

European Union Property Law  
From Fragments to a System



Eveline Ramaekers

# European Union Property Law From Fragments to a System



Ius Commune Europaeum

Eveline Ramaekers

European Union Property Law  
From Fragments to a System

Intersentia Ltd  
Trinity House | Cambridge Business Park | Cowley Road  
Cambridge | CB4 0WZ | United Kingdom  
Tel.: +44 1223 393 753 | Email: mail@intersentia.co.uk

ISBN 978-1-78068-171-9  
D/2013/7849/61  
NUR 828

© 2013 Intersentia  
Cambridge – Antwerp – Portland  
www.intersentia.com | www.intersentia.co.uk

Cover photo: © rzdeb - iStockphoto

PhD-thesis defended on April 4, 2013 at Maastricht University

No part of this book may be reproduced in any form, by print, photo copy, microfilm or any other means, without written permission from the author.

## PREFACE AND ACKNOWLEDGEMENTS

‘What is the topic of your doctoral dissertation?’

‘European Union property law.’

‘... Does that exist?’

‘That’s what I’m trying to find out.’

‘And you are dealing with the whole of property law? Isn’t that a bit too broad?’

During the four years I spent researching this thesis I was regularly asked these questions. Yes, it was a broad topic. And yes, it was possible to tackle it in four years. I undertook this research project, the aim of which was to establish the status quo of the EU’s *acquis* in the area of property law and to propose a framework for its further development, convinced that approaching the topic in its broadest sense was the best (and the only) way to get a complete picture of how much EU property law currently exists, where it is to be found, and whether or not it is developing in a consistent and coherent manner. I was fortunate to be able to build on substantial existing comparative research into the national property laws of the EU Member States, and on research into specific sub-areas of EU property law such as cross-border security rights on movable objects. Have I, by including all aspects of property law, been able to propose a complete system of property law to be developed at EU level? Far from it. There are so many decisions still to be made, so many gaps to fill in, so many bridges to be built. It would be impossible for one person to achieve all that in four years. But I do believe I have been able to provide a detailed overview of the existing EU property law and the fundamentals for its future development.

European Union property law does exist. It is still in its early stages but it is rapidly developing. It has been immensely exciting and fulfilling to be able to work on such a young area of law, where there is still so much to explore and develop. If, with this dissertation, I have been able to make even the most modest contribution to the development of this field I would be tremendously pleased.

During these four years I have had the pleasure to work with and be supported by some extraordinary people. At the ever-existing risk of overlooking

someone, I would like to thank a number of friends, family and colleagues. Let me start with my *Doktorvater*, Sjef van Erp. I thank him wholeheartedly for creating an academic environment in which cooperation, loyalty and warmth were key, and in which there was always room for even the most unusual ideas, and for Monday morning cake. I hope to remain a member of his *Doktorfamilie* for many years to come. I also want to thank Bram Akkermans who, with his lively and generous personality and his unrelenting questioning of my research has made me a better academic, and I have come to think of him as one of my dearest friends.

I am grateful for the friends and colleagues from Maastricht, Stellenbosch, Edinburgh, Leuven and many other places, who have made the past four years so memorable. I would like to name in particular my two paranymphs, Gary and Pim, and furthermore Anna, Willem, Tanja, Mariken, Nicole, Katharina, Jennifer, Dalindyebo, Nishara, Maartje, Ronia, Tristan, Wian, Ernst, Jill, Koen and many others.

I would like to thank the members of the reading committee for their academic, and often also personal, support. Jan Smits, who, with the founding of M-EPLI, created an excellent forum to test new research ideas. Andre van der Walt, who has welcomed me many times at the South African Research Chair in Property Law, where I have felt inspired to come up with some of the most fundamental ideas for my dissertation. Hildegard Schneider, who scrutinised my chapter on free movement and property law in its early stages. Reiner Schulze, who gave me the opportunity to spend some time at his *Centrum für Europäisches Privatrecht* in Münster. And Vincent Sagaert, who, through various events of the *Ius Commune* research school, has regularly provided me with feedback on my research. Thanks are also owed to Arthur Salomons, Kenneth Reid and Eva-Maria Kieninger for evaluating earlier drafts of chapters of my dissertation.

Special thanks to my brother, Pascal, for providing me with the software and the skills necessary to create the cubical images in my thesis, and to my parents for their unconditional support over the years, especially during my move to Oxford when my dissertation was in its final stages.

Last but not least, I want to express my deep-felt appreciation for the love and support of my wonderful fiancé, Rogier, who is always encouraging me to do and be better. Thank you for all the cups of tea, flowers, home-cooked dinners and many, many..... many hot chocolates.

Research for this study was concluded at the end of June 2012. Only minor alterations were made afterwards.

## TABLE OF CONTENTS

PREFACE AND ACKNOWLEDGEMENTS.....	V
<b>CHAPTER 1: PURPOSE AND METHOD OF THE STUDY .....</b>	<b>1</b>
Introduction .....	1
1. Reasons for the Development of Property Law by the European Union .....	4
1.1. The Relationship between Free Movement Law and Property Law.....	6
1.1.1. Free Movement of Goods.....	6
1.1.2. Free Movement of Capital .....	8
1.1.3. Free Movement of Services.....	8
1.1.4. Free Movement of Persons .....	9
1.2. Harmonization of other Areas of Private Law.....	9
1.3. Summary .....	12
2. The <i>Acquis</i> Method: Defining EU Property Law.....	13
2.1. Delimiting the Field of Law and Defining its Concepts: the Role of Comparative Research in the <i>Acquis</i> Method.....	16
2.1.1. The Comparative Method as Developed by the CJEU.....	17
2.2. The Selection of EU Legislation and Case Law for the <i>Acquis</i> Analysis.....	20
2.2.1. Defining Property Law: Introducing the System-Cube .....	20
2.2.2. The System of Property Rights: a Three-Dimensional Model.....	24
2.2.3. Practical Application of the System-Cube .....	26
2.2.3.1. A Right of Usufruct.....	27
2.2.3.2. A Non-Possessory Right of Pledge on an Incorporeal Object.....	28
2.2.3.3. Security Rights in Relation to Corporeal Objects.....	28
2.2.3.4. Right of Ownership of Emission Rights.....	29
2.2.3.5. Timeshare of Immovable Property .....	29
2.2.4. The System-Cube applied to English Law .....	30
2.2.4.1. Common Law and Equity.....	32
2.2.4.2. Trusts .....	35
2.2.5. Summary .....	38

3.	Linguistic Problems: the Method of the Court of Justice of the European Union .....	38
3.1.	The Semantic Approach and the Contextual Approach .....	39
	Conclusion .....	41
	<b>CHAPTER 2: PROPERTY LAW AND THE INTERNAL MARKET .....</b>	<b>45</b>
	Introduction .....	45
1.	Cross-border or Purely Internal Situation?.....	48
2.	Horizontal or Vertical Relationships .....	52
3.	Free Movement of Goods.....	53
3.1.	Definition of 'Goods' .....	54
3.2.	Mutual Recognition of Property Rights? .....	56
3.3.	Classifying the Measure: from <i>Keck</i> to <i>Trailers</i> .....	59
3.3.1.	<i>A de Minimis</i> Requirement in Free Movement of Goods? .....	65
3.4.	Obstacles to the Free Movement of Goods: the Case of <i>Krantz</i> .....	67
3.4.1.	Facts of the Case .....	67
3.4.2.	Arguments of the parties .....	68
3.4.3.	Opinion of Advocate-General Darmon.....	69
3.4.4.	Judgment of the Court.....	70
3.4.5.	The Obstacles to Free Movement of Goods: Loss of Property Right and Increase in Costs .....	70
3.5.	The Effect of the Free Movement of Goods on National Property Law .....	74
4.	Free Movement of Capital .....	74
4.1.	What Constitutes a Capital Movement? .....	75
4.2.	Discrimination or Market Access Test: a <i>de Minimis</i> Requirement in Free Movement of Capital? .....	76
4.3.	Obstacles to the Free Movement of Capital.....	77
4.4.	The Effect of the Free Movement of Capital on National Property Law .....	81
5.	Free Movement of Services.....	82
5.1.	Directive 2006/48/EC .....	83
5.2.	Discrimination or Market Access Test: a <i>de Minimis</i> Requirement in Free Movement of Services?.....	85
5.3.	Obstacles to the Free Movement of Services .....	85
5.4.	The Effect of the Free Movement of Services on National Property Law .....	86
6.	Free Movement of Persons .....	87
6.1.	Discrimination or Market Access Test: a <i>de Minimis</i> Requirement in Free Movement of Persons? .....	87
6.2.	Obstacles to the Free Movement of Persons.....	88
6.3.	The Effect of the Free Movement of Persons on National Property Law .....	91



7.	Justification Grounds.....	91
7.1.	Proportionality .....	94
	Conclusion .....	96
<b>CHAPTER 3: THE EU'S COMPETENCE TO REGULATE PROPERTY LAW .....</b>		<b>101</b>
	Introduction - The Relationship between European Law and Property Law .....	101
1.	Article 345 of the Treaty on the Functioning of the European Union.....	102
2.	Methodology of the CJEU .....	103
3.	Interpretation of Article 345 TFEU .....	104
3.1.	Linguistics: Prejudice, Prejudge or Preclude? .....	104
3.2.	History of the Article: Relating to Undertakings or not?.....	106
3.2.1.	Article 345 TFEU as seen from the Point of View of Property Law .....	110
3.2.2.	Private or Public Property Law? .....	112
3.3.	'The Treaties' to which Article 345 TFEU Refers .....	114
3.4.	Combining the Above: a Possible Interpretation of Article 345 TFEU .....	115
4.	Article 345 TFEU in EU Legislative Work .....	115
5.	Interpretation of Article 345 TFEU by the Court of Justice of the European Union.....	120
6.	Article 345 TFEU in the Debate on Privatizations and Nationalizations .....	124
7.	Preliminary Conclusions.....	126
8.	Legal Basis.....	127
8.1.	Subsidiarity and Proportionality .....	135
	Final conclusions .....	138
<b>CHAPTER 4: SUBSTANTIVE PROPERTY LAW AND PROPERTY LAW TERMINOLOGY IN PRIMARY AND SECONDARY EU LAW .....</b>		<b>143</b>
	Introduction .....	143
<b>Part I - Substantive European Union Property Law .....</b>		<b>145</b>
1.	Direct EU Property Law .....	145
1.1.	Regulation 650/2012/EU on International Successions .....	145
1.2.	Regulation 207/2009/EC on the Community Trade Mark (codified version) and Regulation 6/2002/EC on Community Designs .....	147
1.3.	Regulation 1346/2000/EC on Insolvency Proceedings .....	148
1.4.	Directive 2008/48/EC on Credit Agreements for Consumers .....	151
1.5.	Directive 2006/112/EC on the Common System of Value Added Tax .....	152

Table of Contents

1.6.	Directive 2002/47/EC on Financial Collateral Arrangements.....	155
1.7.	Directive 2000/35/EC on Combating Late Payments in Commercial Transactions.....	157
1.8.	Directive 93/7/EEC on the Return of Stolen Cultural Objects.....	158
2.	Indirect EU Property Law .....	159
2.1.	Regulation 881/2002/EC Imposing certain Specific Restrictive Measures Directed against certain Persons and Entities Associated with Usama bin Laden, the Al-Qaida Network and the Taliban.....	159
2.2.	Directive 2003/87/EC Establishing a Scheme for Greenhouse Gas Emission .....	160
2.3.	Natura 2000.....	162
2.4.	Directive 93/13/EEC on Unfair Terms in Consumer Contracts .....	163
2.5.	Directive 85/577/EEC on Contracts Negotiated away from Business Premises ('doorstep selling directive') .....	164
	<b>Part II - Terminology .....</b>	<b>166</b>
3.	Searching for Property Law Terms.....	166
3.1.	Language of the Search .....	170
3.2.	TEU and TFEU .....	171
4.	Defined Property Law Terms .....	172
4.1.	Right <i>in Re(m)</i> /Real Right/Personal Right.....	172
4.2.	Property/ Assets/ Things/ Objects .....	174
4.3.	Possessor/Possession .....	176
4.4.	Transfer/Convey/ Assign/ Cession.....	177
5.	Undefined Property Law Terms .....	180
5.1.	Owner/Ownership/Proprietor .....	180
5.1.1.	Retention of Title/Reservation of Ownership.....	182
5.2.	Interest in/Title to.....	182
5.3.	Tenure/Tenancy .....	183
5.4.	Estate/Fee Simple/Freehold/Leasehold .....	184
5.5.	Trust/Beneficiary.....	186
5.6.	Numerus Clausus and Limited Property Rights .....	187
5.6.1.	Security Rights.....	189
5.7.	Movable/Immovable .....	191
5.8.	Tangible/Corporeal.....	192
5.9.	<i>Lex Rei Sitae</i> .....	193
	Conclusion .....	195

<b>CHAPTER 5: OPTIONS FOR THE FUTURE DEVELOPMENT OF EUROPEAN UNION PROPERTY LAW</b> .....	199
Introduction .....	199
1. Explanation of Terms .....	200
2. The Commission's 2010 Green Paper .....	200
3. EU Private International Law – Changing the <i>Lex Rei Sitae</i> ? .....	202
3.1. Alternatives to the <i>Lex Rei Sitae</i> Rule.....	204
3.1.1. <i>Lex Registrationis</i> .....	204
3.1.2. <i>Lex Destinationis</i> .....	205
3.1.3. <i>Lex Contractus</i> .....	206
3.1.4. Choice of Applicable Property Law .....	207
3.1.5. Mutual Recognition and Country of Origin Principle .....	208
3.2. Preliminary Conclusions.....	212
4. Cross-Border or Purely Internal Situations .....	214
5. Non-Binding Options .....	215
5.1. Inter-Institutional Agreement on a 'Toolbox' for European Property Law .....	217
5.2. Legal Basis.....	218
6. Optional Instrument .....	220
6.1. Legal Basis.....	222
6.2. Regulation or Directive .....	223
6.3. Opt-In or Opt-Out.....	225
6.4. Optional Instrument and Regulatory Competition.....	226
6.5. Preliminary Conclusions – an Optional Instrument for EU Property Law? .....	227
7. Binding Instrument.....	228
7.1. Legal Basis.....	229
7.2. Regulation or Directive .....	230
7.2.1. Minimum or Maximum, Partial or Full Harmonization.....	233
7.3. European Civil Code .....	234
8. International Agreement.....	235
8.1. Enhanced Cooperation.....	236
9. Harmonization through Case Law .....	239
Final Conclusions .....	240

<b>CHAPTER 6: A FRAMEWORK FOR EUROPEAN UNION PROPERTY LAW</b> .....	245
Introduction .....	245
<b>Part I – Status Quo of EU Property Law</b> .....	247
1. The System-Cube .....	247
1.1. Dimension One: Content of Property Rights .....	249
1.2. Dimension Two: Objects of Property Rights .....	250
1.3. Dimension Three: Time .....	250
2. The Operating System .....	250
2.1. Creation .....	251
2.2. Transfer .....	251
2.3. Registration.....	251
2.4. Destruction.....	252
2.5. Third Party Effects .....	252
Concluding Remarks to Part I .....	252
<b>Part II – Where to?</b> .....	254
3. An Optional Instrument for EU Property Law .....	254
3.1. Legal Basis Revisited .....	255
3.2. Advantages of an Optional Instrument .....	257
3.3. Interpretation of the Optional Instrument.....	258
4. Operating Rules and Definition of Terms.....	258
4.1. Operating Rules.....	258
4.2. Definition of Terms.....	269
5. EU Property Rights.....	271
5.1. European Primary Right .....	271
5.1.1. Ownership in the Euratom Treaty .....	274
5.2. European Security Right .....	275
5.2.1. Past Proposals and Existing Cross-Border Security Rights .....	275
5.2.2. Characteristics of the European Security Right .....	281
5.2.2.1. Possessory or Non-Possessory Security Right .....	281
5.2.2.2. For what Type of Objects? .....	282
5.2.2.3. General or Specific Security Right .....	282
5.2.2.4. Accessory or Non-Accessory Security Right.....	284
5.2.2.5. Registration.....	285
5.3. European Use Right.....	285
5.3.1. Content of the Right.....	286
5.3.2. Time-Limit .....	287
5.3.3. For what Type of Objects? .....	288
5.3.4. General or Specific Use Right.....	288
6. The Place of Private International Law in the Optional Instrument.....	288

Concluding Remarks to Part II.....	289
<b>ANNEX TO CHAPTER 4: TERMINOLOGY</b> .....	293
<b>SAMENVATTING</b> .....	305
<b>BIBLIOGRAPHY</b> .....	309
<b>CURRICULUM VITAE</b> .....	337

