



European Property
Rights &
Wrongs

Edited by Diana Wallis MEP and Sara Allanson

European Property
Rights &
Wrongs

Contents

Introduction	5
A few words from Diana Wallis MEP	5
The European Union principles	7
The legal treatment of land and real property within the EU	8
European Property Wrongs – what can the EU do?	11
The areas affected	11
The types of problems encountered	13
Diana comments from experience	16
How citizens have organized to defend their property rights	17
Case study of Empuriabrava	20
Petitions Committee and The Auken Report	21
A European Land Law? ...and the Right to Property	26
<i>Peter Sparkes</i> European Land Law: too narrow for second home owners in Spain?	29
<i>Dr Bram Akkermans, University of Maastricht</i> Property Law in European Union Law	35
<i>Professor Sjef Van Erp, University of Maastricht</i> EU Charter of Fundamental Human Rights and Property Rights	44
<i>Professor Peter Sparkes, University of Southampton</i> Human Rights of Property Buyers	50

© Diana Wallis

PUBLISHER: Diana Wallis

EDITORIAL OFFICE: Conexio Public Relations

GRAPHIC DESIGN: Juha Rätty / www.j-form.fi

ISBN 978-952-67622-1-0 (paperback)

ISBN 978-952-67622-2-7 (PDF)

PRINT: Markprint, Lahti 2011

Linking up national Land Law systems across the EU – some practical steps	56
Some Professional networks – successes with European colleagues	56
<i>Mr Xavier Ibarondo of Eurojuris</i> The Iberjuris project	57
<i>Mr Richard Frimston, Chair of STEP (Society of Estates and Trust Practitioners)</i> How conflicts of laws can affect immovable property	62
Why are Land Registries so important to the process?	64
How do they work?	65
ELRA <i>outline the various models of land registration and the CROBECO Project</i>	66
Diana Wallis MEP concludes	70

Introduction

A few words from Diana Wallis MEP

Since I was elected as a Member of the European Parliament in June of 1999, now twelve and half years ago as I write, there has been one recurring theme of constituents from Yorkshire & the Humber and indeed beyond who contact me about problems. That is the issue of property and related rights. Many constituents and other European citizens have enthusiastically taken up the offer of ‘freedom of movement’ of people; many have chosen on the basis of this freedom offered by all European governments, to study, work or retire in another country. Others have chosen by virtue of the parallel ‘freedom of movement of capital’ to invest in second homes in another EU country, maybe as a holiday home, a retirement prospect or for holiday let. Many sadly have found themselves entangled in impossible legal nightmares; lost deposits, buildings not built, or built in breach of local planning legislation; every possible permutation has crossed my desk at some point or other. Each one represents the life of an individual, or the life of a family ruined, perhaps the biggest investment of their life lost. The stories are heart rending. Of course this should not obscure the many who doubtless do manage such purchases and investments in another EU country without problem. However the numbers and reoccurring nature of the problems are such as to merit closer investigation on behalf of those I represent.

As an MEP my main policy focus over these last twelve and a half years has been around the civil and commercial law of the European Union in relation to the Single Market and our citizens’ rights arising from this. There has been much time

and effort expended by the European Union during this time to extend consumer rights, to give a real boost to shoppers' confidence in what should be a borderless Internet retail experience across Europe. Sometimes it seems strange that we have expended so much legislative time and effort to make sure we can buy a book, a hairdryer or television cross-border but have ignored the horror of what can go wrong if you make potentially the biggest investment of your life and buy a piece of real estate or property cross-border. Even in financial services we have not got it right, as I saw dealing with the sad cases of non Brits who had invested for would-be pensions in the collapsed financial services giant Equitable Life. Even in a case as notorious as this getting redress cross-border was again the proverbial legal nightmare of being pushed from pillar to post, with no regulator or ombudsman wanting to take responsibility for non-nationals.

As a member of the Parliament's Petitions Committee I have also followed at first hand the string of petitions arising from property problems in Spain, which have been the subject matter of all too numerous hearings, visits and reports by Parliament. We have done our best but it still falls short of expectations, and the problems continue, with some families facing the loss of their homes and investments, made in good faith. This cannot be right.

One could all too easily draw the conclusion that we have created a European Union of freedom of movement but without the proper safeguards and access to justice. Again, the recurring theme of much of the correspondence that I have received over the years is a touching belief that Europe is there in the widest sense as a defender of rights; a final guarantee or bulwark against the unfair or unjust decisions, legislation or operation of this or that Member State of the Union. This perception will only be enhanced with the recent entry into force of the Lisbon Treaty which envisages the European Union as a direct signatory and participant in the European Court of Human Rights (ECHR) and Council of Europe. The expectation is huge and somehow or other the Union has to deliver for its citizens. Viviane Reding, Commissioner for Justice, has proposed that the year 2013 be designated the 'European Year of Citizens'; during that year we will need to demonstrate a European system of justice that has the capability to link, overlay or check national legal systems in a way that can produce some sort of coherent whole as citizens go about their daily lives.

As we settle down to working under the new Lisbon Treaty and in anticipation of 2013 it seemed an appropriate moment to review where we have got to

with property rights (this being such a fundamental right) and what the prospects might be for the future. I therefore decided to put together a seminar with my Catalan colleague, Ramon Tremosa MEP, on property rights – and wrongs – in the EU. This current publication is based around the contributions made on that day in June 2011 and subsequently submitted for this collection.

The European Union principles

It is one of the fundamental principles of the European Union as set out in the Treaty of Union¹ at Article 3 that the Union allow free movement of people and capital across borders with the objective of strengthening the union of the peoples of the EU member states. The opportunities for citizens to purchase property as an investment or to relocate to live in another state for economic, leisure or lifestyle or cultural reasons have been enthusiastically embraced by EU citizens. The figures for 2009² show that the highest percentage of EU member state nationals living in another European state were located in Cyprus and Spain, topped only by Luxembourg, with its preferential tax regime and proportionally high number of international institutions.

The movement of citizens across borders has led to increased cultural diversity and settlement that enhances the Union and strengthens the links between people across the continent. This is one of the highest aims of the Treaty of Union, "...to facilitate the free movement of persons, while ensuring the safety and security of their peoples, by establishing an area of freedom, security and justice, in accordance with the provisions of this Treaty..." and "...desiring to deepen the solidarity between their peoples while respecting their history, their culture and their traditions..."³

The new freedoms granted by the treaties have brought with them economic benefits, along with a number of economic problems. The unsustainable speed

1 Consolidated version of Treaty on European Union 30 March 2010 (OJ 2010 C83/01)

2 Figures from Eurostat 2009 published 2010 Cyprus 9.8% foreign national residents from EU states, Spain 12% – no Eurostat data is available on the actual numbers of property purchases though some state land registries do keep local data on purchases by EU nationals

3 From preamble to the Consolidated Treaty as above

of the development and lack of integrated planning in many states has led to the bubble bursting where state nationals become priced out of the property market and the inward investment levels off, leaving unsold units. Property bubbles have temporarily boosted the economy of states such as Bulgaria which peaked in 2008; and then saw a drop in average house prices by around 30 % by 2010⁴. Lack of infrastructure often means that completed developments are unusable without access to mains utilities, transport links or sanitation. Turkey has been the latest “hot spot” for investors who are looking to its membership application to the EU although in the prevailing economic climate there may a much reduced bubble effect with less easy mortgage finance and falling property prices leaving “bargains” in more established states.

The legal treatment of land and real property within the EU

Given the high priority placed on the movement of citizens and strengthening of ties between nations, one could assume that the purchase of “real property” (the technical term for land property), a home, might be protected outright in EU legislation. This is not the case; in fact the Treaty of Rome makes special exception for the purchase of real property at Article 295 stating that it “... shall in no way prejudice the rules in Member States governing the system of property ownership”. Academics are continuing to debate the meaning and impact of Article 295 on the development of legislation in this area.

Whilst substantive land law remains national, EU legislation has developed in a piecemeal or sectoral way, which can however impinge on certain elements of real property transactions. Regulations relating to the sale and purchase of time share rights in property and the effects of the unfair contracts terms legislation are examples, though a weakness in the latter is that this will only apply when purchasing from a business such as a developer and not between private citizens. A further major barrier to a coherent European approach to land or property law lies in the principle of subsidiarity upheld by the EU member states, this enshrines the competency of a State to deal with matters relating to it at the most local

4 National Statistical Institute of Bulgaria, Annual data on average market price of dwellings <http://www.nsi.bg/otrasalen.php?otr=45>

level and provides a counterweight to centralised Brussels-based decision making. This conundrum is well illustrated by the sometimes shrill debate over the European Contract Law Project; a common or coherent approach to contract law is seen as having the potential to increase legal certainty and confidence and deliver a huge boost to cross-border trade. Whatever the benefits this is seen as encroaching on the sensitive core of national civil law born of separate legal cultures and traditions. The final way out of this impasse has been to go in the direction of an optional instrument which parties to a cross-border transaction can elect to use. This might in future have the potential to help certain surrounding elements of a property purchase.

The reasons that real property, real estate, land, bricks and mortar – whatever you may call it – are treated differently lie in their immovability. The subject of the purchase is literally part of the land of the state where it is located; the way in which it is treated affects not just the property itself but the environment of the whole neighbourhood or region. Similarly, the rights created and passed on relate to the cultural fabric of the community, the way the citizen, the family and marriage are viewed and treated in law. There are two basic underlying approaches of dealing with real property, these are represented by the two main European legal traditions the Civil Law and the Common Law. The Civil Law tradition is based on the reception of Roman law and the establishment of a predictable and standardised model of rights and obligations used by courts; whereas Common Law is based on the historical decisions of Courts and Tribunals and the interpretation of those decisions by Judges.

Both traditions have their advantages and supporters, and it must be borne in mind when considering any reform that such basic issues as the rights to the land under our feet and the roof over our head are based on legal practice that has developed over hundreds of years; they cannot be unpicked at a stroke by a simple regulation or directive. The issue is even more complex when the future expectations of those who will inherit real property are taken into account, wills, trusts, estates planning, pension funds and matrimonial rights are all affected. Again many of these elements are already the target of the European legislator in a search to facilitate daily life in the European space.

Part of the problem for those purchasing property in another state may be a conceptual one, the very notion of ownership and other property rights may be completely different from the one they are familiar with. In addition, the practice

of the professionals assisting them will vary considerably according to the customs and culture of the state. For example purchasers maybe be unaware that a lawyer advising them can also within his or her legal system quite legitimately also be simultaneously advising the developer and or the seller. The unwary purchaser may not know who is the correct legal professional to advise them in a different legal culture, and may unwittingly be led astray. An estate agent may be selling on 100 % commission and under great pressure to make a sale, a town hall official may be issuing a certificate knowing that the Regional government will not ratify it later and the home will be built "illegally". The tricksters can be there in any country, it is just that in our own culture we are better aware of what to look out for.

For the purpose of this publication the contributions which follow fall roughly into three categories; Firstly those which deal with the experience of campaigning groups from Spain that have served to highlight in stark relief the problems; the second which deals with both the current and developing EU legal framework; and the last, which sets out some of the practical means in which EU legal systems, administration and professionals can be more linked up. ●

European Property Wrongs – *what can the EU do?*

The areas affected

It is important to bear in mind that many EU citizens do successfully purchase property in other member states, including those outlined below, and peacefully enjoy their property without any problems. However, where problems are encountered there tends to be underlying local causes and trends, local to the region or wider state. The real challenges for the purchaser lie in being alert to and understanding the social, cultural, commercial and legal aspects behind the system of transactions and property rights in another country; a challenge especially great when all the dealings may be carried out in an unfamiliar language.

It cannot be ignored, however, that some states have thrown up more problem cases than others. Perhaps in greater numbers because the country experienced a bubble of development, the pricing was advantageous to sterling buyers, the infrastructure geared up for tourism and the critical mass for taking action and bringing the problem to wider attention was present.

Spain has thrown up some difficult issues, where in regions such as Valencia and Andalucia, planning law is devolved to the autonomous regional government. Valencia introduced a law, the Ley Reguladora de la Actividad Urbanistica (LRAU) in 1994 allowing for the expropriation of rural land where the developer could obtain permission to have the land re-classified as suitable for development.

The law was introduced at the start of the housing boom with the intention of preventing say one local farm owner from holding back the development of an area by refusing to sell land, the balance of rights historically lying with the community rather than the individual. Unfortunately the law was not well drafted and allowed developers to take advantage of its terms to propose a development scheme over land they did not own. They would then be able to legally take over inhabited land in these areas with minimal compensation paid and a bill to the former land owner for the installation of services such as street lighting which they did not want or need. This law was revised two years later and became the Ley Urbanística Valenciana (LUV) which did not address the central concerns of land owners. A similar law was also in place in Andalucía with the same effects. Nationally, a re-prioritisation of environmental issues and planning for sustainability has led to a desire by Regional Governments to re-claim for the public and future heritage some of the coastal region and special rural places given over to rampant development in the 1980s and early 1990s in what is known as "urbanisation". The painful process of finding a balance between public natural spaces and sensible urban planning has left many innocent victims in possession of homes that have been declared illegal, despite having been purchased with apparent full compliance. Sadly, criminal prosecutions and convictions of local public officials and developers continue to demonstrate that corruption in the real estate sector played a part in this picture.⁵

Bulgaria saw an unprecedented property boom when EU membership talks began in 2000, with six years of growth as an investment hotspot, and figures for 2005 showing 23% of sales to foreign buyers and a capital price increase of 37%.⁶ Most of the foreign buyers' difficulties arose from properties purchased "off-plan", i.e. not yet built, with a lack of sustainable infrastructure and uncertain and under-regulated planning, legal and sales advice. The majority of problem areas arose as a result of ambitious promises of large returns on investment for properties bought off-plan through aggressive marketing with oversupply and the downturn in the market leading to many developments going bust and being left unfinished. In addition, the Pirin National Park became overdeveloped as a ski

5 Transparency International Global Corruption Report 2009

6 <http://www.channel4.com/4homes/buy-sell/homes-abroad/country-region-guides/bulgaria-08-05-29>

area particularly in the resort of Bansko due to developers cashing in on the boom and a lax application of regulations leading to environmental damage.

The Republic of Cyprus has a long history of tourism and the advantage for sterling buyers of a heritage as a former British colony; with its membership of the EU in 2004 a boom in foreign investment took place. While the economic crisis affected the total number of property transactions in 2010, those coming from foreign buyers registered at the Land Registry were still 22% of the total property sales registered⁷; an increase from 2009. Most of the problems experienced by foreign buyers arose from anomalies in the legal system in place which led to the withholding of title deeds, a practice that by 2008 had left an estimated 29,000 foreign buyers⁸ waiting for deeds. The particular circumstances of the Cypriot title deeds issue have allowed unscrupulous developers to re-mortgage a property once it has been sold, to increase an existing mortgage or build without relevant permits in place, all without the knowledge of the purchaser. The State has brought forward legislation to address the problem this year and transactions will now require the specific performance of transfer and registration of title deeds.

The fluctuations in the world economy have affected the cross-border property market within the EU, as demonstrated by the recent difficulties in Ireland. Investment in real estate across Member State borders, particularly in Bulgaria, but also Spain and Turkey, was promoted heavily in Ireland during the boom years and many people purchased hoping to make a profit on a quick re-sale or "fly-to-let" basis. Agencies in Ireland are now targeting Russian buyers to re-sell these unwanted investments as people face negative equity and a falling market. Property in Ireland itself has seen a dramatic crash following the Celtic Tiger building boom, and is now the target of foreign buyers looking for an investment.

The types of problems encountered

It is useful to consider some of the types of problems encountered. This is not an exhaustive list but does illustrate some pitfalls.

7 <http://www.international-adviser.com/article/home/news/cyprus-property-sales-expected-to-fall-in-11>

8 <http://www.cyprus-property-buyers.com/law/title-deeds.htm>

A European Land Law?

...and the Right to Property

The following contributions both map and comment on the current status of land law and property systems in the EU Member States and demonstrate how EU law and human rights law overlay these. It is a complex web which emerges and one that is hardly simple for the lay property purchaser or citizen with a problem to understand or access. Also it is quite clear that there is, as it were, much work in progress in order to attempt to make a reality of European citizenship and the rights that go with it, so as to make freedom of movement a practical reality.

In the meantime, the first issues confronting the would-be cross-border purchaser are the differing traditions of national law and legal systems. Traditions born of national history and politics, the differences are perhaps most marked as between the two great legal traditions of the civil and common law. The latter as manifested in England and Wales basing its property law on what is now little more than an anachronistic fiction that all property is owned by and held from the Crown. Try explaining this to a civilian lawyer used to an ordered system of property and property rights ownership. It is difficult to promote understanding of the differing systems between domestically trained lawyers, the hope that there may one day be such a profession as that of 'European conveyancer' remains a hope, but the reality is probably a long way off.

The differences in conceptual and indeed the resulting practical approaches become most marked when it comes to dealing with rights of third parties which affect a property through the operation of law, be it something as simple as a right of way, or the right to say pick fruit, more difficult are the rights of the family of the owners and his or her heirs and beneficiaries. All these rights have their origins in a national system of law, whilst the property stays in one place subject to the laws of where it physically is, the people who have rights can come from differing countries and can have gained or established rights according to the inheritance or trust law of yet quite another legal regime, not necessarily even that of the country where they reside. The various regimes can often come in to conflict, (especially in the event of death or insolvency) then we need the so-called 'conflict of laws rules' to identify which law should apply. In mainstream inheritance or succession law and land law, even the conflict of laws rules are not yet the same between EU member states. The legislative process, with regard to a proposal to simplify these rules in relation to wills and succession is well underway, but looks likely to proceed without the UK participating. This will be a great lacuna and will leave British citizens at a real disadvantage, not to mention those EU citizens from other Member States who purchase property in the UK.

Harmonisation of substantive property law is, in these circumstances as the various writers point out, hardly on the agenda. However the reality is that by logical extension of the rights of free movement, by continuous attempts at improving the operation of the Single Market law around the fringes of property law, that law itself is being adapted and 'Europeanised'. This is often on the basis of consumer protection, or level competition; this particularly in relation to financial services and cross-border loans or mortgages. Likewise, the proposal for an optional European contract law could very well impinge on property related contracts; with or without the UK.

Added to this are the expectations, already referred to, concerning the 'human right' to property. The current form of the European Union puts respect for fundamental rights at the core of its operation and requires member states to ratify the European Convention on Human Rights as a condition of membership. Importantly, Article I of Protocol I to the ECHR guarantees the right to property.

The Luxembourg-based Court of Justice of the European Union, which interprets EU law, holds the European Convention of Human Rights in regard when

making decisions which touch upon fundamental rights issues. In addition, the EU has developed its own Charter of Fundamental Rights¹⁷ which gathers together all the rights of citizens in the EU including human rights. The Charter applies to Member States where they implement EU law and includes, in Article XVII, the freedom to own property.

While there has always been a formal distinction of sorts between the European Court and Convention on Human Rights and the European Union, the Union is soon expected to accede to the European Convention on Human Rights. This will give European citizens the right to bring an action against the EU or its institutions if they have violated the rights in the Convention whereas previously this right only existed against the individual Member States. The EU's signing up to the Convention may well have an effect on the balance of rights in areas such as property law, though the likely impact has not been fully assessed and cannot be easily predicted.

This remains a developing area where the EU will have to provide a coherent answer either by ensuring a system of more simple enforcement of rights, or admitting that the EU does have a responsibility to ensure justice vis à vis Member States in this respect. What is certain is that citizens will not accept a situation where EU and Member States keep passing the problem to and fro to the detriment, and indeed anger of individual property owners.

17 Given legal effect in Treaty of Lisbon 2009

Peter Sparkes

European Land Law: too narrow for second home owners in Spain?

Professor **Peter Sparkes**, Professor of Property Law, University of Southampton; author of *European Land Law* (Hart, 2007) considers how a European Land Law may assist second home owners in Spain.

Many home buyers in Spain have fallen foul of the 'land grab' laws, particularly those in force in the south-eastern community of Valencia. Numerous complaints have been received by MEPs, Diana Wallis being among the most active and vocal in support of the victims. They have encountered limited success because, at bottom, the problem here is largely a matter of Spanish law and the complaints fall outside the remit of EU law. There is a European Land Law but it is narrow, and does not much help the victims in Spain. Current limits are easily stated but the more interesting question is whether any expansion is feasible or desirable.

Territoriality

Animals defend their nest and food supply instinctively. Humans erect fences to mark out the plot in their occupation and defend the ownership of it against all comers. States display the same principle when asserting jurisdiction over the land within the national boundaries. This is demonstrated by the enactment of a civil law to regulate the ownership of land and transactions with it, and by asserting exclusive jurisdiction to decide disputes affecting land. More, and to a very major degree, states assert an overriding power to regulate the use of land. This includes the ultimate power to buy private land for public uses (compulsory purchase, eminent domain, expropriation) as well the power to control private usage through, for example, planning regimes. These powers are essential attributes of statehood. There are many cogent reasons why decisions should be reached locally within member states and should not be coordinated at a pan-European level.

sion land as such because of the spectrum of contracts affected; if a contract to sell a house is national, what of a contract to rent a holiday cottage, a short term rental of a home or a mortgage? There will be no European contract for the purchase of land and the EU will not regulate the details of ownership regimes. If it did it would have to reserve to states the power to control land use in the public interest. The problems in Catalonia arise from land use rules that are out of line with the rest of Europe. That is not an EU problem, but the problem of information asymmetry might be.

Bram Akkermans

Property Law in European Union Law

Dr. **Bram Akkermans** LL.M, assistant professor in European Private Law at Maastricht University and fellow of the Maastricht European Private Law Institute (M-EPLI) considers the existence of property law with EU law.

Introduction

This contribution is a short written version of the contribution made to the ALDE conference *Property Rights and Wrongs* organised at the European Parliament on 14 June 2011.¹⁸ This contribution focuses on land law, or the law relating to immovables, in the European Union and the existing EU property law relating to land and immovables.

Types of ownership of land throughout the EU

In Europe there are generally two different systems relating to land law. In the majority of European legal systems, which all follow the civil law tradition, there is a concept of ownership. Ownership is the most extensive entitlement a person can have relating to land. Because it is the most extensive entitlement, there can only be one right of ownership on each object. The right of ownership is, in other words, unitary and cannot be fragmented. Entitlement to this ownership of land can be shared in a co-ownership regime, but only – in these civil law legal systems – on a theoretical level entitling each holder to a share in the value. The second group of legal systems adhere to the common law tradition. In this common law tradition there is technically no right of ownership in the civil law meaning of the right. Instead there is an entitlement or interest to land (also known as estate),

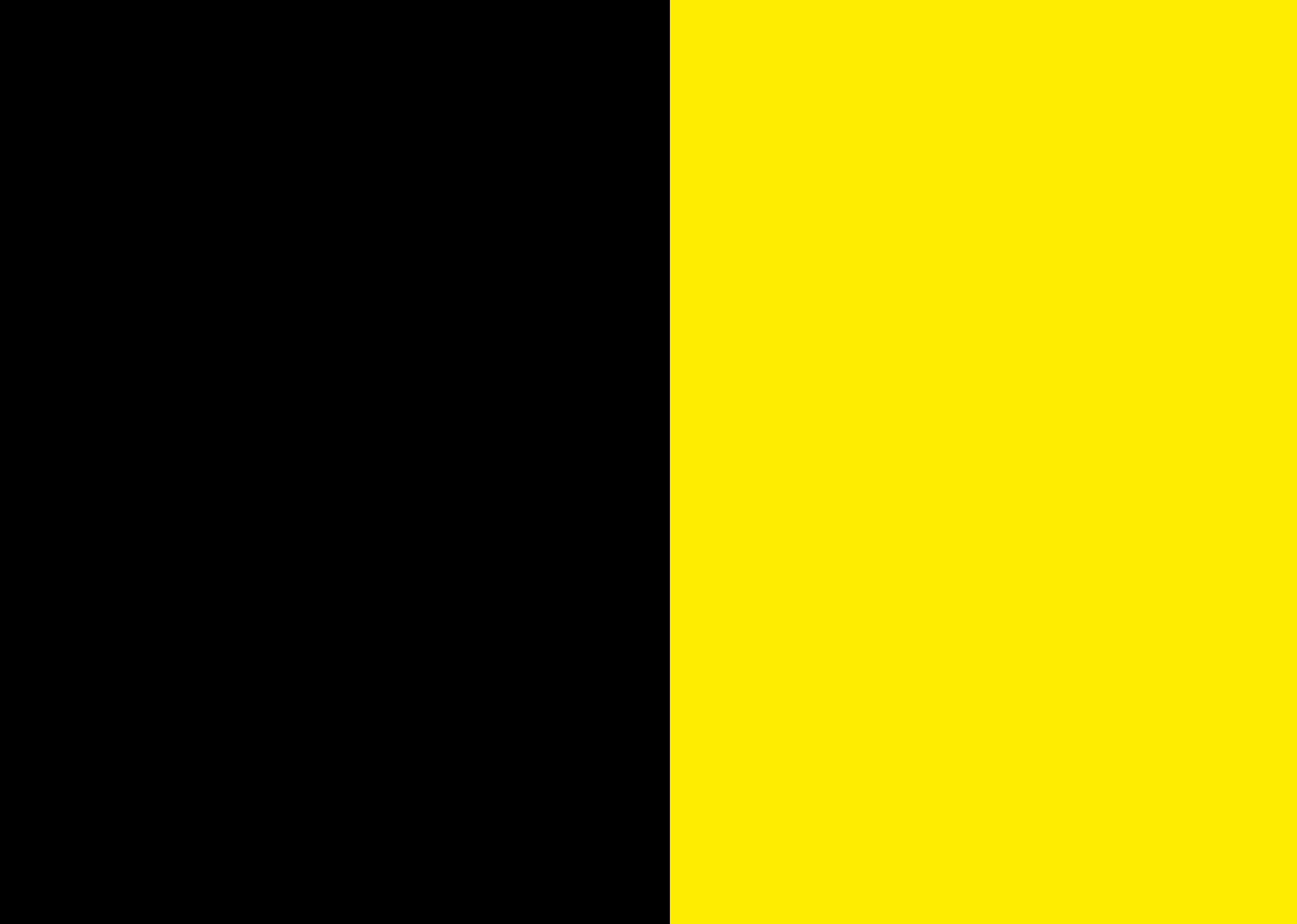
¹⁸ See <http://mepli.blogspot.com/2011/06/european-property-rights-and-wrongs.html>

Diana Wallis MEP concludes

It was a real privilege to host the seminar in June and especially to see the reaction of many participants who perhaps felt that they had been working away in their own corners on these issues without attracting sufficient input or notice from the European Institutions. I hope that this small publication goes some way towards correcting that and will help raise the profile of these matters.

It has to be emphasised that the e-mails from constituents keep coming and we have to respond. Whilst on the one hand the contributions to this publication showcase the many admirable initiatives at professional and administrative level, what is lacking is clear and systematic intervention from the European legislature. Many will argue that such intervention is currently a political impossibility, far too difficult and sensitive, but if highlighting the pitfalls around cross-border property purchases shows that we are currently letting our citizens down - what better motivation (and indeed justification) could exist for more attention and action on this subject? The right to property, a citizen's right to their home, is fundamental and is as much a European value as the many other so called European values which we champion daily. At a time of economic uncertainty, that right needs underpinning more than ever, and should find its place in the program for the proposed 'European Year of Citizens' in 2013. ●







www.alde.eu

www.dianawallismep.org.uk