inhabit = Droits d'usage et d'habitation (art. 625 à 636 C. civ.)	♦ Use or inhabit an immovable thing but the droit d'usage may also be set on a moveable thing ♦ Not transmissible ♦ Power to exclude others from disturbing the	♦ cfr usufruct	♦ Temporary cfr usufruct

	right and the power to bring to action those who do it		
Easements= servitudes (art 637 à 710 bis. civil. code) Art 637: "Une servitude est une charge imposée pour l'usage et l'utilité d'un héritage appartenant à un autre propriétaire"	• Use something immovable or part of another immovable thing (i.e. right of way) • Transmissible automatically with the dominant land or building	• Legal and contractual	• Perpetual but a limit can be set by contract AND the right comes to an end if not used during 30 years (706 Civil code) AND people may apply to the judge to suppress an easement that has lost any utility (710 bis Civil Code added in 1983) Legal easements have their own rules
Emphyteusis (Long lease = emphytéose (loi du 10 janvier 1824- dutch origin) Defined as "un droit réel qui consiste à avoir la pleine jouissance d'un immeuble appartenant à autrui, sous la condition de lui payer une redevance annuelle, soit en argent, soit en nature, en reconnaissance de son droit de propriété"	• Use • Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing and power to construct • Transmissible by contract and succession	• obligation to pay is fundamental	• the duration is minimum 27 years and maximum 99 years
Surface Right (building right)= droit de superficie (loi du 10 janvier 1824- dutch origin) Defined as "un droit réel, qui consiste à avoir des bâtiments, ouvrages ou plantations sur un fonds appartenant à autrui	• Use • Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) • Transmissible intervivos and mortis causa	• Legal and contractual	Temporary : maximum 50 years but it can be renewed (art. 4)
Lease = droit personnel de jouissance issu d'un contrat de bail; so, not a "real" right in belgian law	• use of an immovable thing (or movable) • Transmissible with the landlord's consent	• rent	• Temporary
Possession When exercised on the possessor's behalf (different from mere detention, where its exercised in the owners behalf): possession/ détention	• Ius utendi • Ius fruendi • Transmissible		• Separately considered is always temporary

Table 12 – Enjoyment rights in Belgium

2. Denmark

(Contribution of Kasper D. Blangsted Henriksen)

Right	Powers	Main Obligations	Duration
Property Right In Danish: "ret over fast ejendom".	• Use • Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) • Power to transfer the right either by contract or succession • Power to exclude others from disturbing the right and the power to bring to action those who do it	• Legal limitations of the right: • Property social function • Collision of rights • Public interest, mainly related to the right to build	• Perpetual and only exceptionally temporary (exceptions strictly determined by law)
Usufruct In Danish: "privatretlige servitutter".	Depends on the terms and conditions of the usufruct. • Power to exclude others from disturbing the right and the power to bring to action those who do it	Can be established by contract, by testament or by prescription.	• Temporary
Use and inhabit In Danish: "brugsret".	Depends on the terms and conditions of the contract • Power to exclude others from disturbing the right and the power to bring to action those who do it	The rights deriving from use and inhabit is usually based on a contract and is limited to the terms and conditions of the contract.	• Temporary According to the contract.
Easements In Danish: "servitut". Danish law distinguishes between "positive easements" and "negative easements". A positive easement allows the holder of the easement to make use of an immovable thing or property whereas the negative easement imposes an obligation on the owner of an immovable thing or property to refrain from certain acts.	• Use something or part of another immovable thing (i.e. right of way) • Transmissible automatically with the dominant land or building	• Legal and contractual	• Perpetual Negative easements can be deviated from by a public district plan.
Surface Right (building right)	• Use • Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing)	Subject to public regulation and district plans.	• Temporary or perpetual

	♦ Transmissible intervivos and mortis causa		
Lease In Danish: "leje".	♦ use of an immovable thing ♦ Transmissible with the landlord's consent Sublease can be made of up to half of the rooms of the lease or the lease in whole for up to 2 years under certain circumstances, The Danish Lease Act §§ 69-72.	♦ rent	♦ Temporary Perpetual unless the lease contract is for a limited period.
Possession When exercised on the possessor's behalf (different from mere detention, where its exercised in the owners behalf)	♦ Ius utendi ♦ Ius fruendi ♦ Transmissible		♦ Separately considered is always temporary

Table 13 – Enjoyment rights *in* Denmark

3. France

(Contribution of Antoine Allez)

Right	Powers	Main Obligations	Duration
Property Right: "droit de propriété"	• Use: "droit d'user de la chose" or "usus" • Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing): "droit de percevoir les fruits " or "droit de jouir de la chose" or "fructus" • Power to transfer the right either by contract or succession: "droit de disposer de la chose" or "abusus" • Power to exclude others from disturbing the right and the power to bring to action those who do it	• Legal limitations of the right: • Property social function • Public interest, mainly related to the right to build and to the expropriation right • Unusual disturbance of possession (defined by case-law) The power to transfer the right may be limited by registered encumbrances or subject to a pre-emption right, requisition right, or expropriation right. Limitations to the transfer of the rights must be limited in time.	• Perpetual and only exceptionally temporary (exceptions strictly determined by law)
Usufruct: "Usufruit"	• Use • Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) • Transmissible by contract • Power to exclude others from disturbing the right and the power to bring to action those who do it	• Usufruct is intuitus personae. It may be transferred subject to prior approval of the "nu propriétaire" (grantor of the usufruct).	• Temporary: - for natural persons: their entire life, - for corporate entities: 30 years.
Use and inhabit	• Use or inhabit an immovable thing • Not transmissible • Power to exclude others from disturbing the right and the power to bring to action those who do it	PLEASE REFER TO LEASE SECTION	• Temporary
Easements: "Servitudes"	• Use something or part of another immovable thing (i.e. right of way) • Transmissible automatically with the dominant land or building	Easements are attached to the land. They are created either by agreement (conventional easements) or by virtue of law (planning	• Perpetual

		easements). Both easements created by operation of law and recorded conventional easements are transferable.	
Emphyteusis (Long lease): "Bail emphytéotique"	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible by contract and succession	♦ Created by virtue of a contractual relation. It must be registered at the land registry.	♦ Temporary: maximum of 99 years.
Surface Right (building right) This right does not exist as such under French law (it only exists as a volumetric division), but I may consider it under the angle of a construction right as envisaged by planning laws.	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Planning laws define the surface that can be built according to the surface of land (people have to refer to town-planning documents)	♦ Legal	♦ Temporary or perpetual
Lease: "Bail"	♦ use of an immovable thing ♦ Transmissible with the landlord's consent	♦ Created by virtue of contractual relationship. ♦ Lease law contains many restrictions (mainly directed toward protecting tenants): I make a distinction between residential leases, mainly subject to a 1989 law, and commercial leases, subject to a 1953 decree on commercial leases, which was recently incorporated into the Commercial Code	♦ Temporary: - inhabitation: minimum of 3 years for leases granted by individuals, and 6 years for leases granted by corporate entities, - commercial: minimum of 9 years, with a break clause at every 3 year period.
Adverse Possession ("prescription acquisitive" or "usucapion") under French law	♦ Ius utendi ♦ Ius fruendi ♦ Transmissible The French system of "usucapion" allows someone who possesses an immovable thing for 10 years pursuant to a title deed, or for 30 years without any title, to become the legal owner of the thing.		♦ Separately considered is always temporary

Table 14 - Enjoyment rights in France

4. Germany

(Contribution of Detlev Stoecker & Amel Al-Shajlawi**)**

Right	Powers	Main Obligations	Duration
Property Right "Eigentum"	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Power to transfer the right either by contract or succession According to Sec. 28 of the Federal Building Act ("Bundesbaugesetz") communities have a statutory pre-emptive right in all private real estate sales to be exercised in pursuance of urban planning purposes. ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it According to Sec. 906 German Civil Code emissions enacting from neighbouring land have to be tolerated to the extent that the use of the land is not substantially affected. Substantial interferences have to be tolerated if they conform to local custom and if the prevention would be unreasonably expensive.	♦ Legal limitations of the right: ♦ Property social function ♦ Collision of rights ♦ Public interest, mainly related to the right to build Ownership may be restricted by expropriation against compensation in part or in total if necessary for public welfare, e. g. road construction.	♦ Perpetual and only exceptionally temporary (exceptions strictly determined by law, see 3rd column)
Usufruct Nießbrauch	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible by contract According to Sec. 1059 German Civil Code usufruct is not transferable. However, the right to exercise may be transferred to a third party. ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	According to Sec. 1041 to 1047 German Civil Code the beneficiary is legally obliged to maintain the condition of the land, including the buildings, if any. In general, the beneficiary has to undertake to insure the property or maintain insurance obligations and/or pay insurance costs. The beneficiary has to meet all public encumbrances as well as private encumbrances, i.e. interests on land charges or mortgages.	♦ Temporary The usufruct is terminated by the death of the beneficial occupier and/or liquidation of a legal entity (Sec. 1061 German Civil Code). Usufruct expires if it coincides with the ownership of the land (Sec. 1063 German Civil Code).

	The beneficiary is not allowed to alter the economic purpose of the land or to transform existing buildings in a substantial manner unless agreed upon.		
Use and inhabit Dauernutzungsrecht / Dauerwohnrecht	♦ Use or inhabit an immovable thing ♦ rent Registered leases are defined in Sec. 31 to 42 of the Condominium Act ("Wohnungseigentumsgesetz, WEG"). Such registered leases have to be registered with Section II of the Land Register as encumbrances and thus constitute rights in rem. ♦ Transmissible and inheritable (Sec. 33 Condomium Act) ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it (Sec. 34 para. 2 Condominium Act)	According to Sec. 33 Condomium Act the Lessee has to maintain the condition of the premises and has to meet the costs of maintenance and be considerate of the interests of other beneficiaries while exercising the right.	♦ Temporary ♦ Perpetual if agreed upon (subject to Sec. 41 Condominium Act).
Easements Dienstbarkeiten	♦ Use something or part of another immovable thing (i.e. right of way) German Civil Law distinguishes between restricted personal easements ("persönliche beschränkte Dienstbarkeiten") and easements in terms of Sec. 1018 German Civil Code ("Grunddienstbarkeit"). Whereas the latter always entitles the owner of another real property, the restricted personal easement is charged in favour of an individual person. Land may also be charged so that certain acts may not be done by the land owner (i.e. a specific kind of building may not be built or that rights deriving from the ownership in the land may not be exercised). ♦ Transmissible automatically with the dominant land. According to Sec. 1092 German Civil Code restricted personal easements are not transmissible. Even the right to exercise may not be transferred to a third party unless being agreed upon.	According to Sec. 1021 German Civil Code the holder of the right has to be considerate of the interests of the landowner while exercising the right. Further obligations conform to the specific right and may be contractually agreed upon.	♦ Perpetual Restricted personal easements expire with death of the individual or at the time agreed upon.
Emphyteusis (Long lease)	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain		

Erbpacht	whatever contractual benefit without losing the right over the thing) ♦ Transmissible by contract and succession Emphyteusis in terms of the German "Erbpacht" was formerly defined as right to operate an agricultural business on a leased property. Besides the legal institution of "heritable building right" ("Erbbaurecht") German law currently does not provide for emphyteusis any more.		
Surface Right (building right) Erbbaurecht	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible intervivos and mortis causa The owner of a heritable building right demands the consent of the owner of the land for the disposition and encumbrance of the right.	♦ Legal and contractual Payment of a ground rent ("Erbbauzins") by the owner of the heritable building right if agreed (Sec. 9, 9a of the Heritable Building Right Ordinance ("ErbbauRVO"). The ordinance provides in Sec. 1 for further contractual obligations which may be agreed upon and entered into the Land Register to be effective towards legal successors.	♦ Temporary or perpetual Heritable building rights may be granted for an indefinite period of time, whereas they are seldom granted for more than ninety-nine years.
Lease	♦ use of an immovable thing ♦ Transmissible with the landlord's consent	♦ Rent Besides the rental payment obligation the parties may constitute further main obligations, i.e. the lessee's obligation to redecorate the rented property.	♦ Temporary Although the lessee may theoretically lease property for longer than thirty years under a short term lease Sec. 567 German Civil Code provides that either party may terminate the lease after that period, subject only to the statutory notice requirements.
Possession "Besitz" When exercised on the possessor's behalf (different from mere detention, where its exercised in the owners behalf)	♦ Ius utendi ♦ Ius fruendi ♦ Transmissible		♦ Separately considered is always temporary

Table 15 - Enjoyment rights in Germany

5. Italy
(Contribution from Ugo A. Milazzo)

Right	Powers	Main Obligations	Duration
Property Right Proprietà	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Power to transfer the right either by contract or succession ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	♦ Legal limitations of the right: ♦ Property social function ♦ Collision of rights ♦ Public interest, mainly related to the right to build According to Article 833 (Divieto di Atti di Emulazione) of the Italian Civil Code the owner can not perform any acts - whenever lawful - aiming at no other purposes but to harm or cause annoyance to any third parties.	♦ Perpetual and only exceptionally temporary (exceptions strictly determined by law)
Usufruct Usufrutto	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) It also includes the right to benefit from the relevant fruits. ♦ Transmissible by contract According to Italian Law usufruct can also be acquired by acquisitive prescription. ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	The main legal restriction to the right of usufruct consists in the usufructuary's duty to respect the economic destination of the immovable thing he has the usufruct on. Charges and duties are borne by either the proprietor and the usufructuary. The former shall bear any expenses for extraordinary maintenance and any charges burdening the property, the latter shall pay expenses for ordinary maintenance and any charges burdening the income.	♦ Temporary Whenever entitled to the usufruct is an individual the right cannot exceed his own life, whilst usufruct cannot last over 30 years as it is held by a legal entity.
Use and inhabit Uso e Abitazione	♦ Use or inhabit an immovable thing ♦ Not transmissible ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it According to Article 1021 of the Italian Civil Code, the right of use does not differ from the right of usufruct, but for the extension of the right to the possible fruits, in a sense that whoever holds the use over a productive thing		♦ Temporary

	can benefit from its fruits to the extent of his own and his family's needs. As far as the inhabit, Article 1022 of the Italian Civil Code defines it as the right to inhabiting a house within the limit of his own and his family's needs.		
Easements Servitù Prediali	♦ Use something or part of another immovable thing (i.e. right of way) ♦ Transmissible automatically with the dominant land or building	♦ Legal and contractual	Please note that – according to Italian Law - Easements bear a 20 (twenty) year term Statute of Limitation. Under this point of view Italian Law makes a distinction between "Positive Easements" - which allow the owner of the dominant tenement to make a direct use of the servient tenement so that the owner of the latter shall only refrain from disturbing such use - and "Negative Easements" - consisting in the obligation not to do something (i.e. not to build up, not to add a storey to a building etc.) binding upon the owner of the servient tenement. As far as the Positive Easement, the period provided by the Statute of Limitation starts running from the ceasing of the use of the servient tenement, whilst, as far as the "Negative Easements" it starts running on the occurring of any events violating the negative easement's content (i.e. the owner of the servient tenement build up a gazebo) and yet the owner of the dominant tenement does not complain
Emphyteusis (Long lease) Enfiteusi	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible by contract and succession It is firstly to be remarked that Emphiteusis is no longer applied in now days legal practice. Considering its wideness, the right of Emphiteusys is the most similar to the right of property and the reason of its obsolescence lays in the fact that - actually - the Emphiteusys holder is awarded the right to redeem the tenement by paying a consideration summing up to the amount of the annual	The main obligations binding upon the Hemphyteusis holder consist of the duty to make improvements to the tenement and to pay the relevant instalments.	Whereas not perpetual according to Article 958 of the Italian Civil Code, Emphyteusis can not last less than 20 years.

	instalments capitalisation, not being the ground landlord allowed to refuse his consent to the redemption. Nevertheless, in case the long lease holder failed in paying two yearly instalments or in improving the tenement, the ground landlord is entitled to go to court to demand either the devolution of the tenement - i.e. the expiry of the right of Emphyteusis		
Surface Right (building right) Superficie	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible intervivos and mortis causa The Building Right suspends the effects of the Principle of Accession (Accessione) - according to which any constructions existing on the soil belong to the owner of the soil - so that the holder of the right is entitled (Article 952 of the Italian Civil Code) to build up or to maintain a construction over the soil belonging to a third party not being the ownership of such construction acquired by the owner of the soil.	♦ Legal and contractual	The Building Right bears a 20 (twenty) year term Statute of Limitation. Whenever the constitution of the right is made for a fixed time, once elapsed this time the Building Right is extinguished and the owner of the soil acquires the ownership of the building insisting on it.
Lease Locazione Actually - according to Article 1572 of the Italian Civil Code - the Lease is a contract whereby one party undertakes to make another party enjoy an immovable thing (enjoyment of also movable things is generally provided) for a given time and against a given consideration.	♦ use of an immovable thing ♦ Transmissible with the landlord's consent	♦ rent	♦ Temporary
Possession When exercised on the possessor's behalf (different from mere detention, where its exercised in the owners behalf)	♦ Ius utendi ♦ Ius fruendi ♦ Transmissible		♦ Separately considered is always temporary

Table 16 - Enjoyment rights in Italy

6. Luxembourg

(Contribution of Andersen Legal Real Estate Group)

Right	Powers	Main Obligations	Duration
Property Right	♦ Ius utendi ♦ Ius fruendi ♦ Ius abutendi ♦ Ius excludendi	♦ Legal limitations of the right: ♦ Property social function ♦ Collision of rights ♦ Public interest, mainly related to the ius edificandi	♦ Perpetual and only exceptionally temporary (exceptions strictly determined by law)
Usufructus	♦ Ius utendi ♦ Ius fruendi	♦ Legal and contractual	♦ Temporary
Emphyteusis	♦ Ius utendi ♦ Ius fruendi ♦ Ius abutendi	♦ Legal and contractual ♦ Rent	♦ Temporary
Surface Right	♦ Ius utendi ♦ Ius fruendi ♦ Ius abutendi	♦ Legal and contractual	♦ Temporary
Lease	♦ use of an immovable thing	♦ rent	♦ Temporary

Table 17 - Enjoyment rights in Luxembourg

7. The Netherlands

(Contribution of Marieke Enneman & Leon Hoppenbrouwers)

Right	Powers	Main Obligations	Duration
Property Right	♦ Ius utendi ♦ Ius fruendi ♦ Ius abutendi ♦ Ius excludendi	♦ Legal limitations of the right: ♦ Property social function ♦ Collision of rights ♦ Public interest, mainly related to the ius edificandi	♦ Perpetual and only exceptionally temporary (exceptions strictly determined by law)
Usufructus Vruchtgebruik	♦ Ius utendi ♦ Ius fruendi ♦ The bare owner (“boot eigenaar”)can give the usufructuary the right to eat into his capital	♦ Legal and contractual	♦ Temporary
Usus and Habitatio	♦ Ius utendi	♦ Legal and contractual	♦ Temporary
Servitutiones	♦ Ius utendi	♦ Legal and contractual	♦ Perpetual
Emphyteusis erfpacht	♦ Ius utendi ♦ Ius fruendi ♦ Ius abutendi	♦ Legal and contractual ♦ Rent	♦ Temporary or perpetual
Surface Right opstalrecht	♦ Ius utendi ♦ Ius fruendi ♦ Ius abutendi	♦ Legal and contractual	♦ Temporary or perpetual
Lease	♦ use of an immovable thing	♦ rent	♦ Temporary
Possession	♦ Ius utendi ♦ Ius fruendi		♦ Separately considered is always temporary

Table 18 - Enjoyment rights in The Netherlands

8. Spain

(Contribution of Oscar de Santiago)

Right	Powers	Main Obligations	Duration
Property Right Propriedad	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Power to transfer the right either by contract or succession ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	♦ Legal limitations of the right ♦ Property social function ♦ Collision of rights ♦ Public interest, mainly related to the right to build - Limitations imposed either by the transferor within the legal limits (i.e., prohibition of disposing of property), or by the owner, granting rights in rem over the thing on behalf of any third parties. - Prohibition of acts of emulation ("actos de emulación"): the owner cannot perform any acts - whenever lawful - aiming at no other purposes but to harm or cause annoyance to any third parties.	♦ Perpetual and only exceptionally temporary (exceptions strictly determined by law) Temporality can be imposed also by the transferor (i.e., property subject to condition subsequent or to a term).
Usufruct Usufructo	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) It also includes the right to benefit from the relevant fruits, accessions, easements and any other profits inherent in the thing. Usufruct can fall either on movable or immovable things.	The main legal restriction to the right of usufruct consists in the usufructuary's duty to respect the form and the substance of the immovable thing he has the usufruct on, to the effect that he is obliged to maintain the thing, respect its economic destination and value, and refrain from destroying it, unless law or the usufruct deed allow the opposite.	♦ Temporary Whenever usufruct holder is an individual the right can not exceed his own life, or the life of the person who dies the last, in case usufruct is constituted on behalf of more than one person, whilst usufruct can not last over 30 years as it is held by a legal entity.

	♦ Transmissible by contract According to Spanish Law usufruct can be acquired either by contract, succession or by acquisitive prescription (in case of immovable things, a prescription of 20 or 30 years). ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	Charges and duties are borne by both the proprietor and the usufructuary. The former shall bear any expenses for extraordinary maintenance and any charges burdening directly the capital, the latter shall pay expenses for ordinary maintenance and any annual charges, contributions and any charges burdening the fruits.	
Use and inhabit Uso y habitación	♦ Use or inhabit an immovable thing ♦ Not transmissible ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it According to Article 524 of the Spanish Civil Code, the right of use consists of the right to use a productive thing (whether movable or immovable) receiving its fruits to the extent of his own and his family's needs. And the inhabit right is defined as the right to occupy the pieces of somebody else's house within the limit of his own and his family's needs.	Charges and duties are borne, in principle, by the owner, but by the right of use or inhabit holder if he consumes all the fruits of the thing or occupies the entire house. If he only consumes part of the fruits of the thing or occupies part of the house, he only have to contribute to charges and duties if the remaining fruits and uses are not enough to cover them.	♦ Temporary
Easements Servidumbre	♦ Use something or part of another immovable thing (i.e. right of way) ♦ Transmissible automatically with the dominant land or building Also entails the power to exclude others from disturbing the right and the power to bring to action those who do it According to Articles 530, 531 and 533 of the Spanish Civil Code, Spanish law singles out four main categories of easements: - "servidumbres reales" (real easements), that consist of the encumbrance imposed on a land (servient tenement) on behalf of another	♦ Legal and contractual Necessary works for the use and maintenance of the easement are borne by the dominant owner. If they are several, or if the servient owner uses in some way the easement, they will pay the works proportionally to the profit that each one of them obtain from the works.	♦ Perpetual Although the easements are in principle perpetual, the doctrine and case law admits the possibility of granting them for a certain period of time. Easements can be extinguished by non-use during a term of 20 years that starts running from the ceasing of the use of the servient tenement in case of discontinuous easements, and from the day in which an act in opposition to the easement has taken place, in case of continuous easements.

	pertaining to a different owner (dominant tenement). - "servidumbres personales" (personal easements), that consist of attribution to one or more people or a community, any partial profit that a tenement is susceptible to provide. - "servidumbres positivas" (affirmative easements), where the servient owner allows the dominant owner to do something in the servient tenement. - "servidumbres negativas" (negative easements), where the servient owner stops the dominant owner from doing something that it would be allowed without the easement. According to Spanish Law, continuous and apparent easements can be acquired by acquisitive prescription of 20 years.		
Emphyteusis (Long lease) Enfiteusis	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible by contract and succession Emphyteusis is an institution in disuse in the current legal practise. One of the reasons of its obsolescence lays in the fact that emphyteusis holder may redeem the emphyteusis. In case of purchase and sale or donation in payment ("dación en pago") of the tenement, ground landlord has first refusal and pre-emption rights. In case of onerous transmission of the tenement, parties can agree a right of "laudemio" (laudemium) on behalf of the ground landlord – money consideration that emphyteusis holder have to pay to the ground landlord.	Contributions and taxes over the tenement are borne by the emphyteusis holder, who is also obliged to pay the relevant instalments.	Although emphyteusis is in principle perpetual or constituted for an indefinite time, the emphyteusis holder is allowed to redeem the emphyteusis by paying the ground landlord a money consideration, not being the ground landlord allowed to refuse his consent to the redemption. Notwithstanding, parties can agree that the redemption cannot take place during the life of the emphyteusis holder or any certain person, or during a term that does not exceed 60 years. In the event that the emphyteusis holder failed in paying three yearly instalments or in fulfilling the agreed conditions, or that he seriously damaged the tenement, the ground landlord is entitled to claim the refund of the tenement.
Surface Right (building right)	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow,	♦ Legal and contractual Registration with the Land Registry is	According to Spanish Law surface right is temporary and it only can be granted for a

Superficie Besides surface right, it is regulated the right known as "derecho de sobreelevación", that consist of the right to raise one or more storeys of a building or to carry out constructions under its soil, acquiring the resultant constructions.	or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible intervivos and mortis causa Surface Right, excluding the effects of the principle of accession ("accesión") - according to which any constructions existing on the soil belong to the owner of the soil – consist of the right to either build or plant, or to maintain a construction or a plantation over the soil belonging to a third party not being the ownership of such construction acquired by the owner of the soil.	required for the due constitution of surface right.	maximum term of 75 years – in case of surface right granted by any public corporation- or 99 years – in case of surface right granted by a private person. Once elapsed this time, surface right is extinguished and the owner of the soil acquires the ownership of the building existing on it, unless otherwise stated.
Lease Arrenda-miento According to Article 1543 of the Spanish Civil Code - the lease is a contract whereby one party undertakes to make another party enjoy a thing (movable or immovable) for a given time and against a given price.	♦ use of an immovable thing ♦ Transmissible with the landlord's consent	♦ rent	♦ Temporary
Possession When exercised on the possessor's behalf (different from mere detention, where its exercised in the owners behalf)	♦ Ius utendi ♦ Ius fruendi ♦ Transmissible		♦ Separately considered is always temporary

Table 19 - Enjoyment rights in Spain

8. Sweden

(Contribution of Per Månsson)

Right	Powers	Main Obligations	Duration
Property Right Äganderätt till fast egendom	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Power to transfer the right either by contract or succession ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	♦ Legal limitations of the right: ♦ Property social function ♦ Collision of rights ♦ Public interest, mainly related to the right to build The right to exclude others is limited by the legal right of access to private land, (Sw. "Allemansrätt" ("Everymans's right")) which entitles anyone to walk on other person's property and to stay there temporarily, provided this behaviour is not disruptive and does not cause any damage. This right is not regulated by any statutory provision.	♦ Perpetual
Usufruct Nyttjanderätt	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible by contract ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	Limitations in form of "everyman's right" (as described above) appear. Usufruct in form of a rented apartment is not fully transferable. Subletting has to be approved by the owner of the immovable or by the rent tribunal.	♦ Temporary
Use and inhabit Användande och boende.	♦ Use or inhabit an immovable thing ♦ Not transmissible (except through subletting as stated below) ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	♦ Legal and contractual	♦ Temporary
Easements	♦ Use something or part of another	♦ Legal and contractual	♦ Perpetual, unless the dominant

Servitut	immovable thing (i.e. right of way) ♦ Transmissible automatically with the dominant land or building Easements based on contracts are not automatically transferred with the dominant land. If the easement is registered, is automatically transferred.		property is sold with contractual easement not registered in the property register and the easement is not reserved in the transfer agreement.
Surface Right (building right) Tomträtt	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible intervivos and mortis causa	♦ Legal and contractual	♦ Temporary
Lease Hyra	♦ use of an immovable thing ♦ Transmissible with the landlord's consent, subletting of an apartment could be accepted by the rent tribunal if the landlord refuses his consent.	♦ rent	♦ Temporary
Possession When exercised on the possessor's behalf (different from mere detention, where its exercised in the owners behalf) Besittning	♦ Ius utendi ♦ Ius fruendi ♦ Transmissible		♦ Separately considered is always temporary

Table 20 - Enjoyment rights in Sweden

9. UK (Engand and Wales)

(Contribution of Andrew Lewry)

Right	Powers	Main Obligations	Duration
Property Right Legal and equitable rights (s.1 Law of Property Act 1925)	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Power to transfer the right either by contract or succession ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it ♦ s.1 Law of Property Act 1925 distinguishes two legal estates (freehold and leasehold) and five legal interests or charges (easements, rent charges, mortgages, miscellaneous charges and rights of entry). All other proprietary rights in land are equitable only	♦ Legal limitations of the right: ♦ Property social function ♦ Collision of rights ♦ Public interest, mainly related to the right to build	♦ Perpetual and only exceptionally temporary (exceptions strictly determined by law)
Usufruct This concept is not recognised under the law of England & Wales although the use of trusts is common (i.e. someone other than the legal owner of an estate holds the beneficial interest)	♦ Use ♦ Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing) ♦ Transmissible by contract ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	♦ Types of trust: "Express Trust" – where the owner of a legal title in land expressly declares himself as a trustee of that title for another "Implied Trust" – arising by operation of law. Two types of implied trust – resulting trust and constructive trust	♦ Temporary
Use and inhabit "Licence" (in contrast to a lease)	♦ Use or inhabit an immovable thing – A licence confers a personal permission to occupy, as opposed to an estate in land conferred by a lease. The minimal function of a licence is to suspend liability for trespass. No proprietary right is created ♦ Not transmissible ♦ Power to exclude others from disturbing the right and the power to bring to action those who do it	♦ Types of licence: "bare licence" (personal permission to enter someone else's land without consideration) "contractual licence" (permission to be present on land under an express or implied contract	♦ Temporary
Easements "Easements"	♦ Use something or part of another immovable thing (i.e. right of way) – a positive or negative right of user over the land of another ♦ Transmissible automatically with the dominant land or building	♦ Legal and contractual ♦ There must be a dominant tenement and a servient tenement ♦ The easement must "accommodate" the dominant tenement	♦ Perpetual

		• The dominant and servient tenements must be owned or occupied by different persons • The easement must be capable of forming the subject matter of a grant	
Emphyteusis (Long lease) This term is not recognised under the law of England & Wales, however long leases are often granted over property (see "lease" below)			
Surface Right (building right) This term is not recognised under the law of England & Wales			
Lease "Term of years absolute" (s.1(1)(b) Law of Property Act 1925) otherwise known as a "lease" or "tenancy"	• use of an immovable thing for a determinate period • Transmissible with the landlord's consent by way of assignment or sub-lease	• Rent or other consideration • The parties to a lease must be legally competent • A lease must have a fixed maximum duration • The demised premises must be identified with certainty • A lease must confer a right of exclusive possession	• Temporary
Possession When exercised on the possessor's behalf (different from mere detention, where its exercised in the owners behalf) "Licence" – see above under "Use and inhabit"	• Ius utendi • Ius fruendi • Transmissible		• Separately considered is always temporary

Table 21 - Enjoyment rights in the UK

Annex VI – Comparative tables

1. Property right

Right → Country ↓	Property right national designation	Contents
Austria	NA	NA
Belgium	Droit de propriété	It includes the powers to use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing), transfer the right either by contract or succession, to exclude others from disturbing the right and the power to bring to action those who do it and the power to destroy the thing. There are limitations to the right: Legal limitations of the right: “pourvu qu’on n’en fasse pas…”, the collision of rights either between two property rights or between property right and other rights i.e. authorship; théories jurisprudentielles de l’abus de droit et des troubles de voisinage and the public interest, mainly related to the right to build: règles de l’urbanisme. The property right is perpetual and only exceptionally temporary (exceptions strictly determined by law).
Denmark	Ret over fast ejendom	Includes the power to use, enjoy, transfer the right by either contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest. The property right is generally perpetual.
Finland	NA	NA
France	Droit de propriété	Includes the power to use, ("droit d'user de la chose" or "usus") enjoy ("droit de percevoir les fruits " or "droit de jouir de la chose" or "fructus"), transfer the right either by contract or succession ("droit de disposer de la chose" or "abusus") and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights, the public interest and the expropriation right. The property right is generally perpetual. Unusual disturbance of possession is defined by case law. The power to transfer the right may be limited by registered encumbrances or subject to a pre-emption right, requisition right, or expropriation right. These limitations to the transfer of the rights must be limited in time.
Germany	Eigentum	Includes the power to use, enjoy, transfer the right by either contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest. According to Sec. 28 of the Federal Building Act (“Bundesbaugesetz”) communities have a statutory pre-emptive right in all private real estate sales to be exercised in pursuance of urban planning purposes. According to Sec. 906 German Civil Code, emissions enacting from neighbouring land have to be tolerated to the extent that the use of the land is not substantially affected. Substantial interferences have to be tolerated if they conform to local custom and if the prevention would be unreasonably expensive. Ownership may be restricted by expropriation against compensation in part or in total if necessary for public welfare, e. g. road construction. The property right is generally perpetual and only exceptionally temporary, strictly determined by law.

Greece	NA	NA
Ireland	NA	NA
Italy	Proprietà	Includes the power to use, enjoy, transfer the right by either contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest. According to Article 833 (Divieto di Atti di Emulazione) of the Italian Civil Code the owner can not perform any acts - whenever lawful - aiming at no other purposes but to harm or cause annoyance to any third parties The property right is generally perpetual and only exceptionally temporary.
Luxembourg	NA	NA
Netherlands	NA	The property right is defined as the most absolute right one may have with respect to an asset. The owner may exclusively enjoy and dispose of assets and acquire the proceeds of them, provided that the use is not incompatible with the rights of others and the written and unwritten laws. The property right may relate to an apartment or fraction of a building (appartementsrecht). The property right is generally perpetual
Portugal	Propriedade	Includes the power to use, enjoy, transfer the right by either contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest, especially related to the ius edificandi. Property is perpetual and only exceptionally temporary (exceptions strictly determined by law).
Spain	Propriedad	Includes the power to use, enjoy, transfer the right by either contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest, especially related to the ius edificandi. There may be limitations imposed either by the transferor within the legal limits (i.e., prohibition of disposing of property), or by the owner granting rights in rem over the thing on behalf of any third parties and there is a prohibition of acts of emulation ("actos de emulación"): the owner can not perform any acts - whenever lawful - aiming at no other purposes but to harm or cause annoyance to any third parties. Property may be perpetual or temporary: Temporality can be imposed also by the transferor (i.e., property subject to condition subsequent or to a term).
Sweden	Äganderätt till fast egendom	Includes the power to use, enjoy, transfer the right by either contract or succession and the power to exclude others from disturbing it and bring to action those who do it. The main limitations of the right are the property social function, the collision of rights and the public interest, especially related to the ius edificandi. The right to exclude others is limited by the legal right of access to private land, (Sw. "Allemansrätt" ("Everyman's right")) which entitles anyone to walk on other person's property and to stay there temporarily, provided this behaviour is not disruptive and does not cause any damage. This right is not regulated by any statutory provision.
UK	Freehold	s.1 Law of Property Act 1925 distinguishes two legal estates (freehold and leasehold) and five legal interests or charges (easements, rent charges, mortgages, miscellaneous charges and rights of entry). All other proprietary rights in land are equitable only. Freehold ownership equates to absolute ownership in that it provides for the right to own, occupy and dispose of the land and any buildings on the land.

Table 22 - The property right in the Member-states

2. Usufructus

Right → Country ↓	Usufructus	Contents
Austria	NA	NA
Belgium	Usufruit	It includes the powers of use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing), transfer and exclude others from disturbing the right and the power to bring to action those who do it. Contractual obligations may exist if usufruct finds its source in a contract. The legal obligations: a) before taking possession of the thing, the usufructuary must find some one who gives surety and an inventory must be drawn up; b) during the right, the usufructuary must pay the ordinary costs of the thing and maintain it. The usufruct is always temporary: For physical persons, the right is for life, unless a peculiar time has been set (when the origin is contractual); for legal persons (companies…) the right can be created for maximum 30 years (619 civil code).
Denmark	Privatretlige servitutter	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing), transmissible by contract, depending on the terms and conditions of the usufruct, and the power to exclude others from disturbing the right and the power to bring to action those who do it. It can be established by contract, by testament or by prescription and is always temporary.
Finland	NA	NA
France	Usufruit	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). The Usufruct is intuitus personae. It may be transferred subject to prior approval of the "nu propriétaire" (grantor of the usufruct). It is always Temporary: for natural persons: their entire life, and for corporate entities: 30 years maximum.
Germany	Nießbrauch	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). According to Sec. 1059 German Civil Code usufruct is not transferable. However, the right to exercise may be transferred to a third party. It includes the power to exclude others from disturbing the right and the power to bring to action those who do it. The beneficiary is not allowed to alter the economic purpose of the land or to transform existing buildings in a substantial manner unless agreed upon. According to Sec. 1041 to 1047 German Civil Code the beneficiary is legally obliged to maintain the condition of the land, including the buildings, if any. In general, the beneficiary has to undertake to insure the property or maintain insurance obligations and/or pay insurance costs. The beneficiary has to meet all public encumbrances as well as private encumbrances, i.e. interests on land charges or mortgages. The usufruct is terminated by the death of the beneficial occupier and/or liquidation of a legal entity (Sec. 1061 German Civil Code). Usufruct expires if it coincides with the ownership of the land (Sec. 1063 German Civil Code).
Greece	NA	NA
Ireland	NA	NA
Italy	Usufrutto	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). It also

		includes the right to benefit from the relevant fruits. Transmissible by contract, according to Italian Law can also be acquired by acquisitive prescription. It includes the power to exclude others from disturbing the right and the power to bring to action those who do it. The main legal restriction to the right of usufruct consists in the usufructuary's duty to respect the economic destination of the immovable thing he has the usufruct on. Charges and duties are borne by either the proprietor and the usufructuary. The former shall bear any expenses for extraordinary maintenance and any charges burdening the property, the latter shall pay expenses for ordinary maintenance and any charges burdening the income. It is always temporary: Whenever entitled to the usufruct is an individual the right can not exceed his own life, whilst usufruct can not last over 30 years as it is held by a legal entity.
Luxembourg	NA	NA
Netherlands	Vruchtgebruik	Ius utendi, Ius fruendi. The bare owner ("boot eigenaar") can give the usufructuary the right to eat into his capital. It is always temporary.
Portugal	Usufruto	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). It also includes the right to benefit from the relevant fruits and the power to exclude others from disturbing the right and the power to bring to action those who do it. Transmissible by contract, is always temporary.
Spain	Usufructo	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing. It also includes the right to benefit from the relevant fruits, accessions, easements and any other profits inherent in the thing. Usufruct can fall either on movable or immovable things. According to Spanish Law usufruct can be acquired either by contract, succession or by acquisitive prescription (in case of immovable things, a prescription of 20 or 30 years). Power to exclude others from disturbing the right and the power to bring to action those who do it. The main legal restriction to the right of usufruct consists in the usufructuary's duty to respect the form and the substance of the immovable thing he has the usufruct on, to the effect that he is obliged to maintain the thing, respect its economic destination and value, and refrain from destroying it, unless law or the usufruct deed allow the opposite. Charges and duties are borne by either the proprietor and the usufructuary. The former shall bear any expenses for extraordinary maintenance and any charges burdening directly the capital, the latter shall pay expenses for ordinary maintenance and any annual charges, contributions and any charges burdening the fruits. Whenever usufruct holder is an individual the right can not exceed his own life, or the life of the person who dies the last, in case usufruct is constituted on behalf of more than one person, whilst usufruct can not last over 30 years as it is held by a legal entity.
Sweden	Nyttjanderätt	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). It also includes the right to benefit from the relevant fruits and the power to exclude others from disturbing the right and the power to bring to action those who do it. Limitations in form of "everyman's right" (as described above) appear. Usufruct in form of a rented apartment is not fully transferable. Subletting has to be approved by the owner of the immovable or by the rent tribunal. It is always temporary.
UK	Inexistent. Most similar institute: Trust	The Usufruct is concept is not recognised under the law of England & Wales although the use of trusts is common (i.e. someone other than the legal owner of an estate holds the beneficial interest).

Table 23 - The Usufructus in the Member-states

3. Usus and habitatio

Right → Country ↓	Usus and Habitatio	Contents
Austria	NA	NA
Belgium	Droits d'usage et d'habitation	It includes the powers to use or inhabit an immovable thing but the droit d'usage may also be set on a moveable thing. It is not transmissible and it includes the power to exclude others from disturbing the right and the power to bring to action those who do it. Its limitations and duration are the same as to, mutates mutandis, the usufruct.
Denmark	Brugsret	Use or inhabit an immovable thing. Transmissibility depends on the terms and conditions of the contract. Includes the power to exclude others from disturbing the right and the power to bring to action those who do it. The rights deriving from use and inhabit are usually based on a contract and are limited to the terms and conditions of the contract. Temporality depends of the contract.
Finland	NA	NA
France	Included in the Lease regulation	
Germany	Dauernutzungsrecht / Dauerwohnrecht	Use or inhabit an immovable thing. Registered leases are defined in Sec. 31 to 42 of the Condominium Act ("Wohnungseigentumsgesetz, WEG"). Such registered leases have to be registered with Section II of the Land Register as encumbrances and thus constitute rights in rem. Transmissible and inheritable (Sec. 33 Condomium Act). Includes the power to exclude others from disturbing the right and the power to bring to action those who do it (Sec. 34 para. 2 Condominium Act). According to Sec. 33 Condomium Act the Lessee has to maintain the condition of the premises and has to meet the costs of maintenance and be considerate of the interests of other beneficiaries while exercising the right. May be perpetual if agreed upon (subject to Sec. 41 Condominium Act).
Greece	NA	NA
Ireland	NA	NA
Italy	Uso e Abitazione	Use or inhabit an immovable thing. Includes the power to exclude others from disturbing the right and the power to bring to action those who do it. Not transmissible. According to Article 1021 of the Italian Civil Code, the right of use does not differ from the right of usufruct, but for the extension of the right to the possible fruits, in a sense that whoever holds the use over a productive thing can benefit from its fruits to the extent of his own and his family's needs. As far as the inhabit, Article 1022 of the Italian Civil Code defines it as the right to inhabiting a house within the limit of his own and his family's needs. Always temporary.
Luxembourg	NA	NA
Netherlands	NA	Ius utendi. Legal and contractual. Temporary
Portugal	Uso e habitação	Use or inhabit an immovable thing. Includes the power to exclude others from disturbing the right and the power to bring to

		action those who do it. Not transmissible. The right of use does not differ from the right of usufruct, but for the extension of the right to the possible fruits, in a sense that whoever holds the use over a productive thing can benefit from its fruits to the extent of his own and his family's needs. Always temporary.
Spain	Uso y habitación	According to Article 524 of the Spanish Civil Code, the right of use consists of the right to use a productive thing (whether movable or immovable) receiving its fruits to the extent of his own and his family's needs. And the inhabit right is defined as the right to occupy the pieces of somebody else's house within the limit of his own and his family's needs. Charges and duties are borne, in principle, by the owner, but by the right of use or inhabit holder if he consumes all the fruits of the thing or occupies the entire house. If he only consumes part of the fruits of the thing or occupies part of the house, he only have to contribute to charges and duties if the remaining fruits and uses are not enough to cover them. Always temporary.
Sweden	Användande och boende	Use or inhabit an immovable thing. Not transmissible (except through subletting). It includes the power to exclude others from disturbing the right and the power to bring to action those who do it. Always temporary.
UK	Licence	A licence confers a personal permission to occupy, as opposed to an estate in land conferred by a lease. The minimal function of a licence is to suspend liability for trespass. No proprietary right is created. There are two types of licence: "bare licence" (personal permission to enter someone else's land without consideration) and "contractual licence" (permission to be present on land under an express or implied contract).

Table 24 - The Usus and Habitatio in the Member-states

4. Surface right

Right → Country ↓	Surface Right	Contents
Austria	NA	NA
Belgium	Droit de superficie	It includes the power of use and enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). It is transmissible intervivos and mortis causa. It is always temporary: maximum 50 years but it can be renewed (art. 4).
Denmark	Building right	Use, Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). Transmissible intervivos and mortis causa. Subject to public regulation and district plans. Temporary or perpetual
Finland	NA	NA
France	Inexistent	
Germany	Erbbaurecht	Use, Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). Transmissible intervivos and mortis causa. The owner of a heritable building right demands the consent of the owner of the land for the disposition and encumbrance of the right. Payment of a ground rent ("Erbbauzins") by the owner of the heritable building right if agreed (Sec. 9, 9a of the Heritable Building Right Ordinance ("ErbbauRVO"). The ordinance provides in Sec. 1 for further contractual obligations which may be agreed upon and entered into the Land Register to be effective towards legal successors. Heritable building rights may be granted for an indefinite period of time, whereas they are seldom granted for more than ninety-nine years.
Greece	NA	NA
Ireland	NA	NA
Italy	Superficie	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing), transmissible intervivos and mortis causa. The Building Right suspends the effects of the Principle of Accession (Accessione) - according to which any constructions existing on the soil belong to the owner of the soil - so that the holder of the right is entitled (Article 952 of the Italian Civil Code) to build up or to maintain a construction over the soil belonging to a third party not being the ownership of such construction acquired by the owner of the soil. The Building Right bears a 20 (twenty) year term Statute of Limitation. Whenever the constitution of the right is made for a fixed time, once elapsed this time the Building Right is extinguished and the owner of the soil acquires the ownership of the building insisting on it.
Luxembourg	NA	NA
Netherlands	Opstalrecht	Ius utendi, Ius fruendi, Ius abutendi. Temporary or perpetual
Portugal	Direito de superficie	Ius utendi, Ius fruendi, Ius abutendi. Temporary or perpetual

Spain	Superficie	Use, Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing), transmissible intervivos and mortis causa. The surface right excludes the effects of the principle of accession ("accesión") - according to which any constructions existing on the soil belong to the owner of the soil – consist of the right to either build or plant, or to maintain a construction or a plantation over the soil belonging to a third party not being the ownership of such construction acquired by the owner of the soil. Registration with the Land Registry is required for the due constitution of surface right. According to Spanish Law surface right is temporary and it only can be granted for a maximum term of 75 years – in case of surface right granted by any public corporation- or 99 years – in case of surface right granted by a private person. Once elapsed this time, surface right is extinguished and the owner of the soil acquires the ownership of the building existing on it, unless otherwise stated. Besides surface right, it is regulated the right known as "derecho de sobreelevación", that consists of the right to raise one or more storeys of a building or to carry out constructions under its soil, acquiring the resultant constructions.
Sweden	Tomträtt	Use, Enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing), transmissible intervivos and mortis causa.
UK	Inexistent	

Table 25 - The Surface right in the Member-states

5. Servitutiones

Right → Country ↓	Servitutiones	Contents
Austria	NA	NA
Belgium	Servitudes	Servitudes include the power to use an immovable or part of it (i.e. right of way). It is transmissible automatically with the dominant land or building. Servitudes are perpetual but a limit can be set by contract. The right comes to an end if not used during 30 years (706 Civil code). People may apply to the judge to suppress an easement that has lost any utility (710 bis Civil Code added in 1983). Legal easements have their own rules.
Denmark	Servitut	Use something or part of another immovable thing. Transmissible automatically with the dominant land or building. Danish law distinguishes between "positive easements" and "negative easements". A positive easement allows the holder of the easement to make use of an immovable thing or property whereas the negative easement imposes an obligation on the owner of an immovable thing or property to refrain from certain acts. Negative easements can be deviated from by a public district plan.
Finland	NA	NA
France	Servitudes	Use something or part of another immovable thing. Transmissible automatically with the dominant land or building. Easements are attached to the land. They are created either by agreement (conventional easements) or by virtue of law (planning easements). Both easements created by operation of law and recorded conventional easements are transferable. Perpetual
Germany	Dienstbarkeiten	Use something or part of another immovable thing. Transmissible automatically with the dominant land or building. German Civil Law distinguishes between restricted personal easements (“persönliche beschränkte Dienstbarkeiten”) and easements in terms of Sec. 1018 German Civil Code (“Grunddienstbarkeit”). Whereas the latter always entitles the owner of another real property, the restricted personal easement is charged in favour of an individual person. Land may also be charged so that certain acts may not be done by the land owner (i.e. a specific kind of building may not be built or that rights deriving from the ownership in the land may not be exercised). According to Sec. 1092 German Civil Code restricted *personal* easements are not

		transmissible. Even the right to exercise may not be transferred to a third party unless being agreed upon. According to Sec. 1021 German Civil Code the holder of the right has to be considerate of the interests of the landowner while exercising the right. Further obligations conform to the specific right and may be contractually agreed upon. Restricted personal easements expire with death of the individual or at the time agreed upon.
Greece	NA	NA
Ireland	NA	NA
Italy	Servitù Prediali	Use something or part of another immovable thing. Transmissible automatically with the dominant land or building. According to Italian Law - Easements bear a 20 (twenty) year term Statute of Limitation. Under this point of view Italian Law makes a distinction between "Positive Easements" - which allow the owner of the dominant tenement to make a direct use of the servient tenement so that the owner of the latter shall only refrain from disturbing such use - and "Negative Easements" -consisting in the obligation not to do something (i.e. not to build up, not to add a storey to a building etc.) binding upon the owner of the servient tenement. As far as the Positive Easement, the period provided by the Statute of Limitation starts running from the ceasing of the use of the servient tenement, whilst, as far as the "Negative Easements" it starts running on the occurring of any events violating the negative easement's content (i.e. the owner of the servient tenement build up a gazebo) and yet the owner of the dominant tenement does not complain.
Luxembourg	NA	NA
Netherlands	NA	Use something or part of another immovable thing. Transmissible automatically with the dominant land or building
Portugal	Servidão	Use something or part of another immovable thing. Transmissible automatically with the dominant land or building
Spain	Servidumbre	Use something or part of another immovable thing. Transmissible automatically with the dominant land or building. Also entails the power to exclude others from disturbing the right and the power to bring to action those who do it. According to Articles 530, 531 and 533 of the Spanish Civil Code, Spanish law singles out four main categories of easements: "servidumbres reales" (real easements), that consist of the encumbrance imposed on a land (servient

		tenement) on behalf of another pertaining to a different owner (dominant tenement). "servidumbres personales" (personal easements), that consist of attribution to one or more people or a community, any partial profit that a tenement is susceptible to provide. "servidumbres positivas" (affirmative easements), where the servient owner allows the dominant owner to do something in the servient tenement. "servidumbres negativas" (negative easements), where the servient owner stops the dominant owner from doing something that it would be allowed without the easement. According to Spanish Law, continuous and apparent easements can be acquired by acquisitive prescription of 20 years. Necessary works for the use and maintenance of the easement are borne by the dominant owner. If they are several, or if the servient owner uses in some way the easement, they will pay the works proportionally to the profit that each one of them obtain from the works. Although the easements are in principle perpetual, the doctrine and case law admits the possibility of granting them for a certain period of time. Easements can be extinguished by non-use during a term of 20 years that starts running from the ceasing of the use of the servient tenement in case of discontinuous easements, and from the day in which an act in opposition to the easement has taken place, in case of continuous easements.
Sweden	Servitut	Use something or part of another immovable thing. Easements based on contracts are not automatically transferred with the dominant land. If the easement is registered, it is automatically transferred. Perpetual, unless the dominant property is sold with contractual easement not registered in the property register and the easement is not reserved in the transfer agreement.
UK	Easements	The Easements include the use of something or part of another immovable thing (i.e. right of way) – a ositive or negative right of user over the land of another. There must be a dominant tenement and a servient tenement, the easement must "accommodate" the dominant tenement, the dominant and servient tenements must be owned or occupied by different persons and the easement must be capable of forming the subject matter of a grant. It is transmissible automatically with the dominant land or building.

Table 26 - The Servitutiones in the Member-states

6. Emphyteusis

Right → Country ↓	Emphyteusis	Contents
Austria	NA	NA
Belgium	Emphytéose	It includes the use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing and the power to construct and is transmissible by contract and succession. The obligation to pay is fundamental. The duration is minimum 27 years and maximum 99 years.
Denmark	Inexistent	
Finland	NA	NA
France	Bail emphytéotique	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). Transmissible by contract and succession. Created by virtue of a contractual relation. It must be registered at the land registry. Temporary: maximum of 99 years.
Germany	Erbpacht	Emphytheusis in terms of the German "Erbpacht" was formerly defined as right to operate an agricultural business on a leased property. Besides the legal institution of "heritable building right" ("Erbbaurecht") German law currently does not provide for emphytheusis any more.
Greece	NA	NA
Ireland	NA	NA
Italy	Enfiteusi	It is firstly to be remarked that Emphiteusis is no longer applied in now days legal practice. Considering its wideness, the right of Emphyteusis is the most similar to the right of property and the reason of its obsolescence lays in the fact that - actually - the Emphyteusis holder is awarded the right to redeem the tenement by paying a consideration summing up to the amount of the annual instalments capitalisation, not being the ground landlord allowed to refuse his consent to the redemption. Nevertheless, in case the long lease holder failed in paying two yearly instalments or in improving the tenement, the ground landlord is entitled to go to court to demand either the devolution of the tenement - i.e. the expiry of the right of Emphyteusis -.
Luxembourg	NA	NA
Netherlands	Erfpacht	Ius utendi, Ius fruendi, Ius abutendi. Rent. May be temporary or perpetual.
Portugal	Enfiteuse	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). Transmissible by contract and succession. Perpetual. No longer in use.
Spain	Enfiteusis	Use, enjoy (i.e., the power to rent, let, borrow, or gain whatever contractual benefit without losing the right over the thing). Transmissible by contract and succession. Emphyteusis is an institution in disuse in the current legal practise. One of the reasons of its obsolescence lays in the fact that emphyteusis holder may redeem the emphyteusis. In case of purchase and sale or donation in payment ("dación en pago") of the tenement, ground landlord has first refusal and pre-emption rights. In case of onerous

		transmission of the tenement, parties can agree a right of “laudemio” (laudemium) on behalf of the ground landlord – money consideration that emphyteusis holder have to pay to the ground landlord. Contributions and taxes over the tenement are borne by the emphyteusis holder, who is also obliged to pay the relevant instalments. Although emphyteusis is in principle perpetual or constituted for an indefinite time, the emphyteusis holder is allowed to redeem the emphyteusis by paying the ground landlord a money consideration, not being the ground landlord allowed to refuse his consent to the redemption. Notwithstanding, parties can agree that the redemption cannot take place during the life of the emphyteusis holder or any certain person, or during a term that does not exceed 60 years. In the event that the emphyteusis holder failed in paying three yearly instalments or in fulfilling the agreed conditions, or that he seriously damaged the tenement, the ground landlord is entitled to claim the refund of the tenement.
Sweden	Inexistent	
UK	Inexistent as such. Some leaseholds (long leases) have similar nature and effects	A lease (or tenancy) is used when something less than absolute ownership is intended. It provides the leaseholder or tenant with the exclusive right to use, occupy or take the profits from land or the whole or part of a building on set terms. There is no limit on the length of a lease, which may be for a fixed term or by way of a periodic tenancy or even for an individual’s lifetime. A lease will usually be granted for a premium (a capital sum) or for a periodic rent (monthly, quarterly or any other period) or a combination of both. "Long" leases usually last for at least 50 years at a nominal rent containing only limited restrictions and obligations on the tenant. In many cases the tenant under a long lease will effectively be in the same position as if it owned the freehold interest in the land. Usually a lump sum or "premium" is paid at the outset.

Table 27 - The Emphyteusis in the Member-states

7. The lease

Right → Country ↓	Lease	Contents
Austria	NA	NA
Belgium	Bail	It includes the power to use an immovable thing (or movable) and is transmissible with the landlord's consent.
Denmark	Leje	Use of an immovable thing, transmissible with the landlord's consent. Sublease can be made of up to half of the rooms of the lease or the lease in whole for up to 2 years under certain circumstances, The Danish Lease Act §§ 69-72. Perpetual unless the lease contract is for a limited period of time
Finland	NA	NA
France	Bail	Use of an immovable thing, transmissible with the landlord's consent. Created by virtue of contractual relationship. Lease law contains many restrictions (mainly directed toward protecting tenants). There is a distinction between residential leases, mainly subject to a 1989 law, and commercial leases, subject to a 1953 decree on commercial leases, which was recently incorporated into the Commercial Code. Temporary: - inhabitation: minimum of 3 years for leases granted by individuals, and 6 years for leases granted by corporate entities, - commercial: minimum of 9 years, with a break clause at every 3-year period.
Germany		Use of an immovable thing, transmissible with the landlord's consent. Besides the rental payment obligation the parties may constitute further main obligations, i.e. the lessee's obligation to redecorate the rented property. Although the lessee may theoretically lease property for longer than thirty years under a short term lease Sec. 567 German Civil Code provides that either party may terminate the lease after that period, subject only to the statutory notice requirements.
Greece	NA	NA
Ireland	NA	NA
Italy	Locazione	Use of an immovable thing, transmissible with the landlord's consent. Actually - according to Article 1572 of the Italian Civil Code - the Lease is a contract whereby one party undertakes to make another party enjoy an immovable thing (enjoyment of also movable things is generally provided) for a given time and against a given consideration.
Luxembourg	NA	NA
Netherlands	NA	Use of an immovable thing, transmissible with the landlord's consent.
Portugal	Arrendamento	Use of an immovable thing, transmissible with the landlord's consent.
Spain	Arrendamiento	According to Article 1543 of the Spanish Civil Code - the lease is a contract whereby one party undertakes to make another party enjoy a thing (movable or immovable) for a given time and against a given price
Sweden	Hyra	Use of an immovable thing, transmissible with the landlord's consent. Subletting of an apartment could be accepted by the rent tribunal if the landlord refuses his consent.
UK	Lease	The "lease" or "tenancy", term of years absolute (s.1 (1)(b) Law of Property Act 1925), implies the right of exclusive possession for a determinate period in exchange for rent or other consideration. The demised premises must be identified with certainty, the parties to a lease must be legally competent and the lease is transmissible with the landlord's consent by way of assignment or sub-lease.

Table 28 - The Lease in the Member-states

Annex VII – Answers to the questionnaires Conveyance

1. Belgium

Phase	Yes	No	Optional
Precontract (preliminary agreement)			xxx (“compromis”)
Precontract (preliminary agreement) subject to the register?	Y	The precontract can not be registered at the “Conservation des hypothèques” (immovable publicity, permitting the act to have effect towards third parties)	The precontract can be registered at the “bureau de l’enregistrement” (tax formality)
Formal contract (notary act)	Necessary in order to have effect towards third parties, when real right and when immovable (property, usufruct, use and habitation, easement, emphyteusis, surface right) If one party does not want to sign, the other party may ask a judgment which value will be the same as the notary act		
Informal contract (without notary intervention)	only possible when leasing (personal right)	XXX	
Land register	Yes : Registre de la Conservation des hypothèques Art 1er loi hypothécaire Otherwise, the act is valid but cannot have any effect regarding third parties		

Table 29 - Conveyance in Belgium

2. Denmark

Phase	Yes	No	Optional
Precontract (preliminary agreement)			Optional, but usually a purchase agreement is concluded.
Precontract (preliminary agreement) subject to the register?			
Formal contract (notary act)	A deed of ownership is filed for registration of the title.		
Informal contract (without notary intervention)			
Land register	Upon registration, the title is registered in the land register which is open to the public.		

Table 30 - Conveyance in Denmark

3. France

Phase	Yes	No	Optional
Precontract (preliminary agreement)			X but market practice is to sign a precontract.
Precontract (preliminary agreement) subject to the register?	A unilateral promise to sell has to be recorded. If it is not, this preliminary agreement is void.	A bilateral promise to sell need not be recorded unless the parties have agreed to it or if the agreement contains a substitution clause.	Bilateral precontracts may be recorded at the Land Registry.
Formal contract (notary act)	Deed of sale is subject to a formal contract.		
Informal contract (without notary intervention)		Not subject to recording.	
Land registry	For recording the conveyance of any immovable thing, any mortgage, or any restriction of property rights (such as easements).		

Table 31 - Conveyance in France

4. Germany

Phase	Yes	No	Optional
Precontract (preliminary agreement)	--	--	X
Precontract (preliminary agreement) subject to the register?	Not the pre-contract itself but parts thereof may be subject to the entry into the Land Register i.e. if the parties agree to secure the intended acquisition by entering a priority notice ("Vormerkung") into the Land Register.	X	--
Formal contract (notary act)	Conveyances (and nearly all real property transactions) must be recorded by a notary. Wherever an application for entry into the Land Register is concerned, notary certification is required according to Sec. 29 of the Land Register Act ("Grundbuchordnung").	--	X
Informal contract (without notary intervention)	--	X	--
Land register "Grundbuch"	X The Land Register clearly shows all legal relationships and all relating changes. However, since certain changes such as succession may take place without being subject to the entry into the register it can be still considered as reliable. Furthermore, Sec. 892 German Civil Code states the legal presumption that the Land Register is correct.	--	--

Table 32 - Conveyance in Germany

5. Italy

Phase	Yes	No	Optional
Precontract (preliminary agreement)			Under Italian Law precontracts are optional by definition, though - particularly with reference to immovable things and rights - actually pre-contracts always apply.

Precontract (preliminary agreement) subject to the register?	It is to be remarked that - according to Article 1351 of the Italian Civil Code - pre-contracts are void unless made in the same form provided by Law for the validity of the relevant definitive contract, i.e. – as better hereinafter specified – the written form. For the purpose to make it publicly known to any third parties pre-contracts can be posted in the Land Register. It is however provided (Article 2645*bis*, fourth Paragraph of the Italian Civil Code) that the effect of the posting of any pre-contracts in the Land Register expires whenever - elapsed one year from the date scheduled by the parties for the execution of the relevant definitive contract and, in any case, elapsed three (3) years from the date of the aforementioned posting - the relevant definitive contract or any other deed however giving execution to the provisions contained in the pre-contract is not posted in the Land Register. According to Article 2645*bis*, first Paragraph, of the Italian Civil Code, - even though subject to any conditions or relevant to building to be constructed or under construction should they result from a notary act or a private deed with authentic signature or judicially assessed - pre-contacts are subject to the register whenever providing the execution of any of the following contracts: 1. Contracts transferring the property right over immovable things. 2. Contracts constituting, transferring or modifying (i) the right of usufruct over immovable things, (ii) the right of building lease (iii) the right of either the Landlord or of the emphyteusis holder. 3. Contracts constituting the ownership in common of the aforementioned rights. 4. Contracts constituting or modifying (i) the easements (ii) the right of use over immovable things (iii) the right of occupancy.		
Formal contract (notary act)			For the purposes of their validity - and under penalty of voidness - Italian Law provides the only requirement of the written form. Hence, it is necessary to draw down in writing - no matter however in the form of notary act or private deed indiscriminately - (i) any contracts transferring the right of property and, generally, any other real rights over an immovable things, (ii) any contracts however constituting, modifying or extinguishing whichever real right over an immovable thing, and finally (iii) lease contracts lasting more than nine years. The form of notary act or of authenticated private deed is however required for the purposes of posting the aforementioned contracts in the Land Register.

Informal contract (without notary intervention)			See previous item “Formal Contracts” in this chattel.
Land register			The posting of the contracts in the Land Register serves the purpose to make it publicly known to any third parties. , As a written contract is perfectly valid and binding upon the parties, the posting makes the difference insofar as -should a dispute on the actual and lawful title to the right over an immovable thing rise between one or more people - the settlement shall be definitively in favour of the first one who posted the contract. According to Articles 2643, 2645 and 2653 of the Italian Civil Code shall be made public by filing in the Land Register (i) Contracts transferring the right of property over an immovable good or otherwise (ii) constituting, transferring, modifying or extinguishing any Real Security Rights over an immovable good, (iii) lease contracts lasting more than nine years and (iv) partnership or incorporation contracts whereby an immovable thing is contributed upon an open-ended or over nine (9) year enjoyment, (v) unilateral acts – such as the statement of redemption relevant to a sale with right of redemption - producing the same effects and (vi) judgments and any other judicial proceedings suitable to produce such effects.

Table 33 - Conveyance in Italy

6. The Netherlands

Phase	Yes	No	Optional
Precontract (preliminary agreement)	X		

Precontract (preliminary agreement) subject to the register?		X	
Formal contract (notary act)	X		
Informal contract (without notary intervention)		X	
Land register	X		

Table 34 - Conveyance in The Netherlands

7. Portugal

Phase	Yes	No	Optional
Precontract (preliminary agreement)			X
Precontract (preliminary agreement) subject to the register?			X
Formal contract (notary act)	X		
Informal contract (without notary intervention)		X	
Land register	X		

Table 35 - Conveyance in Portugal

8. Spain

Phase	Yes	No	Optional
Precontract (preliminary agreement)			Under Spanish Law precontracts are optional by definition, though - particularly with reference to immovable things and rights – actually precontracts are usual.
Precontract (preliminary agreement) subject to the register?	Pre-contracts are void unless made in the same form provided by Law for the validity of the relevant definitive contract (i.e., the written form). The only precontract that can be registered with the Land Register is the Option Right Agreement (section 14 Reglamento Hipotecario). All other precontracts cannot be registered as they entail personal rights among the parties, therefore with no access to the Land Register.		
Formal contract (notary act)			According to Article 1280 of the Spanish Civil Code, it is necessary to draw down in the form of notary act the following contracts: i) any contracts constituting, transferring, modifying or extinguishing whichever right *in rem* over an immovable thing; ii) lease contracts over immovable things lasting more than 6 years, whenever they must harm third parties. On the other hand, it is necessary to draw down in writing – no matter however in the form of notary act or private deed indiscriminately – any contract in which the consideration of any of the parties exceed of Pesetas 1,500 (9,02 €). The form of notary act or of authenticated private deed is however required for the purposes of posting the aforementioned contracts in the Land Register.

Informal contract (without notary intervention)			See previous item “Formal Contracts” in this chattel.
Land register			According to Articles 1278 and 1279 of Spanish Civil Code, contracts are compulsory, whatever their form, if they fulfil all the essential requirements for their validity. If written form or any special form is legally demanded, the parties may demand the fulfilment of such a form, but the absence of this form does not affect the validity of the contract.The posting of the contracts in the Land Register serves the purpose to make it publicly known to any third parties, granting a priority or preference right to the person who first post the contract. According to Article 2 of the Spanish Mortgage Act, the following contracts can be registered with the Land Register: (i) titles transferring or declaring the property over an immovable thing (ii) titles constituting, acknowledging, transferring, modifying or extinguishing any rights *in rem* over an immovable thing, (iii) acts or contracts adjudicating immovable things or rights *in rem*, (iv) court judgments declaring legal disability for managing, absence, decease, or any judgment modifying the individuals’ capacity of exercise civil rights in relation to the free use of theirs goods, (v) lease contracts over immovable things, sublease, assignments and any subrogation of such rights (vi) title of acquisition of goods from the state, civil or ecclesiastical corporations.

Table 36 - Conveyance in Spain

9. Sweden

Phase	Yes	No	Optional
Precontract (preliminary agreement)			Optional, not legally binding.
Precontract (preliminary agreement) subject to the register?		No.	
Formal contract (notary act)		No.	
Informal contract (without notary intervention)	There are specific formal criteria on the contract, i.e. it has to be in writing		
Land register	Yes.		

Table 37 - Conveyance in Sweden

10. UK – England and Wales

Phase	Yes	No	Optional
Precontract (preliminary agreement)	At the pre-contract stage the seller will normally prepare a pre-contract package (including the draft contract) for the buyer. The buyer will then make a number of pre-contract searches and enquiries, investigate title and approve the draft contract		
Precontract (preliminary agreement) subject to the register?		No	
Formal contract (notary act)	Once the draft contract is approved, contracts are exchanged. At this point, neither party can withdraw from the process without being in breach of contract. The buyer then prepares the purchase deed which the seller approves and the transfer is completed. Any transfer of an interest in land must be made in writing and must be signed as a deed		
Informal contract (without notary intervention)		No	
Land register	It is compulsory to register all transfers of freehold land and leases for a term of over 21 years at HM Land Registry. Where the land has already been registered an application must be made to change the register		

Table 38 - Conveyance UK (England and Wales)

Annex VIII. ECJ Case law about the principle of the non-discrimination in relation with the residential aspects of the EC freedoms

- C-28/00, Kauer [2002] ECR, available at http://curia.eu.int;
- C-255/99, Humer [2002] ECR, available at http://curia.eu.int;
- C-268/99, Jany and Others [2001] ECR, available at http://curia.eu.int;
- C-189/00, Ruhr [2001] ECR, available at http://curia.eu.int;
- C-50/98 & C-49/98, Finalarte [2001] ECR, available at http://curia.eu.int;
- C-212/00, Stallone [2001] ECR, available at http://curia.eu.int;
- C-180/99 & C-95/99, Khalil [2001] ECR, available at http://curia.eu.int;
- C-235/99, Kondova [2001] ECR, available at http://curia.eu.int;
- C-257/99, Barkoci and Malik [2001] ECR, available at http://curia.eu.int;
- C-63/99, Gloszczuk [2001] ECR, available at http://curia.eu.int;
- C-184/99, Grzelczyk [2001] ECR, available at http://curia.eu.int;
- C-43/99, Leclere and Deaconescu [2001] ECR, available at http://curia.eu.int;
- C-263/99, Commission v Italy [2001] ECR, available at http://curia.eu.int;
- C-389/99, Rundgren [2001] ECR, available at http://curia.eu.int;
- C-33/99, Fahmi and Esmoris Cerdeiro-Pinedo Amado [2001] ECR, available at http://curia.eu.int;
- C-85/99, Offermanns [2001] ECR, available at http://curia.eu.int;
- C-397/98, Metallgesellschaft and Others [2001] ECR, available at http://curia.eu.int;
- C-162/99, Commission v Italy [2001] ECR, available at http://curia.eu.int;
- C-411/98, Ferlini [2000] ECR, available at http://curia.eu.int;
- C-124/99, Borawitz [2000] ECR, available at http://curia.eu.int;
- C-73/99, Movrin [2000] ECR, available at http://curia.eu.int;
- C-281/98, Angonese [2000] ECR, available at http://curia.eu.int;
- C-35/98, Verkooijen [2000] ECR, available at http://curia.eu.int;

- C-87/99, Zurstrassen [2000] ECR, available at http://curia.eu.int;
- C-356/98, Kaba [2000] ECR, available at http://curia.eu.int;
- C-169/98, Commission v France [2000] ECR, available at http://curia.eu.int;
- C-34/98, Commission v France [2000] ECR, available at http://curia.eu.int;
- C-369/96, Arblade [1999] ECR, available at http://curia.eu.int;
- C-391/97, Gschwind [1999] ECR, available at http://curia.eu.int;
- C-430/97, Johannes [1999] ECR, available at http://curia.eu.int;
- C-337/97, Meeusen [1999] ECR, available at http://curia.eu.int;
- C-302/97, Konle [1999] ECR, available at http://curia.eu.int;
- C-262/96, Sürül [1999] ECR, available at http://curia.eu.int;
- C-224/97, Ciola [1999] ECR, available at http://curia.eu.int;
- C-416/96, Eddline El-Yassini [1999] ECR, available at http://curia.eu.int;
- C-18/95, Terhoeve [1999] ECR, available at http://curia.eu.int;
- C-274/96, Bickel [1998] ECR, available at http://curia.eu.int;
- C-210/97, Akman [1998] ECR, available at http://curia.eu.int;
- C-114/97, Commission v Spain [1998] ECR, available at http://curia.eu.int;
- C-185/96, Commission v Greece [1998] ECR, available at http://curia.eu.int;
- C-118/97 & C-9/97, Jokela [1998] ECR available at http://curia.eu.int;
- C-127/97, Burstein [1998] ECR available at http://curia.eu.int;
- C-35/97, Commission v France [1998] ECR available at http://curia.eu.int;
- C-171/96, Pereira Roque [1998] ECR available at http://curia.eu.int;
- C-264/96, Imperial Chemical Industries [1998] ECR available at http://curia.eu.int.