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European-Autonomous Property Rights: Does the EU Operate Its Own *Numerus Clausus*?

Eveline RAMAEKERS* & Bram AKKERMANS*

Abstract: Property rights are at the core of property law. They are used to shape relationships between people and things. Their effect is generally against the world (*erga omnes*) and hence there are limitations on the number and content of those rights. The vast majority of legal systems within the EU operates a *numerus clausus* – or ‘closed list’ – of property rights. In the past decades, there has been an increase in the making of a European private law: private law rules at the EU level. This does not only concern rules of EU contract law, but increasingly also rules of property law at the EU level. Examples of the latter are rules relating to mortgage credit that influence the content of rights of hypothec, but also rules on the law applicable to international succession- or matrimonial property law cases. At the same time, there is influence of the four basic freedoms (freedom of movement of goods, persons, services and capital) on national private law. In this case law, the Court of Justice of the European Union (CJEU) relies on national law, but also provides its own EU terminology and definitions. This does not mean that a full-fledged law of property arises at the EU level, but it raises the question what system-elements are also present at the EU level.

National legal systems generally operate on the basis of a closed system of property rights (a *numerus clausus*). Existing European Property Law research looks into the rise of European property law and the existence of principles such as the *numerus clausus*, in European legislation. This article focuses on the Court of Justice of the European Union and investigates whether EU law has its own *numerus clausus*: a list of property rights defined autonomously in European case law and legislation

Résumé: Les droits de propriété occupent une place centrale en droit des biens. Ils sont utilisés pour encadrer les relations entre les personnes et les biens. Leur effet s’applique généralement *erga omnes* et par conséquent il existe des limitations quant au nombre et contenu de ces droits. La grande majorité des systèmes légaux au sein de l’UE utilisent un *numerus clausus* – ou ‘liste fermée/closed list’ – de droits de propriété. Durant les dernières décennies, on a pu voir un développement dans l’élaboration d’un droit privé européen: des règles de droit privé au niveau de l’UE. Ceci ne concerne pas seulement des règles du droit européen des contrats, mais aussi de plus en plus, des règles du droit des biens au niveau de l’UE. En ce qui concerne ces dernières, on trouve par exemple, des règles relatives au crédit hypothécaire qui influencent le contenu des règles de l’hypothèque, mais aussi des règles sur le droit applicable aux successions internationales – ou de la jurisprudence en matière de droit de la propriété matrimoniale. En même temps, il existe une influence des quatre libertés fondamentales (liberté de circulation des biens, des personnes, des services et des capitaux) sur le droit privé national. Dans cette jurisprudence, la Cour de Justice de l’Union européenne (CJUE) se base sur le droit national, mais apporte aussi ses propres définitions

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et sa terminologie européennes. Ceci ne signifie pas qu'un droit des biens à proprement parler atteint le niveau européen, mais on soulève la question de savoir quels éléments du système se retrouvent également au niveau européen. Les systèmes juridiques nationaux fonctionnent généralement sur base d'un système fermé de droits de propriété (un *numerus clausus*). Les recherches existantes en droit des biens européen étudient le développement du droit des biens européen et l'existence, dans la législation européenne, de principes tels que le *numerus clausus*. Le présent article se concentre sur la Cour de Justice de l'Union européenne et examine si le droit européen a son propre *numerus clausus*: une liste de droits de propriété définis de manière autonome dans la jurisprudence et la législation européennes.

Zusammenfassung: Eigentumsrechte stehen im Zentrum des Sachenrechts. Sie dienen dazu, Beziehungen zwischen Menschen und Dingen zu gestalten. Ihre Wirkung richtet sich im Allgemeinen gegen alle (*erga omnes*) und daher unterliegen Anzahl und Inhalte dieser Rechte Begrenzungen. Die überwiegende Mehrheit der Rechtssysteme in der EU sieht einen *Numerus Clausus* – oder eine ‘abgeschlossene Liste’ – von Eigentumsrechten vor. In den letzten Jahrzehnten hat sich zunehmend ein europäisches Privatrecht herausgebildet: Privatrechtsvorschriften auf EU-Ebene. Dies betrifft nicht nur Regelungen des EU-Vertragsrechts, sondern zunehmend auch Sachenrechtsvorschriften auf EU-Ebene. Beispiele für Letzteres sind Vorschriften in Bezug auf Hypothekenkredite, die den Inhalt von Hypothekenrechten beeinflussen, aber auch Bestimmungen über das anzuwendende Recht in internationalen Fällen des Erb- oder des Eherechts mit Sachenrechtsbezug. Gleichzeitig beeinflussen die vier Grundfreiheiten (Freizügigkeit von Waren, Personen, Dienstleistungen und Kapital) das nationale Privatrecht. In seiner Rechtsprechung hierzu stützt sich der Europäische Gerichtshof (EuGH) auf nationales Recht, stellt jedoch auch seine eigene EU-Terminologie und Definitionen bereit. Dies bedeutet nicht, dass ein vollwertiges Sachenrecht auf EU-Ebene entsteht, sondern wirft die Frage auf, welche Systemelemente auch auf EU-Ebene vorhanden sind. Die nationalen Rechtssysteme arbeiten im Allgemeinen auf der Grundlage eines geschlossenen Systems von Eigentumsrechten (einem *Numerus Clausus*). Bestehende Untersuchungen zum europäischen Sachenrecht befassen sich mit der stärker werdenden Entwicklung des europäischen Sachenrechts und dem Bestehen von Grundsätzen, wie dem *Numerus Clausus*, in der europäischen Gesetzgebung. Der vorliegende Beitrag konzentriert sich auf den Europäischen Gerichtshof und untersucht, ob das Unionsrecht einen eigenen *Numerus Clausus* hat: eine Liste von Eigentumsrechten, die in der europäischen Rechtsprechung und Gesetzgebung autonom definiert sind.

Keywords: European Property Law; Comparative Property Law; Property Law; *Numerus Clausus*; Property Rights.

1. Introduction

1. Property rights are at the core of property law.¹ They are used to shape relationships between people and things.² Their effect is generally against the world (*erga omnes*) and hence there are limitations on the number and content of those rights. The

1 E. RAMAEKERS, *European Union Property Law: From Fragments to a System* (Antwerp: Intersentia 2013), pp 20–26.

2 J.H.M. VAN ERP, ‘Chapter 1 Introduction’, in J.H.M. van Erp & B. Akkermans (eds), *Cases, Materials and Text on Property Law* (Oxford: Hart 2012), pp 51–53.

vast majority of legal systems within the EU operates a *numerus clausus* – or ‘closed list’ – of property rights.³

In the past decades, there has been an increase in the making of a European private law: private law rules at the EU level. This does not only concern rules of EU contract law, but increasingly also rules of property law at the EU level. Examples of the latter are rules relating to mortgage credit that influence the content of rights of hypothec, but also rules on the law applicable to international succession- or matrimonial property law cases.⁴ At the same time, there is influence of the four basic freedoms (freedom of movement of goods, persons, services and capital) on national private law. In this case law, the Court of Justice of the European Union (CJEU) relies on national law, but also provides its own EU terminology and definitions. This does not mean that a full-fledged law of property arises at the EU level, but it raises the question what system-elements are also present at the EU level.

2. Any regular system of property law adheres to the principles of *numerus clausus* and transparency.⁵ The principle of *numerus clausus* holds that the number and content of available property rights is limited.⁶ The principle of transparency holds that a property relation must be specific in terms of what subject matter (object or thing) the right rests on and who holds the property right in his or her patrimony, as well as that the existence of the property relation must be known to the outside world.⁷

3 There are a few legal systems that operate, to some extent, a *numerus apertus*. See B. AKKERMANS, *The Principle of Numerus Clausus in European Property Law* (Antwerp: Intersentia 2008), p 7 and fn. 37.

4 Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (data.europa.eu/eli/dir/2013/36/oj), Regulation 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (data.europa.eu/eli/reg/2012/650/oj), Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (data.europa.eu/eli/reg/2016/1103/oj).

5 See J.H.M. VAN ERP, *European and National Property Law: Osmosis or Growing Antagonism?*, p 6 (Walter van Gerven Lectures; Groningen: Europa Law Publishing 2006), J.H.M. VAN ERP, ‘European Property Law: A Methodology for the Future’, in R. Schulze & H. Schulte-Nölke (eds), *European Private Law: Current Status and Perspectives* (Munich: Sellier 2011), pp 227 et seq.

6 See B. AKKERMANS, ‘The *Numerus Clausus* of Property Rights’, in M. Graziadei & L. Smith (eds), *Comparative Property Law: Research Handbooks in Comparative Law* (Cheltenham – Northampton: Edward Elgar Publishing 2017), pp 100 et seq.

7 See for a discussion on the transparency principle, A. BERLEE, *Access to Personal Data in Public Land Registers – Balancing Publicity of Property Rights with the Rights to Privacy and Data Protection* (The Hague: Eleven Publishers 2018).

This article investigates whether EU law has its own *numerus clausus*: a list of property rights defined autonomously in European case law and legislation.⁸ It forms the completion of a research project carried out mostly by Ramaekers, in which she explored the way in which the CJEU classifies objects, i.e. the movable, immovable and intangible ‘things’ in which one can have property rights,⁹ and on the use of property terminology in legislation (as opposed to case law).¹⁰ In both our works we come to the conclusion that there is a *numerus clausus* of property rights in EU legislation.¹¹ In the present contribution we will focus on European-autonomous definitions of property rights in the case law of the CJEU.

The starting point for this study is the following list of property rights:^{12 13}

ownership
retention of title/reservation of ownership
fee simple/freehold
lease(hold)/tenancy
mortgage/hypothec
pledge
lien
charge (fixed and floating)
servitude/easement
usufruct
restrictive covenant
emphyteusis
superficies

We will regularly refer to other language versions of these terms besides English (mostly German, Dutch and French), especially where this was the language of the case, because many civilian legal concepts do not have a suitable translation in English. Before studying each of these terms, a preliminary search was conducted

8 The term *numerus clausus* is as such never mentioned in any of the cases, unless it is in a medical context.

9 E. RAMAEKERS, ‘Classification of Objects by the European Court of Justice’, 39/4 *European Law Review* (2014), pp 447–469.

10 E. RAMAEKERS, *European Union Property Law: From Fragments to a System*, Ch. 4 Part II – Terminology.

11 See also B. AKKERMANS, *The Principle of Numerus Clausus in European Property*, pp 533 et seq.

12 The search was conducted during May–July 2018. Checks for new appearances of these terms were thereafter conducted regularly until December 2018.

13 This list matches the one used for the previous publications and is based on a general understanding of what can be property rights. See B. AKKERMANS, ‘Standardisation of Property Rights in European Property Law’, in B. Akkermans, E. Ramaekers & E. Marais (eds), *Property Law Perspectives II* (Oxford-Antwerp-Portland: Intersentia, 2013), pp 225–226, E. RAMAEKERS, *European Union Property Law: From Fragments to a System*, pp 166–167.

for the term ‘right in rem’ (and property right). The results of that search will be discussed before moving on to the various property rights just listed.

In order to provide a complete picture of the existence (or lack thereof) of a *numerus clausus* of property rights in EU law we will, where there is any relevant information, refer back to our previous findings in legislation on the term being discussed. We will thereafter present the results gathered on this term from the case law studied for this article. Our article does not investigate whether the EU adheres to a rule or rather a principle of *numerus clausus*,¹⁴ it seeks to establish which, if any, property rights feature in the list at EU level and to what extent they have been given a European-autonomous interpretation. It investigates, in other words, whether the EU operates its own *numerus clausus* of property rights.

2. The Meaning of the Term ‘Rights *in rem*’

3. Property lawyers use a variety of terms to describe rights to things – as opposed to rights vis-à-vis another person – such as property rights, real rights, or rights *in rem*. EU law uses the latter. The term ‘rights *in rem*’ is used in several regulations and directives, but the case law explaining what rights *in rem* are focuses on two regulations in particular, namely Regulation 1215/2012/EU on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (‘Brussels I’)¹⁵ and Regulation 2015/848/EU on insolvency proceedings.¹⁶ The Brussels I Regulation states in Article 24:

The following courts shall have exclusive jurisdiction, regardless of the domicile of the parties:

1. In proceedings which have as their object rights *in rem* in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

4. Note that the Court decided in *Gaillard* that ‘tenancies of immovable property’ are rights *in personam*.¹⁷ The Insolvency Regulation states in Article 8:

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets, both specific assets and collections of indefinite assets as a whole which

14 Cf B. AKKERMANS, *The Principle of Numerus Clausus in European Property Law*, p 403.

15 [2012] OJ L 351/1 (data.europa.eu/eli/reg/2012/351/oj).

16 [2015] OJ L 141/19 (data.europa.eu/eli/reg/2015/848/oj).

17 ECJ 5 April 2001, Case C-518/99, *Gaillard v. Chekili*, EU:C:2001:209 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-518/99>), para. 16.

change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

We will discuss the meaning of the term ‘rights *in rem*’ as used in each of these two Regulations separately below.

2.1 *Rights in rem in the Brussels I Regulation*

5. The Court has interpreted the phrase ‘proceedings which have as their object rights *in rem* in immovable property’ in Article 24 of the Brussels I Regulation as follows: they are:

actions which seek to determine the extent, content, ownership or possession of immovable property or the existence of other rights *in rem* therein.¹⁸

This sentence is grammatically awkward in that it equates things to rights *in rem* which are not in fact rights *in rem*. The phrase ‘or [...] **other** rights *in rem*’ (emphasis added) refers back to ‘extent, content, ownership or possession’ of immovable property, suggesting that these four items are also rights *in rem*. Surely, though, extent and content of immovable property are factual issues, not rights *in rem*. Arguably, ‘ownership’ is the only right *in rem* in this list of four given that possession, although often the essence of a right *in rem*, is not a right *in rem* as such.

The German version of this sentence makes more grammatical sense.¹⁹ It reads:

Klagen [...] die [...] darauf gerichtet sind, Umfang oder Bestand einer unbeweglichen Sache, das Eigentum, den Besitz oder das Bestehen anderer dinglicher Rechte hieran zu bestimmen.

This would have to be translated as ‘actions which seek to determine the extent or content of immovable property, its ownership, its possession or the existence of other rights *in rem* therein.’ This makes more grammatical sense in that it separates extent and content of the immovable property (facts) from the ownership, possession and other rights *in rem* in the immovable property (rights, although possession could arguably fall in either category).²⁰

18 ECJ 18 May 2006, Case 343/04, *Land Oberösterreich v. ĆEZ*, EU:C:2006:330, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-343/04>, para. 30.

19 German was the language of the case.

20 The French, Dutch, Italian, Portuguese and Spanish versions all follow the English version. The Danish version on the other hand follows the German version. So does the Swedish version, albeit

On the other hand, even though the German version makes more grammatical sense, it makes less sense as an explanation of the phrase ‘proceedings which have as their object rights in rem in immovable property’ because it suggests that such proceedings could also be those purely aimed at determining the extent or content of an immovable property. Such proceedings would have as their object the *res*, but not the rights *in rem*.

We would therefore suggest that the Court might really have meant to say the following: that proceedings which have as their object rights *in rem* in immovable property are actions which seek to determine the ownership or possession of immovable property, the existence of other rights *in rem* therein, or the extent or content of these rights.

6. Leaving grammar aside, let us look at how else the Court has interpreted ‘rights *in rem*’ in its case law. Because the Brussels I Regulation decides which court has jurisdiction in a given case, emphasis is often placed on procedure rather than substance. With regard to Article 24 this sometimes leads to confusing outcomes. In *Gaillard v. Chekili* the Court held that in order for Article 24 of the Regulation to apply, the action in question must be based on a right in rem or on a tenancy of immovable property and not just concern a right *in rem* in or have a link with immovable property.²¹ *Gaillard* concerned proceedings for rescission of a contract for the sale of immovable property. According to the Court, this is an action *in personam* because the action is rooted in the rights flowing from the contract. In contrast, the Court held in *Komu* that an action for the termination of co-ownership in undivided shares of immovable property by way of sale is an action in rem,²² the reason being that there is no contract for sale yet and the action is therefore rooted in the parties’ co-ownership rights.

While it may be true that the action in *Gaillard* was rooted in a personal right whereas the action in *Komu* was rooted in a property right, the distinction is somewhat artificial. *Gaillard* was brought in Belgium but concerned property located in France. Under both Belgian and French law the conclusion of the contract for the sale of the immovable property would have simultaneously led to the passing of ownership from seller to buyer.²³ The rescission of the contract

in a slightly different way: ‘*och syftar till att fastställa vad en fastighet omfattar eller vem som äger den eller huruvida egendomen belastas av andra sakrätter*’.

21 ECJ 5 April 2001 (*Gaillard v. Chekili*), *supra* n. 17, para. 16, repeated in ECJ 16 November 2016, Case C-417/15, *Schmidt v. Schmidt*, EU:C:2016:881 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-417/15>), para. 34. Note here that a tenancy in immovable property is considered to be a right *in personam*, or at least not a right *in rem*. More about this below at section 3.d.

22 In full: such an action falls within the category of proceedings ‘which have as their object rights in rem in immovable property’.

23 M. HINTEREGGER & L.P.W. VAN VLIET, ‘Chapter 8 – Transfer’, in J.H.M. van Erp & B. Akkermans (eds), *Cases, Materials and Text on Property Law* (Oxford: Hart Publishing 2012), pp 788–789.

would therefore lead to the ownership automatically reverting back from buyer to seller. Although the action may therefore technically be an *in personam* one, it clearly has *in rem* consequences. The Court is inappropriately casual about these consequences:

18. Even if, in some circumstances, proceedings for rescission of a contract for the sale of immovable property may have some impact on the title to the property, they are none the less based on the personal right that the claimant obtains under the contract entered into between the parties.

Proceedings for rescission of a contract for the sale of immovable property ‘may’ not just have ‘some impact’ on title to the property; they have a huge impact on title to the property. For jurisdictions other than those from the French legal tradition (e.g. those from the German legal tradition) rescission of the contract does not automatically lead to the reversion of the right of ownership but requires ownership to be retransferred in accordance with all the normal rules for the transfer of ownership. Such a retransfer would be an action concerning rights *in rem* if we are to follow the *Komu* judgment, with the result that, for some Member States, one court would have jurisdiction over the rescission of the contract while another court would have jurisdiction over the retransfer of the right of ownership. Especially in situations where the jurisdictions involved fall on either side of the French/German divide, this seems a very undesirable situation.²⁴

7. More recently, in *Schmidt v. Schmidt*,²⁵ the Court held that an action seeking the avoidance of a gift of immovable property (action no. 1) does not fall within the exclusive jurisdiction of the *forum rei sitae*, but that an action seeking the removal from the land register of notices evidencing the donee’s right of ownership (action no. 2), which would have followed the avoidance of the contract of gift, does fall within the *forum rei sitae*’s exclusive jurisdiction. This would lead to a split

24 The Court displays a similar flippancy with regard to the *in rem* consequences of an action *in personam* in ECJ 10 January 1980, Case 115/88, *Reichert and Kockler v. Dresdner Bank*, EU: C:1990:3 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=115/88>). This case concerned an *actio pauliana*. The Court states at para. 13 that ‘although in certain Member States the rules governing the public registration of rights in immovable property require public notice to be given of legal actions seeking to have transactions affecting such rights avoided or declared ineffective as against third parties and of judgments given in such actions, that fact alone is not enough to justify conferring exclusive jurisdiction on the courts of the Contracting State in which the property affected by those rights is situated. Such rules of national law are based on the need to afford legal protection to the interests of third parties, and such protection can be ensured, if need be, by public notice in the form and at the place prescribed by the law of the Contracting State in which the property is situated.’

25 At the time of this case the Brussels I Regulation had been recast as Regulation 1215/2012 and Article 22 had become Article 24.

jurisdiction in this mixed action, but the Court solves this by holding that action no. 1 falls within the special jurisdiction of the court of the place of performance of the obligation. Given that the performance of the gift, namely conveyance of the ownership of the immovable property in question, took place in the same country where action no. 2 would take place, the Court neatly brings these two actions within the jurisdiction of the *forum rei sitae* after all.

That this solution happened to work in this instance does however not mean that it can be applied in future cases. If this case had been about a registered but movable object (e.g. a ship instead of a house) the place of performance of the contract of gift could have been in a different country than the place of (de) registration. The jurisdictions involved in *Schmidt v. Schmidt* were Austria and Germany.²⁶ It is not that hard to sail a ship down the Danube from Vienna to Regensburg, making Austria the place of registration and Germany the place of performance.

8. A more helpful judgment in clarifying the meaning of the term rights *in rem* is *Weber v. Weber*.²⁷ This judgment tells us why the German *Vorkaufsrecht* (or ‘right of pre-emption’) is a right *in rem*: it is because it affects third parties in the sense that the holder of the right can supersede a contract of sale between the owner of property and a third party buyer and have the ownership of the property transferred to herself upon the same conditions as those agreed between the owner and the third party. Here we finally find an explanation that actually focuses on what *rights* in rem are, not just on what *actions* in rem are. This explanation, which uses the effect on third parties as a way to distinguish between real and personal rights, matches the explanations given in both the Schlosser Report on the Brussels Convention²⁸ (the predecessor to the Brussels I Regulation) and in the Court’s judgments concerning the Insolvency Regulation.²⁹

2.2 *Rights in rem in the Insolvency Regulation*

9. A separate explanation of the term rights *in rem* can be found in the *Lutz* case concerning the Insolvency Regulation.³⁰ This case dealt *inter alia* with the question whether a ‘right to attach’³¹ a bank account constituted a right *in rem*. The Court

26 Incidentally: two jurisdictions from the same legal family again, just as in *Gaillard*. The Court will not always be so lucky.

27 ECJ 3 April 2014, Case C-438/12, *Weber v. Weber*, EU:C:2014:212 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-438/12>).

28 See below, section 1.c.

29 See below, section 1.b.

30 Regulation 2015/848/EU (recast) on insolvency proceedings, [2015] OJ L 141/19 (data.europa.eu/eli/reg/2015/848).

31 In German, the language of the case: ‘Pfändungspfandrecht an Kontoguthaben’. In Dutch: ‘recht tot het leggen van beslag op banktegoeden’.

held that this might be the case, if the right were ‘exclusive in relation to the other creditors of the debtor company’ under the national law concerned.³² Here the judgment introduces a tension between European and national law: national law gets to determine whether a right is a right *in rem*, but this can only be so – following the European criterion – if the right is ‘exclusive’.

10. Advocate General Szpunar sheds more light on this in his Opinion in the *Senior Home* case (the judgment itself is discussed further down).³³ Even though the Regulation refers to national law to determine what a right *in rem* is, it also provides autonomous classification criteria for determining what constitutes a right *in rem* for the application of Article 8 of the Regulation.³⁴ Here it is helpful to return to the text of the Insolvency Regulation and see in what way it provides these autonomous classification criteria. The Insolvency Regulation, the only legislative measure that provides something resembling a definition of ‘rights *in rem*’, states in Article 8(2) and (3) that:

2. The rights [*in rem*] referred to in paragraph 1 shall, in particular, mean:

- (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
- (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
- (c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
- (d) a right *in rem* to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, based on which a right *in rem* within the meaning of paragraph 1 may be obtained shall be considered to be a right *in rem*.

This article provides a functional description of the competences attached to various rights *in rem*. It gives us an insight into the kind of legal relationships EU law considers to be of an *in rem* nature, although it must be noted that the use of the words ‘in particular’ indicates that this is a non-exhaustive list. Categories (a) and (b)

32 ECJ 16 April 2015, Case C-557/13, *Lutz v. Bäuerle*, EU:C:2015:227, (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-557/13>) para. 28. In German, the language of the case: ‘ausschließlichen Charakter’. In Dutch: ‘exclusief recht’. In French: ‘caractère exclusif’.

33 ECJ 26 October 2016, Case C-195/15 *Senior Home*, EU:C:2016:369 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-195/15>).

34 AG Szpunar in Case C-195/15 *Senior Home*, para. 39.

of section 2 concern security rights. They include the assignment of a claim by way of guarantee as a security right, in deviation from the way in which some Member States would view this.³⁵ Category (c) concerns remedies relating to rights *in rem* and category (d) concerns rights to use. Section 3 resembles the German concept of *Vormerkung* – or ‘priority notice’ – to which one can resort in order to protect a claim to be granted a right in a plot of land or a right burdening a plot of land.³⁶ According to section 3, the right registered through such a priority notice is considered to be a right *in rem*. In doing so, the Regulation takes a European-autonomous stance on what constitutes a right *in rem*, contrary to some Member States, whose legal system provides for priority notice but without such notice leading to the acquisition of a property right.³⁷

11. The judgment in *Senior Home* shows us that the interaction between the Insolvency Regulation and national property law leads to a two-step approach to determining whether and when a right constitutes a right *in rem*. The question in *Senior Home* was whether a public charge on real property constitutes a right *in rem*.³⁸ The Court stated that the basis, validity and extent of a right *in rem* are determined by national property law.³⁹ This is step one. At step two, rights regarded as *in rem* by national law must satisfy certain criteria in order to fall within Article 8 of the Insolvency Regulation, i.e. to be considered *in rem* for the purposes of the Regulation.⁴⁰ These criteria follow from Article 8(2) and (3) as printed above. The Court applied the criteria from Article 8 to the public charge at issue in the main proceedings and concluded that it was a right *in rem* for the following reasons⁴¹:

- a) The charge directly and immediately encumbered the real property.
- b) The owner had to accept enforcement against his property.
- c) During insolvency proceedings the tax authorities had the status of a preferential creditor on the basis of the charge over the property.

35 V. SAGAERT, ‘De verworvenheden van het Europese goederenrecht’, in A.S. Hartkamp, C.H. Sieburgh, & L.A.D. Keus (eds), *De invloed van het Europese recht op het Nederlandse privaatrecht* (Onderneming en Recht, 42-I; Deventer: Kluwer 2007), p 309.

36 See §883(1) of the German civil code: ‘Zur Sicherung des Anspruchs auf Einräumung oder Aufhebung eines Rechts an einem Grundstück oder an einem das Grundstück belastenden Recht oder auf Änderung des Inhalts oder des Ranges eines solchen Rechts kann eine Vormerkung in das Grundbuch eingetragen werden. Die Eintragung einer Vormerkung ist auch zur Sicherung eines künftigen oder eines bedingten Anspruchs zulässig.’

37 E. RAMAEKERS, *European Union Property Law: From Fragments to a System*, p 150.

38 ECJ 26 October 2016 (*Senior Home*), *supra* n. 33, para. 15.

39 ECJ 26 October 2016 (*Senior Home*), *supra* n. 33, para. 18.

40 ECJ 26 October 2016 (*Senior Home*), *supra* n. 33, para. 22.

41 ECJ 26 October 2016 (*Senior Home*), *supra* n. 33, paras 23 and 32.

The Court also added that it is irrelevant whether the right *in rem* is public or private.⁴²

12. This two-step approach, by which a right must first meet national criteria and then European criteria before being classified as *in rem*, has two possible consequences. First of all, a right that is considered to be *in rem* under national law may still fail the European test and therefore not be considered *in rem* under the Insolvency Regulation. This of course means that the powers and protection connected to the right change as it is now treated as being only personal in nature. Secondly, a right that is not considered to be *in rem* under national law may nevertheless pass the European test and therefore be ‘elevated’ to the status of *in rem* right for the purposes of the Regulation.

2.3 *Rights in rem in the EU Succession Regulation? The Kubicka-litigation*

13. Also in more recent legislation the term right *in rem* is maintained. The EU Succession Regulation maintained the use of the term. Because of the nature of these regulation, there is explicit and special attention to property rights. Moreover, the Regulation also uses the terms property right and property interest.

Recitals 14 to 17 of the Regulation provide specific attention to the purpose of the Regulation:

(14) **Property rights, interests** and assets created or transferred otherwise than by succession, for instance by way of gifts, should also be excluded from the scope of this Regulation. However, it should be the law specified by this Regulation as the law applicable to the succession which determines whether gifts or other forms of dispositions *inter vivos* giving rise to a right *in rem* prior to death should be restored or accounted for for the purposes of determining the shares of the beneficiaries in accordance with the law applicable to the succession.

(15) This Regulation should allow for the creation or the transfer by succession of a **right in immovable or movable property** as provided for in the law applicable to the succession. It should, however, not affect the limited number (‘**numerus clausus**’) of **rights in rem** known in the national law of some Member States. A Member State should not be required to recognise a **right in rem relating to property** located in that Member State if the **right in rem** in question is not known in its law.

(16) However, in order to allow the beneficiaries to enjoy in another Member State the rights which have been created or transferred to them by

42 ECJ 26 October 2016 (*Senior Home*), *supra* n. 33, para. 27.

succession, this Regulation should provide for the adaptation of an unknown **right in rem** to the closest equivalent **right in rem** under the law of that other Member State. In the context of such an adaptation, account should be taken of the aims and the interests pursued by the specific **right in rem** and the effects attached to it. For the purposes of determining the closest equivalent national **right in rem**, the authorities or competent persons of the State whose law applied to the succession may be contacted for further information on the nature and the effects of the right. To that end, the existing networks in the area of judicial cooperation in civil and commercial matters could be used, as well as any other available means facilitating the understanding of foreign law.

(17) The adaptation of unknown **rights in rem** as explicitly provided for by this Regulation should not preclude other forms of adaptation in the context of the application of this Regulation.⁴³

The first sentence of Recital 14 already shows how different this more recent legislation is. Although it excludes from its scope property rights (or interests) created otherwise than by succession, it – by implicit reference to national law – allows for *any* property right or interest that can be created by succession to be included in the scope of the Regulation. This therefore refers to property rights on land and movables, but also to property rights on incorporeal property. After all, it is very well possible to create a property right on an incorporeal object, such as money on a bank account (which is an obligation/claim) under most national succession regimes.⁴⁴

14. Recital 15 then specifically deals with property rights on corporeal objects, neglecting the possibility that property rights may also exist on incorporeal objects and specifically refers – as a first – to the closed system of property rights at national level. By including the term *numerus clausus*, the Regulation gives room for an autonomous definition of the term *numerus clausus* at the EU level. Moreover, recital 15 and 16 deal with a specific problem in international property law: the recognition and application of foreign property rights.⁴⁵ It seems, therefore, that rights *in rem* remain to be understood as what the national legal systems of the Member States provide are rights *in rem*.

15. Article 1 of the Succession Regulation deals with the scope of the Regulation:

(2) The following shall be excluded from the scope of this Regulation:

(k) the nature of rights ***in rem***; and⁴⁶

⁴³ Emphasis added by authors.

⁴⁴ C. LEBON, 'Chapter 4 – Claims', in J.H.M. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law* (Oxford: Hart Publishing 2012), pp 365 et seq.

⁴⁵ See on this B. AKKERMANS & E. RAMAEKERS, 'Lex Rei Sitae in Perspective: *National Developments of a Common Rule?*', in B. Akkermans & E. Ramaekers (eds.), *Property Law Perspectives* (Antwerp: Intersentia 2012), pp 125 et seq.

⁴⁶ Emphasis added by authors.

16. And Article 31 of the Succession Regulation, finally, reads:

Adaptation of rights *in rem*

Where a person invokes a **right in rem** to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right in rem in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent **right in rem** under the law of that State, taking into account the aims and the interests pursued by the specific **right in rem** and the effects attached to it.⁴⁷

17. The EU Succession Regulation, in other words, refers to the existence of property rights at the national level. It also explicitly recognizes that Member States operate (even though that is not correct per se, Spanish law formally operates on the basis of a *numerus apertus*) a closed system of property rights.⁴⁸ Any recognition of a property right created in another legal system will always confront the receiving system with a foreign right: a Polish right of ownership is not a German right of ownership.⁴⁹

18. A part of this came in focus in the first judgment dealing with the Regulation. In *Kubicka* a Polish national wanted to choose Polish law as the law applicable to her succession and leave her (German) share of a right of ownership of a house in Germany to her husband by way of a *legatum per vindicationem*. This means that upon her death, her husband would immediately become owner of the house (already holding the other share in the ownership of the house) in Germany. In German law, however, only a *legatum per damnationem* exist in which heirs become owners with a duty to transfer ownership to legatees.⁵⁰ Because of this the Polish notary she approached refused to cooperate. In its decision the CJEU deals with rights *in rem*, and the *numerus clausus*. It held:

48.the existence and number of rights in rem in the legal order of the Member States ('numerus clausus') are also covered by the scope of that provision. Indeed, recital 15 of Regulation No 650/2012 states in that regard that the regulation does not affect the limited number ('numerus clausus') of rights in rem known in the national law of some Member States, and that a Member State

47 Emphasis added by authors.

48 P. GARRIDO, 'Real Property Law: Spain Report', <https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/Spain.pdf>.

49 This example refers to the facts of the *Kubicka* case (ECJ 12 October 2017 (C-218/16)) discussed below.

50 See J.P. SCHMIDT, 'Challenged Legacies – First Decision of the European Court of Justice on the EU Succession Regulation (ECJ, 12 October 2017, C-218/16 (*Kubicka*))', 7. *European Property Law Journal* 2018(1), pp 4 et seq.

should not be required to recognize a right *in rem* relating to property located in that Member State if the right *in rem* in question is not known in its law.

...

61. In the third place, regarding the interpretation of Article 31 of Regulation No 650/2012, it must be noted that, under the terms of that article, ‘where a person invokes a right *in rem* to which he is entitled under the law applicable to the succession and the law of the Member State in which the right is invoked does not know the right *in rem* in question, that right shall, if necessary and to the extent possible, be adapted to the closest equivalent right *in rem* under the law of that State, taking into account the aims and the interests pursued by the specific right *in rem* and the effects attached to it’.

62. In this case, it should be noted that the right *in rem* that Ms Kubicka wishes to transfer by way of a legacy ‘by vindication’ is the right of ownership of immovable property located in Germany. It is undisputed that German law recognises the right of ownership with which the legatee would be vested under Polish law.

The CJEU, in other words, is using its own terminology of right *in rem*, but also of ownership, be it with reference to the national law meaning of the latter term.

2.4 *Rights in rem Only in Corporeal Property? The Schlosser Slip-Up.*

19. A final but important point concerning the case law on ‘rights in rem’ is this: the Court stated in the *Komu* case that rights *in rem* exist in corporeal property.⁵¹ The addition of the word corporeal is novel. It did not appear in earlier cases defining the term rights *in rem*, nor is it compatible with secondary EU legislation, which includes incorporeals as well as corporeals among the things in which one can have a right *in rem*.⁵² This is a huge discrepancy between case law and legislation, one that goes to the core of property law. In *Komu* the Court refers back to a series of judgments (*Weber*, *Gaillard*, *Lieber*) in which it supposedly said the same. However, these judgments, all in turn referring back to the Schlosser Report on the Brussels Convention,⁵³ only say that rights *in rem* exist in ‘an item of property’, not in ‘corporeal property’. Having said that, the German version of all four of these judgments states that a *dingliches Recht* (right *in rem*) is a right in a *Sache*, which, according to German national law, is a corporeal object. German would have been the language of the case for both *Weber* and *Lieber*. Given that

51 ECJ 17 December 2015, Case C-605/14, *Komu and others*, EU:C:2015:833 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-605/14>), para. 27.

52 E. RAMAEKERS, *European Union Property Law: From Fragments to a System*, pp 174-176, 180-181 and 191-193.

53 [1979] OJ C 59/71.

Professor Schlosser was German and English had only been an official language of the Community for six years at the time the Schlosser report was published, we are going to assume that the Schlosser report was originally drafted in German. We can see at paragraph 166 of the report that Professor Schlosser takes the phrase ‘*dingliches Recht*’ from the then Brussels Convention and adds the words ‘*in einer Sache*’ (i.e. in a thing). The English version of the report does not do this and simply keeps referring to the phrase ‘right in rem’ as stated in the Convention without adding ‘in corporeal property’. From this it seems that the addition ‘in corporeal property’ has made its way from Professor Schlosser’s German legal background into the case law explaining the concept ‘rights *in rem*’ from the Brussels Convention and was only properly translated as such in *Komu*. So far nobody seems to have noticed that (a) Professor Schlosser’s German legal background has had a crucial impact on the definition of the term rights *in rem*, and (b) that there is now a discrepancy between the case law and other legislation that can only be solved by either rectifying the ‘Schlosser slip-up’ or by giving priority to the legislation over the case law to ensure that also incorporeals can be the objects of rights *in rem*.

3. Ownership

20. Now that we have looked at the meaning of the term rights *in rem* as such, let us look at how the Court deals with the individual property rights as listed in the introduction to this article.

First of all, our previous research into the concept of ownership as used in legislation did not come up with any useful definitions. The terms owner and proprietor are used interchangeably in legislation and the field is muddled even further by the use of terms such as full ownership, economic ownership and ownership rights without any explanation as to the difference.⁵⁴

Unfortunately there are no cases defining the concept of ownership either. The only two cases that are somewhat relevant are *Komu* and *Kubicka*, in which (*Komu*) it is held that an action to terminate co-ownership in undivided shares by way of sale is a proceeding concerning a right *in rem* and (*Kubicka*) that ownership of immovable property constitutes a transferable property right, although the same in both Polish and German law.⁵⁵ At least we can take comfort from the fact that (co-)ownership is actually considered to be a right *in rem*.

⁵⁴ E. RAMAEKERS, *European Union Property Law: From Fragments to a System*, pp 180-181.

⁵⁵ ECJ 17 December 2015 (*Komu*), *supra* n. 51, para. 33, ECJ 12 October 2017, Case C-218/16, *Kubicka*, EU:2017:755 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-218/16>), para. 14.

3.1 *Fee Simple/Freehold*

21. Although a fee simple or freehold estate in land in English law is different from the civil law concept of ownership in that it is rooted in a feudal system of landholding, it is the most extensive property right one can hold in land, just like civil law ownership. We therefore conducted a search into these concepts as well. The results are discussed here.

First of all, as with the term ownership, there is no legislation using the term fee simple and although the term freehold is mentioned once or twice, no definition is given. Secondly, there are no cases defining the concept of fee simple either. The term freehold is discussed in the *Centralan Property* case, but the Court defers to national law as far as the meaning of the term is concerned, stating that it does not have the competence to interpret the Member States' national laws.⁵⁶ From this we can derive that there is no European-autonomous concept of freehold. In this case it was probably for the better that the Court left the concept of freehold (specifically the freehold reversion) alone. First of all, the Commission already appeared uncomfortable with the term: '[T]he Commission [argues] that it is difficult to accept that each of two different persons, having different rights over a property[i.e. a 999 year leasehold and a freehold reversion], has the right to dispose of it as owner.'⁵⁷ The Court tries to counter this argument by stating that this is perfectly acceptable, given '[t]he various manifestations of the concept of co-ownership in the Member States' legal systems',⁵⁸ thereby suggesting that a freehold estate encumbered by a leasehold is a form of co-ownership, which it is not.⁵⁹

3.2 *Retention of Title/Reservation of Ownership*

22. Directive 2011/7/EU on Combating Late Payment in Commercial Transactions⁶⁰ defines retention of title clauses as 'the contractual agreement according to which the seller retains title to the goods in question until the price has been paid in full'.⁶¹ This corresponds to the basic retention of title or reservation of ownership clauses known in the Member States. Extended retention of title clauses such as they exist in Germany⁶² are however not part of the Directive.

56 ECJ 15 December 2005, Case C-63/04, *Centralan Property Ltd*, EU:C:2005:773 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-63/04>), para. 62.

57 ECJ 15 December 2005 (*Centralan Property Ltd*), *supra* n. 56, para. 65.

58 ECJ 15 December 2005 (*Centralan Property Ltd*), *supra* n. 56, para. 66.

59 This is surprising, given that the *juge-rapporteur* on the case was the Irish judge Aindrias Ó Caoimh.

60 [2011] OJ L 48/1 (data.europa.eu/eli/dir/2011/7/oj).

61 Article 2(9).

62 V. SAGAERT, 'Chapter 5 - Security Interests', in J.H.M. van Erp & B. Akkermans (eds.), *Cases, Materials and Text on Property Law*, pp 499-505.

A search of the case law rendered several results for the concepts ‘retention of title’ and ‘reservation of title’, but none for the concepts ‘reservation of ownership’ and ‘retention of ownership’.

In *Commission v. Italy*⁶³ the Court held that the Late Payments Directive only describes what a retention of title clause is, but that the validity and enforceability of such a clause are to be determined by national law.⁶⁴ So here we do have a European-autonomous definition of a property right but it is a lame duck: whether the retention of title clause is of any use to the person entitled still depends on national law, which will obviously vary from Member State to Member State.

3.3 *The Concepts of Possessor and Holder*

23. As far as legislation is concerned, the possessor/holder distinction is mentioned in the Directive on the return of cultural objects,⁶⁵ which states in Article 2 that:

(6) ‘possessor’ means the person physically holding the cultural object on his own account;

(7) ‘holder’ means the person physically holding the cultural object for third parties;

These definitions seem to be quite well in line with the way in which these concepts are defined in the Member States’ national systems.⁶⁶

63 ECJ 26 October 2006), Case C-302/05, *Commission v. Italy*, EU:C:2006:683 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-302/05>).

64 ECJ 26 October 2006 (*Commission v. Italy*), *supra* n. 63 paras 27 and 30.

65 Directive 2014/60/EU on the return of cultural objects unlawfully removed from the territory of a Member State, [2014] OJ L 159/1 (data.europa.eu/eli/dir/2014/60/oj).

66 Cf. some of the other language versions:

- in German:

‘6. “Eigenbesitzer” [this used to be “Eigentümer”!] die Person, die die tatsächliche Sachherrschaft über das Kulturgut für sich selbst ausübt;

7. “Fremdbesitzer” [this used to be “Besitzer”] die Person, die die tatsächliche Sachherrschaft über das Kulturgut für andere ausübt.’

- in Dutch:

6. ‘bezitter’: degene die een cultuurogoed feitelijk houdt voor zichzelf;

7. ‘houder’: degene die een cultuurogoed feitelijk houdt voor een ander.’

- in French:

‘6) “possesseur”: la personne qui a la détention matérielle du bien culturel pour son propre compte;

7) “détenteur”: la personne qui a la détention matérielle du bien culturel pour compte d’autrui.’

See also the definition in the DCFR VIII.-1:205 stating ‘Possession, in relation to goods, means having physical control over the goods’.

24. Let us now see if these definitions match with what can be found in the Court's case law. The case of *Weidacher*⁶⁷ needs to be mentioned here. It provides us with a definition of the term 'holder'. Entire libraries can be filled with literature on the distinction between owning, possessing or holding something (in German, the language of the case: *Eigentum, Eigenbesitz und Fremdbesitz*; in Dutch, *eigendom, bezit, houderschap*). The *Weidacher* judgment was concerned with the concept of 'holder of surplus stocks' in the sense of Article 4 of Regulation 3108/94 on transitional measures to be adopted on account of the accession of Austria, Finland and Sweden in respect of trade in agricultural products.⁶⁸

The Austrian government contended that a holder (*Besitzer* in the German version of the Regulation) can only be the person with authority to dispose (*Verfügungsgewalt* in the original German version of the case) over the goods.⁶⁹ The Commission on the other hand argued that the holder referred to the person with actual control or actual and physical possession (*tatsächliche Kontrolle oder Sachherrschaft*).⁷⁰ The Court followed the Austrian government's argument.⁷¹ Although this may make sense against the background of the Regulation, whose aim is to tax profits generated by those who actually have the authority to place stored products on the market, it seems odd to refer to these persons as 'holders' (in the sense of *Besitzer*). On the other hand, it happens more often in the context of taxes that the Court separates the authority to dispose over an object from the actual, physical control over an object. Authority and physical control are not always in the same hands and when they are split the Court needs to make sure that, under the relevant Regulation or Directive, the right person is taxed.

In any event, we cannot draw any parallels here with the terms 'possessor' and 'holder' as used in the Directive on the Return of Stolen Cultural Objects. As we just saw from the *Weidacher* judgment, a holder in the sense of Regulation 3108/94 is someone with authority to dispose over goods, regardless of whether or not they actually have physical possession (*Sachherrschaft*) over them, whereas the Directive focuses only on physical possession and distinguishes merely between those who have it for themselves and those who have it for someone else. It is not concerned with who has the authority to dispose. For the moment, therefore, we need to view these terms only within the context of the measure they stem from; we cannot draw any overarching conclusions yet.

67 ECJ 15 January 2002, Case C-179/00 *Weidacher*, EU:C:2002:18 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-179/00>).

68 ECJ 15 January 2002 (*Weidacher*), *supra* n. 67, para. 14, question 3.

69 ECJ 15 January 2002 (*Weidacher*), *supra* n. 67, para. 40.

70 ECJ 15 January 2002 (*Weidacher*), *supra* n. 67, para. 41.

71 ECJ 15 January 2002 (*Weidacher*), *supra* n. 67, paras 42–45.

4. Tenancies

25. The term tenancy is not defined in European legislation, but there is a string of cases dealing with this term in the context of the Brussels I Regulation. As we have seen above,⁷² the Brussels I Regulation in Article 24 confers exclusive jurisdiction on the *forum rei sitae* ‘in proceedings which have as their object rights *in rem* in immovable property or **tenancies** of immovable property’ [emphasis added]. What we can already note based simply on the text of the Regulation, is that tenancies are apparently not considered to be rights *in rem*, otherwise they would not have needed separate mention. The reason for grouping tenancies with rights *in rem* seems to be that ‘tenancies are closely bound up with the law of immovable property and with the provisions, generally of a mandatory character, governing its use, such as legislation controlling the level of rents and protecting the rights of tenants’.⁷³ Given the often hybrid status of tenancies in national law, being part personal and part real right, it seems appropriate that they are treated similarly to rights *in rem* under European law. Let us walk through the cases in which the Court attempts to clarify what is meant by ‘tenancies’ in the Brussels I Regulation.

4.1 *Sanders v. Van der Putte* – ‘usufructuary lease’

26. The question raised in *Sanders v. Van der Putte*⁷⁴ was whether an agreement to rent under a usufructuary lease a retail business (in Dutch, the language of the case: *verpachting van een winkelbedrijf*) carried on in immovable property rented from a third person by the lessor (*verpachter*) constituted a tenancy.⁷⁵ The Court held that it did not, because the dispute between the parties to the usufructuary lease concerned the refusal by the lessee to continue the lessor’s business and had nothing to do with the existence or interpretation of the lease, with compensation for damage caused by the tenant, or with giving up possession of the premises. The Court thus seems to focus more on the nature of the dispute than the nature of the agreement between the parties. This is understandable, and we have seen it before: because the Brussels I Regulation decides which court has jurisdiction in a given case, emphasis is often placed on the nature of the action brought rather than on the content of the underlying agreement between the parties. Be that as it may, it means that this case does not answer the question how the term ‘tenancies’ is to be interpreted.

⁷² Section 1.

⁷³ ECJ 15 January 1985, Case 241/83, *Rösler v. Rottwinkel*, EU:C:1985:6 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=241/83>), para. 19. Cf also the Jenard Report on the Brussels Convention, [1979] OJ C 59/1, p 35.

⁷⁴ ECJ 14 December 1977, Case 73/77, *Sanders v. Van der Putte*, EU:C:1977:208 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=73/77>).

⁷⁵ ECJ 14 December 1977 (*Sanders v. Van der Putte*), *supra* n. 74, para. 7.

4.2 *Rösler v. Rottwinkel and Hacker - Short-Term Holiday Letting*

27. The next case, *Rösler v. Rottwinkel*,⁷⁶ is much more helpful in this regard. It provides a clear definition of leases – here apparently used interchangeably with tenancies – in paragraph 27:

Leases generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put, the obligations of the landlord and tenant regarding the maintenance of the property, the duration of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant, such as water, gas and electricity charges.

The Court also makes clear that what is now Article 24 of the Brussels I Regulation applies to all tenancies of immovable property irrespective of any special characteristics, in this case the fact that it concerned a short-term letting of a holiday home.

Rösler v. Rottwinkel was followed by *Hacker v. Euro-Relais GmbH*.⁷⁷ In this case, Mrs Hacker had concluded what the parties described as a ‘tenancy agreement’ with a travel organizer.⁷⁸ Both parties were resident/established in Germany. Mrs Hacker complained that the holiday accommodation procured for her in the Netherlands did not comply with the tenancy agreement and claimed damages.⁷⁹ The question was whether the Dutch or the German courts had jurisdiction under the then Brussels Convention. The European Court of Justice (ECJ) followed the same line of reasoning as it had in *Sanders*. It stated that this ‘tenancy agreement’, although it included the use of short-term holiday accommodation and might therefore be called a tenancy agreement in the sense of the Convention, just like the short-term lease in *Rösler*, also included other services such as the reservation of seats in connection with travel arrangements and travel cancellation insurance.⁸⁰ For this reason, the Court held that such a ‘complex contract’, which concerns a range of services provided in return for a lump sum, could not constitute a tenancy agreement.⁸¹

We can draw two conclusions from this case: (1) a short-term letting of a holiday home may be considered a tenancy agreement but only if it concerns the letting of the holiday home as such and not if it also includes the provision of other

76 ECJ 15 January 1985 (*Rösler v. Rottwinkel*), *supra* n. 73.

77 ECJ 26 February 1992, Case C-280/90, *Hacker v. Euro-Relais GmbH*, EU:C:1992:92 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-280/90>).

78 ECJ 26 February 1992 (*Hacker v. Euro-Relais GmbH*), *supra* n. 77, para. 2.

79 ECJ 26 February 1992 (*Hacker v. Euro-Relais GmbH*), *supra* n. 77, paras 3–4.

80 ECJ 26 February 1992 (*Hacker v. Euro-Relais GmbH*), *supra* n. 77, para. 14.

81 ECJ 26 February 1992 (*Hacker v. Euro-Relais GmbH*), *supra* n. 77, para. 15.

services; (2) the parties may call an agreement a tenancy agreement, but that does not mean it will be treated as such under the Brussels I Regulation.

4.3 *Lieber v. Göbel – The Landlord–Tenant Relationship*

28. Our next case, *Lieber v. Göbel*,⁸² concerned a claim for payment of compensation for use of property. Ownership of an apartment in France was to be transferred by Mr and Mrs Göbel to Mr Lieber, all resident in Germany. In anticipation of the transfer, the Göbels allowed Mr Lieber to take possession of the apartment. When after nine years the agreement to transfer was declared void *ex tunc* for reasons of German law, Mr and Mrs Göbel sought compensation from Mr Lieber for the period during which he had possessed the apartment. The question arose whether German or French courts had jurisdiction, the answer depending on whether this arrangement granting possession to Mr Lieber qualified as a tenancy. The Court held that this was not a tenancy, because there was no ‘relationship of landlord and tenant’ between the parties.⁸³ Apparently, then, for an arrangement to be classified as a tenancy, such a relationship of landlord and tenant is a requirement. According to the Court, such a relationship is characterized by the following:

[It] comprises a series of rights and obligations in addition to that relating to rent. That relationship [of landlord and tenant] is governed by special legislative provisions, some of a mandatory nature, [...] for example, provisions determining who is responsible for maintaining the property and paying land taxes, provisions governing the duties of the occupier of the property as against the neighbours, and provisions controlling or restricting the landlord’s right to retake possession of the property on expiry of the lease.⁸⁴

This is quite a detailed description. If we compare it to the definition of a tenancy found in *Rösler* we will see that that one focused more on the content of the landlord–tenant relationship, whereas this description in *Lieber v. Göbel* focuses more on the framework of legislation to which such a relationship is usually subject. The two descriptions complement each other nicely.

4.4 *Dansommer – A Functional Approach*

29. We already saw in *Hacker* that it does not matter what name the parties have given to their agreement: they may call their agreement a tenancy but that does not

82 ECJ 9 June 1994, Case C-292/93, *Lieber v. Göbel*, EU:C:1994:241 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-292/93>).

83 ECJ 9 June 1994 (*Lieber v. Göbel*), *supra* n. 82, para. 20.

84 ECJ 9 June 1994 (*Lieber v. Göbel*), para. 20.

mean the Court will see it as such. *Dansommer* seems to go one step further. It seems that the national classification of an agreement as either a right *in rem* or a right *in personam* is irrelevant to the Court: as long as the content of an agreement meets the definition of a tenancy as set by the Court in its case law, the agreement will be treated as a tenancy for the purposes of the Brussels I Regulation. This follows from paragraph 23 of the *Dansommer* judgment:

[I]n a case such as that before the national court, which concerns not a right in rem in immovable property but a tenancy of immovable property, Article 16(1) [now Article 24(1)] applies to any proceedings concerning rights and obligations arising under an agreement for the letting of immovable property, irrespective of whether the action is based on a right in rem or on a right in personam.

The Court refrains from positively classifying tenancies; they are only negatively classified as *not* being rights *in rem*. Beyond that, the Court adopts a functional approach and treats tenancies similarly to rights *in rem*. Tenancies will be treated this way, irrespective of whether national law classifies them as rights *in rem* or rights *in personam*. Nonetheless, a re-classification occurs at EU level in that any tenancy – whether seen as *in rem* or *in personam* at national level – will not be classified as *in rem* at EU level. In other words, tenancies that are considered *in rem* at national level will lose that status at EU level. On the other hand, the functional approach adopted by the Court means that a tenancy will be treated as if it were an *in rem* right even though it might be classified as *in personam* by national law.

4.5 *Commission v. Ireland (Roads Toll) – Specified Duration*

30. This case⁸⁵ concerned the VAT Directive⁸⁶ for a change, instead of the Brussels I Regulation. Article 135 of the VAT Directive reads:

1. Member States shall exempt the following transactions: [...]
 - (l) the leasing or letting of immovable property.
2. The following shall be excluded from the exemption provided for in point (l) of paragraph 1:
 - (a) the provision of accommodation, as defined in the laws of the Member States, in the hotel sector or in sectors with a similar function, including the provision of accommodation in holiday camps or on sites developed for use as camping sites;

85 ECJ 12 September 2000, Case C-358/97, *Commission v. Ireland*, EU:C:2000:425 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-358/97>).

86 Directive 2006/112/EC on the common system of value added tax, [2006] OJ L 347/1 (data.europa.eu/eli/dir/2006/112/oj).

- (b) the letting of premises and sites for the parking of vehicles;
- (c) the letting of permanently installed equipment and machinery;
- (d) the hire of safes.

Member States may apply further exclusions to the scope of the exemption referred to in point (l) of paragraph 1.

The question raised in *Commission v. Ireland* was whether levying a toll for the use of a bridge in Dublin constituted ‘letting of immovable property’ in the sense of, then, Article 13B of the VAT Directive. The Irish Government felt that it did, amongst others because according to Irish law, the term ‘letting’ includes the granting of rights of way or easements over property (the levying of a toll apparently being similar thereto – this is not entirely clear from the case).⁸⁷ The Court, however, held that it did not, because the ‘easement’ granted in this case (i.e. the right to cross the bridge on payment of the toll) was not granted for a predetermined duration.⁸⁸ According to the Court, it is ‘an essential element of a contract to let’ that parties have agreed on the duration of the contract.⁸⁹ It is also for that reason that the term ‘letting’ in the VAT Directive was held to include usufructs because they are granted for a defined period of time.⁹⁰ That a specified duration is part of a tenancy is something we also saw in the definition provided by the Court in *Rösler v. Rottwinkel*.⁹¹

As we can see in section 2 of Article 135, the VAT Directive specifies several instances of leasing or letting of immovable property. The Court notes in *Commission v. Ireland* that, while the definitions here found are wider in some respects than those enshrined in various national laws (e.g. a contract for a hotel room is usually not seen as a lease or tenancy),⁹² the term ‘letting of immovable property’ must be construed strictly.⁹³ Given how much the definitions provided in Article 135 are interwoven with the specific tax law context (section 1 provides an exception to the general rules in the VAT Directive, section 2 provides an exception to the exception from section 1), I refrain from drawing general conclusions about the meaning of the words ‘leasing and letting of immovable property’. Drawing conclusions on the basis of the case law surrounding the Brussels I Regulation seems more helpful and useful: Brussels I is a private international

87 ECJ 12 September 2000 (*Commission v. Ireland*), *supra* n. 85, para. 48.

88 ECJ 12 September 2000 (*Commission v. Ireland*), *supra* n. 85, paras 51–58.

89 ECJ 12 September 2000 (*Commission v. Ireland*), *supra* n. 85, para. 56.

90 ECJ 4 October 2001, Case C-326/99, *Stichting Goed Wonen*, EU:C:2001:506 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-326/99>), paras 54–55.

91 Above, section 3.b.

92 ECJ 12 September 2000 (*Commission v. Ireland*), *supra* n. 85, para. 54.

93 ECJ 12 September 2000 (*Commission v. Ireland*), *supra* n. 85, para. 55.

law measure and the terminology used therein is much more closely connected to private law language than the terminology in the VAT Directive is.

4.6 *Klein v. Rhodos – Specificity, Timeshares and Holiday Homes (Again)*

31. This case concerned a timeshare arrangement. Mr and Mrs Klein concluded a membership contract with Rhodos, which entitled them to purchase a right to use a holiday property on a timeshare basis. Just as in *Hacker*,⁹⁴ this contract was denied the status of tenancy because the membership contract provided for ‘additional services that go beyond the transfer of a right of use which constitutes the subject matter of a tenancy agreement’.⁹⁵ Moreover, the ‘additional services’ – which we assume refers to the club membership – were worth more than the actual timeshare, the membership fee of DM (for Deutschmark) 10 153 constituting the major part of the total price of DEM 13 300.⁹⁶ This was an additional reason for the Court to deny this contract tenancy status.⁹⁷ It seems arbitrary, when deciding whether a contract is a tenancy, to exclude time but include value as a relevant factor: a contract can amount to a tenancy, even if it is for a short period of time,⁹⁸ but not if it is too cheap compared to other services for the use of the immovable property that you are paying for.⁹⁹ When would the arrangement be valuable enough to be worthy of the label ‘tenancy’?

There was a second, not yet before seen reason why the Court held that this arrangement did not amount to a tenancy. The Court stated the following:

[I]t must be observed that the property itself, which is defined only as being of a particular type within a hotel complex, is not specified or designated individually in the club membership contract. As the Commission pointed out, the right of use could relate to a different apartment each year.¹⁰⁰

94 Above, section 3.b.

95 ECJ 13 October 2015, Case C-73/04, *Klein v. Rhodos*, EU:C:2005:607 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-73/04>), para. 27.

96 ECJ 13 October 2015 (*Klein v. Rhodos*), *supra* n. 95, para. 18.

97 ECJ 13 October 2015 (*Klein v. Rhodos*), *supra* n. 95, para. 21.

98 ECJ 15 January 1985 (*Rösler v. Rottwinkel*), *supra* n. 73, as discussed above, section 3.b.

99 The decision in *Klein v. Rhodos* was based on the judgment in ECJ 22 April 1999, Case C-423/97, *Travel Vac v. Sanchis*, EU:C:1999:197 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-423/97>), paras 17-26. The facts and outcome were basically the same: membership of a club entitling the member to a time-share in a holiday complex, the membership having a higher value than the time-share. No tenancy (‘rental of immovable property’) in the sense of Article 3(2)(a) of (then) Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises.

100 ECJ 13 October 2015 (*Klein v. Rhodos*), *supra* n. 95, para. 24.

Looking at this statement as property lawyers, we are reminded of the principle of specificity, one of the foundational principles of property law. According to this principle, one can only claim property rights to objects that are sufficiently specified or specifiable.¹⁰¹ The reasoning behind this principle is that property rights have effect *erga omnes* and therefore it should be known what object the right rests on and who actually holds the property right. The right arising under the timeshare agreement in *Klein v. Rhodos* fails the specificity test and is therefore held not to amount to a tenancy. This reaffirms what we saw above,¹⁰² that tenancies are very much treated as rights *in rem* even though they are not actually classified as such.

4.7 Leasehold

32. In addition to the term ‘tenancy’ we also included the term ‘leasehold’ in our search. The search rendered only one relevant result, namely the *Centralan Property* case discussed above, in which the Court deferred to national law for a definition of the term leasehold and refrained from giving its own definition to the term.¹⁰³

We did not have much luck finding a definition of leasehold in EU legislation either. The only provision that contains a definition (albeit a meagre one) is Article 2 of Regulation 1120/2009/EC,¹⁰⁴ which states:

(f) ‘lease’ means lease or similar types of temporary transactions¹⁰⁵

This definition does not tell us much, other than that lease is considered to be a temporary transaction. As far as national law is concerned, it often will be, although this is not necessarily the case.¹⁰⁶

5. Security Rights

33. The term ‘charge’ is impossible to search for, given that it is not just a property security right but is also used in the sense of ‘being charged with’

101 J.H.M. VAN ERP, ‘Chapter 1 – Introduction’, in J.H.M. van Erp & B. Akkermans (eds), *Cases, Materials and Text on Property Law*, pp 75–92, A. Berlee, *Access to Personal Data in Public Land Registers – Balancing Publicity of Property Rights with the Rights to Privacy and Data Protection* (The Hague: Eleven Publishers 2018).

102 Section 3.d.

103 Above, section 2.a.

104 Regulation 1120/2009/EC on support schemes for farmers, [2009] OJ L 316/1 (data.europa.eu/eli/reg/2009/1120/oj).

105 The Regulation uses the terms *bail*, *Pacht* and (*ver*)*huur* in the French, German and Dutch versions respectively.

106 See B. McFARLANE, *The Structure of Property Law* (Oxford: Hart Publishing 2008), pp 785–802.

something. It is, however, possible to search for the terms ‘floating charge’ and ‘fixed charge’, which we did. No relevant results followed from this search, though.

34. Searching for the term ‘pledge’ did not render many useful results either. First of all, because of its use in the sense of ‘pledging to uphold’ something. Secondly, because of the fact that it is used as an English translation of a civil law term, a translation which is used by comparative lawyers when discussing civil law in English but which does not have a legal meaning in English law. A pledge would be *pandrecht* in Dutch, *Pfandrecht* in German, *droit de gage* in French. We expanded our search on the basis of these language versions, especially where the language of the case was any of these three. This showed that, instead of the word pledge, the word ‘security’ is often used as a translation of the civilian terms.¹⁰⁷ It is also sometimes used as a translation of the civilian terms *hypotheek/Hypothek/hypothèque* in Dutch, German and French respectively.¹⁰⁸

35. Although there are many cases on mortgage loan agreements,¹⁰⁹ none of them seems to provide a description of what a mortgage actually is. The case that comes closest to providing a definition is *Trummer and Mayer*, in which the Court said that ‘mortgages represent the classic method of securing a loan linked to a sale of real property’.¹¹⁰ Although this statement is correct, it is also woefully incomplete, saying nothing about, e.g., the powers of the mortgagee to take possession and sell the property or the accessory nature of the mortgage vis-à-vis the underlying loan.

Luckily, there is a piece of legislation that provides us with more information than the case law does. Regulation 2454/93/EC implementing Regulation 2913/92/EC establishing the Community Customs Code states the following¹¹¹:

107 Often, but not always. In ECJ 15 January 2002, Case C-43/00, *Andersen og Jensen*, EU:C:2002:15 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-43/00>) we see the use of the term security in English, *Sicherheit* in German, *garantie* in French, *sikkerhed* in Danish (the language of the case), with the Dutch language version suddenly using *pand* instead of *zekerheid*.

108 See e.g. ECJ 11 January 2001, Case C-464/98, *Stefan*, EU:C:2001:9 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-464/98>), para. 10.

109 E. RAMAEKERS, ‘Parties’ Rights in Mortgages Property after ECJ Rulings on Mortgage Enforcement Proceedings (May 30, 2016)’. SSRN: <https://ssrn.com/abstract=2594766>, M. ANDERSON, E. ARROYO AMAYUELAS, *The Impact of the Mortgage Credit Directive in Europe. Contrasting Views from Member State* (Groningen: Europa Law Publishers, 2018).

110 ECJ 16 March 1999, Case C-222/97, *Trummer and Mayer*, ECLI:EU:C:1999:143 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-222/97>), para. 23.

111 [1993] OJ L 253/1.

Article 857

1. The types of security [...], within the meaning of Articles 193 [ff], shall be as follows:

(a) the creation of a mortgage, a charge on land, an antichresis¹¹² or other right deemed equivalent to a right pertaining to immovable property;

(b) the cession of a claim, the pledging, with or without surrendering possession, of goods, securities or claims or, in particular, a savings bank book or entry in the national debt register;'

This provision lists a number of security rights in relation to immovable property as well as in relation to movable and intangible property. Note that it mentions the possibility of pledging goods, securities, claims etc. with or without surrendering possession.

36. Finally, the term 'lien' does not feature in any of the Court's judgments, nor is there anything relevant about this term to be found in legislation.

6. Rights to Use Immovable Property

37. European legislation does not mention *usufruct*, *emphyteusis*, servitude, restrictive covenant, easement or *superficies*.¹¹³ To conduct a search for use rights in English is tricky, because many of the civilian concepts have no proper English translation because there is no easy equivalent to be found in English law. Comparative property lawyers therefore often use the Latin terminology, which we have decided to use for our search as well. In addition, we have expanded our search to include the Dutch, German and French language versions in the same way as for security rights (see previous section). The list therefore consisted of the following terms: servitude, easement, restrictive covenant, superficies (*opstal* in Dutch), *emphyteusis* (*erfpacht* in Dutch), and usufruct (*vruchtgebruik* in Dutch).

There are no judgments providing a definition or other relevant information concerning the terms servitude, restrictive covenant, or easement. The Dutch term *opstal*, for which the Latin would be *superficies*, is translated as 'right of superficies' in one case¹¹⁴ but as 'building lease' in another.¹¹⁵ The Dutch term *erfpacht*, for which

112 Translation of the French *antichrèse*, which is now called *gage immobilier* (or charge on land). See *Loi* No. 2009-526 of 12 May 2009.

113 E. RAMAEKERS, *European Union Property Law: From Fragments to a System*, pp 187-189.

114 ECJ 28 April 2016, Case C-128/14, *Het Oudeland Beheer*, EU:C:2016:306 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-128/14>), para. 10.

115 ECJ 8 May 2013, Case C-197/11, *Libert and others*, EU:C:2013:288 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-197/11>), para. 2.

the Latin would be *emphyteusis*, is translated as such in one case¹¹⁶ but has also been translated as ‘perpetual usufruct’,¹¹⁷ ‘long leasehold’,¹¹⁸ and ‘long-term lease’.¹¹⁹ As far as the term *usufruct* is concerned it is noteworthy that the Court refers to a usufructuary (*vruchtgebruiker* in Dutch) as a person ‘who holds a beneficial life interest’ in a *Commission v. Belgium* case.¹²⁰ This would probably set off alarm bells with any English land lawyer, for whom a beneficial life interest is an equitable interest under a trust,¹²¹ not necessarily to be equated with the civilian usufruct.

7. Conclusion: Is There a European-Autonomous *Numerus Clausus*?

38. Our analysis shows that, throughout the years, the CJEU is carefully building EU property terminology. This makes sense: as more legislation is developed that directly or indirectly deals with the law of property, such as new developments in succession and matrimonial property law, more and more terminology is needed. For the moment, the CJEU uses the national conception of property rights. For example, in *Kubicka* the Court refers to the German and Polish concepts of ownership.

However, as more property rights come into contact with other legal systems, the court will also be confronted with the differences between property law systems. Property law, different than contract law or company law, remains to differ from country to country, legal system to legal system. *Kubicka* is one of the first cases in which these differences in property law, here in the form of the law of succession, comes into play. The court observes there are no real differences between the right of ownership in Polish law and in German law. Whether that is correct remains to be seen. Also between rights of ownership, there are fundamental differences.¹²²

On the one hand, there is a lot to be found about what rights *in rem* are considered to be in EU law, both in legislation and in case law. On the other hand, we have very little information about how EU law treats the individual property rights, and no real definition of any of them. If EU law simply followed the definitions provided by the national law at stake in any given case then that might be fine, but not if the national definition is then misinterpreted, as happened

116 Case C-326/99 *Stichting Goed Wonen*, para. 11.

117 ECJ 16 June 2016, Case C-229/15, *Mateusiak*, EU:C:2016:454 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-229/15>), para. 11. Note that the language of this case was Polish. We have no knowledge of Polish but the original term that was translated into the Dutch *erfpacht* seems to have been *wieczystego użytkowania*.

118 ECJ 28 April 2016 (*Het Oudeland Beheer*), *supra* n. 114, para. 10.

119 ECJ 8 May 2013 (*Libert and others*), *supra* n. 115, para. 2.

120 ECJ 24 February 1988, Case 260/86, *Commission v. Belgium*, EU:C:1988:91 (<http://curia.europa.eu/juris/liste.jsf?language=en&num=C-260/86>), para. 2.

121 B. McFARLANE, *The Structure of Property Law* (Oxford: Hart Publishing 2008), p. 686.

122 See G. GRETTON, ‘Ownership and Its Objects’, *Rebels Zeitschrift*, (2007) pp. 802 et seq.

in the *Centralan Property* case where the Court interpreted a freehold encumbered with a leasehold as a form of co-ownership (which it is not).

39. Increasingly, it is therefore the court that needs to take action to clarify the meaning of EU property terminology or to decide what national property law takes precedence over another. EU property law, therefore, develops almost in a common law fashion. It seems a matter of time until the CJEU will need to provide its own *National Provincial Bank v Ainsworth* type of decision.¹²³ In that decision the UK Supreme Court (then House of Lords) provides, after a century of debate on the existence of a *numerus clausus* in English and Welsh property law, a definition of what can be a property right. For now, the answer of the CJEU to this question is a reference to national property law. But what if we come to cases where property rights become central, such as in matters relating to succession and matrimonial property law that now fall clearly within the scope of EU law when there is a cross-border element to them, where one legal system grants property effect to a legal relation and another explicitly does not. The lease of land in English law (and Irish law) comes to mind, as well as rights of usufruct in civil law versus the common law absence of such a right in the common law catalogue of property rights.¹²⁴

40. For those who have been interested in the Europeanization of property law for a longer period of time, it is often surprising that EU law does not deal with property law more often. Of course, there are the national (political) sensitivities on the matter, the large differences between national property systems, not only between common and civil law, and the infamous article 345 Treaty on the Functioning of the European Union (TFEU) that may or may not prevent the EU from legislating in the area of property law.¹²⁵ At the same time, property law is extremely essential to any functioning market economy. As a market building exercise, the EU project cannot escape dealing with issues such as the freedom of ownership, the free circulation of goods and the technical rules that follow from

123 *National Provincial Bank Ltd. v. Ainsworth* [1965] AC 1175 (<http://www.bailii.org/uk/cases/UKHL/1965/1.html>), see B. AKKERMANS and W. SWADLING, 'Chapter 3 - Property Rights', in J.H. M. van Erp & B. Akkermans (eds), *Cases, Materials and Text on Property Law* (Oxford: Hart Publishing 2012), pp 302-305.

124 See on these 'borderline cases', B. AKKERMANS & W. SWADLING, 'Chapter 3 - Property Rights', in JHM van Erp & B Akkermans (eds.), *Text, Cases and Materials on Property Law*, pp 294 et seq.

125 See on this *inter alia*, P. SPARKES, *European Land Law* (Oxford: Hart Publishing 2007), J.H.M. VAN ERP & B. AKKERMANS, 'European Union Property Law', in C. Twigg-Flesner (ed.), *Cambridge Companion to EU Private Law* (Cambridge: Cambridge University Press, 2010), pp 173 et seq., B. AKKERMANS, The principle of *numerus clausus* in European Property Law, E. RAMAEKERS, *European Union Property Law: From Fragments to a System*, but also Peter Sparkes et al., *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, Report to the European Parliament PE 556.936, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556936/IPOL_STU\(2016\)556936_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556936/IPOL_STU(2016)556936_EN.pdf) 1 Jul 2019.

that.¹²⁶ Increased contact between legal systems, especially in legal areas that directly concern matters of property law, such as – for example – foreign land ownership and land registration, succession, marriage, but also company law, social security, and banking, will only increase the need to provide clarity as to when we are dealing with property law (and not contract or company law, for example), which legal system applies in the absence of EU law, or how the rules of EU are to be interpreted. In all these situations, the role of the CJEU is to provide answers. A European-autonomous *numerus clausus*, which can still very much refer to- as well as rely on national law, providing definition and legal certainty as to the effect of the legal relations, is a necessary result of this.

126 See on this B. AKKERMANS, ‘European Union Constitutional Property Law: Searching for Foundations for the Allocation of Regulatory Competences’, in B. Akkermans, J. Hage, N. Kornet, & J.M Smits (eds), *Who Does What in European Private Law?* (Antwerp: Intersentia 2015), pp 177 et seq.